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THE
FEDERAL REPORTER.

VOLUME 52.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 52.

JUDGES

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FREEMAN *et al.* v. CLAY *et al.*

(Circuit Court of Appeals, Fifth Circuit. June 12, 1892.)

No. 12.

1. RES JUDICATA—INJUNCTION—APPEAL.

Both members of a partnership being dead, the widow of the partner who first died had set off to her a dower interest in the partnership lands, and afterwards sued the heir at law of the other partner to recover back rents on her dower interest. The heir at law thereupon brought a bill to enjoin this suit and for an accounting of the partnership affairs, which bill was dismissed on demurrer. The heir at law appealed to the supreme court, notwithstanding which the widow prosecuted her suit for rents to a final decree, and the same was paid by the heir at law without compulsory process. Thereafter the supreme court reversed the decree appealed from, holding that the widow was not entitled to the rents, and remanded the case for further proceedings. *Held*, that neither the decree in the widow's suit for rents nor the fact of its voluntary payment was a bar to the heir at law's right under her bill to an accounting of the rents thus paid.

2. SAME.

Nor was her right affected by the fact that, before sustaining the demurrers and dismissing the bill for injunction and accounting, the trial court offered to retain the same for the purpose of an accounting, which offer was declined by the heir at law.

3. BILL OF REVIEW—WANT OF EQUITY.

A bill to review a decree rendered in the heir at law's suit, which, among other things, ordered the restoration of the rents collected in the widow's suit, was without equity, since the debts of the partnership were entitled to precedence over the widow's dower right in the partnership property, and since, therefore, the widow had obtained, as a result of the prior proceedings, a sum of money which in equity and good conscience she was not entitled to retain.

4. SAME—CITATION ON APPEAL—SERVICE.

An allegation in the bill of review that the widow was not a party to the appeal to the supreme court, because no citation was ever served upon her or any agent or attorney of hers, was immaterial, it appearing from the record that this fact was not alleged in the pleadings filed by her in the main case after the cause was remanded, and that the citation was in fact served upon her attorney of record in that case.

Appeal from the Circuit Court of the United States for the Western
Division of the Northern District of Mississippi.

In Equity. Bill of review brought by Lucy C. Freeman and C. L. Freeman, her husband, citizens of the state of Missouri, against Pattie A. Clay and Brutus J. Clay, her husband, for alleged errors appearing on the face of a decree rendered against complainants under an original bill brought against them by defendants for injunction and an accounting. A demurrer to the bill of review was sustained, and the bill dismissed. Complainants appealed. On motion an order was made dismissing the appeal, unless a perfected appeal bond should be filed before a given day. See 48 Fed. Rep. 849, 1 C. C. A. 115. The question is now on the merits. Affirmed.

For opinions rendered in the course of the litigation resulting in the decree sought to be reviewed, see 34 Fed. Rep. 375, 6 Sup. Ct. Rep. 964, and 11 Sup. Ct. Rep. 419.

Statement by PARDEE, Circuit Judge:

The appeal in this case is from a decree in the court below sustaining a demurrer to a bill of review. In 1859, David I. Field and Christopher I. Field were partners in planting, and owned a plantation in Bolivar county, Miss., as tenants in common, and also slaves and other personal property. David I. Field died in that year, leaving appellant Lucy C. Freeman, his widow, and David I. Field, his only child and heir at law. Christopher I. Field, the surviving partner, remained in the possession of all the partnership property until his death, in the year 1867, when his administrator continued the possession. In 1869 the half interest of David I. Field was sold under a decree of the probate court of Bolivar county for one half of a debt due by the partnership to Christopher I. Field's estate, and Mrs. Pattie A. Clay, the daughter and heir at law of Christopher I. Field, became the purchaser. Said decree and sale were void, and no title passed thereby, but Mrs. Pattie A. Clay received a deed thereunder, and entered into possession. In 1879, Mrs. Lucy A. Freeman, by proceedings in the state court, had her dower of one third in the one-half interest of her deceased husband, David I. Field, in the said plantation set off to her, and in September, 1880, she filed a bill in equity in the chancery court of Bolivar county against the said Mrs. Pattie A. Clay for an account for back rents on her dower interest, which cause was afterwards removed to the United States circuit court for the western division of the northern district of Mississippi. In November of 1880, David I. Field, Jr., brought an ejectment suit in the United States court for the western division of the northern district of Mississippi, as heir at law of David I. Field, deceased, to recover his half interest in the said plantation, and also for back rents. Both the said suits were pending when Mrs. Pattie A. Clay and Brutus J. Clay, appellees herein, filed their bill on the equity side of the said court to enjoin both proceedings, to charge the said plantation with a large debt due by the partnership of David I. & Christopher I. Field, and for an accounting with Mrs. Lucy C. Freeman, widow of David I. Field, and her son David I. Field, Jr., touching the partnership affairs. To this bill demurrers were filed by both Mrs. Freeman and David I. Field, Jr. After hearing upon the demurrers, the court rendered a decree partly

sustaining and partly overruling the same, and ordering a reference to take an account between the parties; but afterwards, on the 6th of March, 1884, the following decree was rendered in the case:

"Be it remembered that this day came on to be heard the above-entitled cause, and the parties appearing in open court by consent, the account herein filed by the master is withdrawn, and the decree of reference hereinbefore rendered is set aside; and counsel for complainants declining to avail himself of the offer of the court to retain the bill for the purpose of stating an account, it is ordered, adjudged, and decreed that said bill be and the same is hereby dismissed, and that the complainants pay the cost, for which let execution issue; and thereupon complainants prayed an appeal to the supreme court of the United States, which is granted upon their entering into a bond in the penalty of one thousand dollars, with two securities, conditioned according to law."

On the 25th of July following said decree, bond was given, and approved by the presiding judge of the court, and thereupon a citation was issued directed to Lucy C. Freeman and David I. Field, appellees, which on the 31st day of July, 1884, was served by handing the same to Frank Johnston, Esq., as attorney of record of the within named appellees. In regard to this the bill of review alleges:

"That said citation, while directed to your oratrix, was never served upon her, or on any agent or attorney of hers; so that your oratrix avers that she was never before the supreme court on said appeal, and that any judgment of the court in the premises was, as to her, *coram non iudice*, and void."

Said appeal was prosecuted, and was decided by the supreme court of the United States April 26, 1886, (118 U. S. 97, 6 Sup. Ct. Rep. 964,) and the report shows that in said case Mr. Frank Johnston and Mr. J. E. McKeighan appeared for appellees. And it may be noticed in this connection that Mr. Frank Johnston appears in this court as the solicitor of Mrs. Freeman. The supreme court in passing on the case said:

"It results from these views that the lien for partnership debts takes precedence not only of the interest of David I. Field, Jr., as heir at law of David I. Field, but of Lucy C. Freeman's right of dower. As, however, dower was actually assigned to her nearly three years before the filing of the present bill, such assignment should not now be disturbed; but no further exaction for detention of dower should be enforced. We think, therefore, that, upon the allegations of the bill, the complainants are entitled to relief, and that the demurrers should have been overruled."

And the decree of the circuit court was reversed, and the cause remanded, with instructions to overrule the demurrers, and to proceed in the case according to law and the principles announced in that opinion. Pending the appeal aforesaid, on the 14th of June, 1884, Mrs. Freeman pushed her cause for back rents on the dower estate to a decree, and recovered \$2,215, and costs. The amount of this decree Mrs. Pattie A. Clay paid in full. On return of the mandate of the supreme court a decree was rendered in the case of *Pattie A. Clay et al. v. Lucy C. Freeman et al.*, overruling the demurrer of the defendants to complainants' bill, and issuing an injunction restraining David I. Field, Jr., from the

further prosecution of his ejectment suit against the complainants, and from suing out final process for the enforcement of a judgment for rent obtained therein; and upon the same day complainants were granted leave to file a supplemental bill "setting up the result of the cause of Lucy C. Freeman against them for arrearages of rent, and such facts in connection therewith as they may desire, and praying such relief touching the same as they may be advised."

The supplemental bill filed alleged as follows.

"(1) After, notwithstanding the filing of the bill in this cause, the defendant L. C. Freeman prosecuted her suit in this court against your orators for arrearages in rent upon and for her dower interest in the Content plantation, as shown in the pleadings, and on the 12th day of June, 1884, A. D., after her demurrer and exception to your orators' original bill had been sustained, recovered a final decree against your orator Pattie A. Clay for three thousand and ninety-two and thirty-four one-hundredths dollars, and costs. On the 14th day of June, 1884, on motion, this judgment or decree was reduced to two thousand two hundred and fifteen one-hundredths dollars, the same, with the costs in the cause, one hundred and sixty-two dollars, your orators well and truly paid, and so performed the said payment and decree of the said district court, from which there was no appeal, as, by the record of said cause, doth appear. (2) That said recovery and payment was not according to right and justice, as appears from the opinion of the supreme court of the United States on your orators' appeal to the above decree of this court in this cause, and the said Lucy C. Freeman ought in this cause to be decreed and adjudged to restore the said sum and costs to your orators, or be compelled to accept it as a charge against her in any accounting hereafter to be had in the cause. The premises considered, your orators pray as prayed in the original bill, and that the said Lucy C. Freeman be adjudged to restore to them the money so wrongfully secured by her in the said cause, and for general relief."

Mrs. Lucy C. Freeman thereafter filed her answer to the original bill, and as to the supplemental bill she answered as follows:

"As to said supplemental bill she says that on the 30th day of September, 1880, your respondent filed against the complainant her original bill of complaint in the chancery court of Bolivar county, Miss., demanding of complainant rents for the dower of respondent in lands of her former husband, David L. Field, deceased, and which complainant had wrongfully withheld from her. Said cause was removed to this court, and on the 10th day of August, 1882, the complainant filed against respondent this, her original bill in this cause, under which respondent was enjoined from prosecuting her suit aforesaid. That afterwards, on the 6th day of March, 1884, after demurrer to the original bill herein, said demurrer having been sustained by this court, said injunction was dissolved, and the bill dismissed. In making said decrees of dissolution and dismissal, the court offered to retain the bill for the purpose of stating the account between the complainant and respondent; yet complainant, well knowing that she could appeal this cause to the supreme court of the United States, and could not appeal the other if it should result in a decree for less than \$5,000.00, deliberately elected not to have said bill so retained, and thereby consented to its dismissal in so far as this account is concerned. Thereupon your respondent proceeded with her cause, as she had a right to do, and said cause resulted, on the 16th day of June, 1884, as is stated in said supplemental bill, in a decree in favor of your respondent against the complainant for the sum of \$2,215.00, not the sum of \$2,200.15 dollars, as

wrongfully stated therein. This sum of \$2,215.00, and the costs, as stated, the complainant (that is to say, the respondent in that cause) voluntarily paid to this respondent, without legal process, on the ——— day of July, 1884; so that your respondent says that the said decree is in full force and effect, unappealed from, unreversed, without any bill of review or petition for rehearing, except that it was voluntarily paid in full, and settled. The matter is *res adjudicata*, and cannot be reopened, and this court will not do obliquely for the complainant what it could not do directly. It would be to affect respondent, and hold her chargeable, even to the extent of setting aside and annulling after two years a solemn and final decree of this court, merely on the ground of error, by an appeal to which she was no party, since the complainant by her course aforesaid induced her to believe that the whole matter was settled and finished, so far as she was concerned. And respondent submits, as a matter of law, whether a matter purely personal to herself and the complainant can be introduced into the accounting of the partnership matters between C. I. Field and D. I. Field, and on this point prays that this answer be taken as a demurrer to the said supplemental bill."

On the 19th of November, 1886, it was ordered that—

"This cause be set down for hearing on the plea of Lucy C. Freeman to the supplemental bill of complaint filed October 4, 1886, as to its sufficiency in law."

Afterwards, on the 11th of January, 1888, the following agreement of record was made:

"In this cause the complainant, having set the 'answer' of Lucy C. Freeman to the supplemental bill down for sufficiency on the idea that it was a plea, it is now agreed, to avoid delay, that the said answer may be taken as such, and considered as if excepted to, and the exceptions of complainant thereto and the demurrer filed to the said supplemental bill be considered and determined by the court, and, if said exceptions and demurrer be overruled, that the cause may be disposed of finally, the complainant being allowed to file exceptions to said answer *nunc pro tunc*. It is further agreed that, if said demurrer be sustained, the proper order may be made dismissing the said supplemental bill, with or without prejudice, as the court may determine."

A great deal of testimony was taken and filed in said cause; and on the 1st day of June, 1888, an order of reference was made in said cause in and by which an account was directed of the partnership affairs aforesaid; and certain directions, not necessary to set forth here, given to the master. Said order, among other things, provides that—

"All other matters arising in the cause as to the claim of the complainant against the defendant Lucy C. Freeman, growing out of the payment to her by the complainant of the amount of a decree heretofore rendered in her favor by this court, and the disposition to be made of the rental accruing on the dower interest of the said Lucy C. Freeman since her occupation of said plantation, and otherwise arising in the cause, are reserved to the final hearing; but in taking the account the commissioner will ascertain and report to the court the rental value of the dower in the said plantation occupied by the said Lucy C. Freeman from the time she was let into possession, and the arrearages of rental asserted by her, and for which a recovery was heretofore had; and in making his report to the court he will ascertain the amount of rent duly chargeable against the complainant for the use of the entire plantation, as well as the amount due on account of the rental value of the dower allotted to the said Lucy C. Freeman, to the end that the court, by a proper decree in the premises, may dispose of the whole controversy," etc.

And afterwards, on the 1st day of August, 1889, the master's report was filed. In and by said report it appeared that there was due to the said firm of D. I. Field & Co., by Christopher I. Field, on the 1st day of January, 1880, after satisfying all demands of said Christopher against said firm, the sum of \$2,396.26, and on the 1st of January, 1889, exclusive of the dower interest of Mrs. Freeman, the sum of \$11,771.94; that three fifths of the last-named sum was the property of the said Pattie A. Clay as the heir at law of said Christopher; and that the said Christopher was entitled to allowance, as against said balance, of three or four small items of disbursement for the benefit of David's estate, not necessary to set forth here, with interest thereon. On such basis, the master then stated the account between Mrs. Lucy C. Freeman and Pattie A. Clay, representative of C. I. Field, as follows:

1889.	Mrs. Lucy C. Freeman in account with C. I. Field.	Dr.	Cr.
Jan 1.	To money paid her in 1861.....	\$ 200 00	
	To interest on same at 6%, 25 years.....	800 00	
	To dower collected in 1884.....	2,887 58	
	To interest on dower 6 years at 6%.....	859 58	
	By balance due C. I. Field.....		\$3,747 11

Certain objections were made to said report, among others that the master had failed to credit Mrs. Freeman with her one-sixth part of the said sum of \$2,396.26, found to be due on the 1st day of January, 1880, as aforesaid; and this objection was allowed by the court. Whereupon said account was so far modified as to reduce the same by said allowance, together with some others not material here, to the sum total of \$2,667.28. Thereupon the court, on the 15th day of August, 1889, rendered a final decree in said cause, in and by which, among other things, it was ordered and adjudged that the complainant, Pattie A. Clay, recover of Mrs. Lucy C. Freeman the said sum of \$2,667.28, with interest thereon from the 1st day of January, 1889, at the rate of 6 per cent. per annum, for which execution may issue to be levied; and part of the costs of said cause were also adjudged against Mrs. Freeman. From the said decree of 15th of August, 1889, all of the parties prayed an appeal to the supreme court of the United States; but that tribunal, on the 2d day of March, 1891, (11 Sup. Ct. Rep. 419,) dismissed the appeal of Lucy C. Freeman on the ground that the amount in controversy was not sufficiently large to give that court jurisdiction.

The bill of review brings the entire record of the cause before the court, and prays that on the final hearing the court will order and adjudge that the decrees herein rendered against Mrs. Freeman on the 15th day of August, 1889, be credited with the said amount of \$2,387.58, with interest thereon at 6 per cent. per annum from the date from which the master computed interest on the same in said account, being the amount improperly and erroneously charged against her, since it was paid to her under said decree of 14th June, 1884, and cannot be recovered in this collateral and indirect manner. A demurrer was filed to the said bill of review, and for causes of demurrer are assigned the following:

"(1) There is no equity on the face of the bill. (2) There is not shown to be any error in the record of, and proceedings had in, the principal case. (3) The complainants have not performed or tendered performance of the decree complained of. (4) And for other causes to be assigned at the hearing."

The court below sustained the said demurrer, and dismissed the said bill of review, whereupon the complainants prosecute this appeal.

Edward Mayes and Frank Johnston, for appellants.

William L. Nugent, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (*after stating the facts.*) The bill of review in this case is brought for alleged error of law appearing on the face of the decree. To sustain the bill—

"The decree complained of must be contrary to some statutory enactment, or some principle or rule of law or equity recognized or acknowledged, or settled by decision, or be at variance with the forms or practice of the court; but the bill cannot be maintained where the error is in mere matter of form, or the propriety of the decree is questioned." Daniel, Ch. Pr. § 1576.

"In regard to errors of law apparent upon the face of the decree, the established doctrine is that you cannot look into the evidence of the case in order to show the decree to be erroneous in its statement of the facts. But taking the facts to be as they are stated to be on the face of the decree, you must show that the court has erred in point of law. * * * In the courts of the United States the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bill, answers, and other proceedings are, in our practice, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained." Story, Eq. Pl. 407.

These propositions are well settled. *Whiting v. Bank*, 13 Pet. 6; *Putnam v. Day*, 22 Wall. 60; *Buffington v. Harvey*, 95 U. S. 99; *Thompson v. Maxwell*, Id. 397; *Beard v. Burts*, Id. 434; *Shelton v. Van Kleeck*, 106 U. S. 532, 1 Sup. Ct. Rep. 491; *Bridge Co. v. Hatch*, 125 U. S. 7, 8 Sup. Ct. Rep. 811.

In the present case the error alleged as apparent upon the face of the decree in the principal suit is the failure of the court to give due effect to an alleged plea of *res adjudicata* contained in the answer of Mrs. Freeman to the supplemental bill. Said answer also contained a demurrer to the supplemental bill on the ground that the collection by Mrs. Freeman from the complainant of rents of her dower estate was a matter purely personal to herself and the complainant, and could not be introduced into an accounting of the partnership matters between C. I. Field and D. I. Field. The answer of Mrs. Freeman was treated by the complainants as a plea, and was duly set down for sufficiency. About 18 months thereafter, as appears by the record, counsel, to avoid delay, agreed that the said answer was to be taken as such, and considered as if excepted to; the agreement providing that if the exceptions of complainant thereto and the demurrer filed to the supplemental bill should be overruled, the case might be disposed of finally, complainants being allowed to file exceptions to

said answer *nunc pro tunc*. And, on the other hand, it was agreed that, if the demurrer should be sustained, the proper order should be made dismissing the supplemental bill, with or without prejudice, as the court should determine. After the said agreement no further notice of the said supplemental bill and answer thereto seems to have been taken by either the parties or the court until the decree of June 1, 1888, referring the cause to a master to take an account, in which decree it was provided as follows:

"All other matters arising in the case as to the claim of complainant against the defendant Lucy C. Freeman, growing out of the payment to her by the complainant of the amount of the decree heretofore rendered in her favor by this court, and the disposition to be made of the rental accruing on the dower interest of the said Lucy C. Freeman since her occupation of the said plantation, and otherwise arising in the cause, are reserved to the final hearing; but in taking the account the commissioner will ascertain and report to the court the rental value of the dower in said plantation occupied by the said Lucy C. Freeman from the time she was let into possession, and the arrearages of rental asserted by her, and for which a recovery was heretofore had; and in making his report to the court, he will ascertain the amount of rent duly chargeable against the complainant for the use of the entire plantation, as well as the amount due on account of the rental value of the dower allotted to the said Lucy C. Freeman, to the end that the court by a proper decree in the premises may dispose of the whole controversy."

To this interlocutory decree no exceptions were taken. In reporting to the court, the master charged Mrs. Freeman with the amount collected from Mrs. Clay, in 1884, as rents of the dower estate, with interest thereon to January 1, 1889, which amount was afterwards made the basis of the decree rendered against Mrs. Freeman in the principal suit.

It is to be noticed that, although Mrs. Freeman filed other exceptions to the master's report, she made no exception to the master's report holding her to account for the amount of the decree collected by her from Mrs. Clay.

The supplemental bill of complainants sets forth the prosecution of the suit by Mrs. Freeman for rent of dower estate, pending the appeal in the main case to the supreme court, the recovery of a decree therein, and the payment by the complainants of the amount of the decree, and its prayer was for the restitution of the money so alleged to have been wrongfully collected in said case. Mrs. Freeman's answer to the supplemental bill sets forth the same state of facts, averring, in addition thereto, the single fact, apparent upon the face of the record in the main case, that the court, in passing upon the demurrers in the main case, had offered to retain the bill for the purpose of stating the account between the complainant and respondent, and that the complainant had deliberately elected not to have said bill so retained; thereby, it is alleged, consenting to its dismissal, so far as an account with Mrs. Freeman was concerned. It seems clear, therefore, that the said supplemental bill and the answer thereto raised no issue of fact between the complainant and defendant. The issue was one solely of law, and that was as to the effect to be given to the enforced payment of the rents of the dower estate, pending the ap-

peal of the main case. The court apparently disposed of this branch of the case on the supplemental bill and answer thereto, disregarding exceptions and demurrer, and the conclusion, as expressed in the decree of the court, was to the effect that those rents were unjustly collected, and should be returned by Mrs. Freeman. Was this conclusion an error of law? Complainants' original bill was for the express purpose of enjoining a further prosecution of Mrs. Freeman's suit against Mrs. Clay for the collection of rents of the dower estate, as well as for enjoining the further prosecution of the ejectment suit brought by David I. Field, Jr., as heir at law for one half of the Content plantation, until an account and settlement could be made of the partnership debts due by David I. Field & Co. to the estate of Christopher I. Field. The court sustained the demurrers of both Mrs. Freeman and David I. Field, Jr., to the said bill, and dismissed the suit, and an appeal was allowed in open court from such decree. It seems to be of little moment that the court offered to the complainants some other decree, which was refused. The decree that was rendered was one sustaining the demurrers and dismissing the bill.

The record shows that an appeal was prayed for and allowed in open court, and that said appeal was afterwards perfected in vacation by giving the required bond, and by issuing citation directed to both parties, which citation appears, by the record, to have been served upon Frank Johnston, Esq., as attorney of record of the appellees, Lucy C. Freeman and David I. Field, Jr. By the record, then, Mrs. Freeman was a party to the appeal, and the question of law raised by the supplemental bill and answer was this: Where, pending the appeal to the supreme court from a decree dismissing the bill brought to enjoin the prosecution of Mrs. Freeman's suit to recover rent of the dower estate and for an accounting, Mrs. Freeman had nevertheless prosecuted her suit for rent to final decree, and collected the same, whether the decree so obtained shall be considered as conclusive of the rights of the parties in the further prosecution of the suit for an accounting after the supreme court has reversed the decree dismissing the bill, and remanded the cause to be further proceeded with according to law. It is true that in the bill of review Mrs. Freeman alleges that she was not a party to the appeal in the main case, because, she says, no citation was ever served upon her, or upon any agent or attorney of hers; and that she never made any appearance in the supreme court. She failed, however, to assert such fact in her answer to the supplemental bill, or in any other pleading filed by her; in the main case; and, as said above, she made no exception whatever to the interlocutory decree directing the master to report with regard to the rents of the dower estate, nor to that part of the master's report which charges her with the rents collected pending the appeal. It may be further noticed that the suit of Mrs. Clay against Mrs. Freeman and David I. Field, Jr., was mainly directed to an accounting of the rents of the partnership property, which included the dower estate claimed by Mrs. Freeman; and it would seem that in such an accounting, where each party was required to account for the rents collected,

it would make but little difference whether the rents received were collected voluntarily or by process of law.

It would seem, therefore, that the court was right in assuming that Mrs. Freeman was a party to the appeal, and in concluding that the decree she obtained against Mrs. Clay, pending such appeal, for rents of the dower estate, was not conclusive of the rights of the parties. It also seems to us from an inspection of the record that this bill of review is without equity. On the facts stated in the original bill, filed in 1882 by Mrs. Clay and Brutus J. Clay against Mrs. Freeman and D. I. Field, Jr., it is clear that neither D. I. Field, Jr., as heir at law, nor Mrs. Lucy C. Freeman, as the widow of David I. Field, Sr., was entitled to any rents of the partnership plantation and property until after the partnership debts due Christopher I. Field were paid and settled. This was the decision of the supreme court in the case as reported in 118 U. S. 97, 6 Sup. Ct. Rep. 964. Conceding the contention of Mrs. Freeman that she was no party to that suit on appeal, the law of the case is nevertheless good as a finding by the supreme court of the United States upon a given state of facts. As Mrs. Freeman was not entitled to collect rents of her dower estate prior to the payment of the partnership debts, it follows that the decree she obtained pending the proceedings on appeal, and the money she recovered thereunder, were inequitably recovered. In short, the record shows that, in the proceedings that have been pending for some years between the heirs of Christopher I. Field, on the one side, and the widow and heirs of David I. Field, on the other, Mrs. Freeman has obtained from Mrs. Clay the sum of \$2,215, which she had no right to, and which she, contrary to equity and good conscience, retains. The decree of the circuit court is affirmed, with costs.

RICHMOND v. ATWOOD.

(Circuit Court of Appeals, First Circuit. September 27, 1892.)

No. 8.

1. APPEALABLE ORDERS—INTERLOCUTORY DECREE—INJUNCTION IN PATENT CASES—CIRCUIT COURT OF APPEALS—MEASURE OF RELIEF—FORM OF MANDATE.

A decree which is rendered after full hearing on the merits, and which sustains the validity of a patent, declares infringement, and awards a perpetual injunction and an accounting, is an "interlocutory decree," granting an injunction, from which an appeal will lie to the circuit court of appeals, under section 7 of the act of March 3, 1891. *Jones Co. v. Munger, etc., Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, approved.

2. SAME—CONSTRUCTION OF STATUTE.

The term "interlocutory order or decree" was used in its broadest sense in this section, and should be given full scope, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal.

3. SAME—DECISION ON APPEAL—MANDATE.

On such an appeal, where the whole record is before the circuit court of appeals, and, in order to determine the rightfulness of the injunction, the court necessarily examines the whole case on the merits, and reaches the conclusion that there is no

infringement, it may not only reverse the decree and dissolve the injunction, but may also vacate the order for an accounting, and order the bill dismissed, thus rendering such a decree as the lower court should have rendered on the whole case. *Jones Co. v. Munger, etc., Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, disapproved.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by Benjamin S. Atwood against Charles C. Richmond for infringement of a patent. The circuit court sustained the patent, found infringement, and entered a decree for perpetual injunction and for an accounting. 47 Fed. Rep. 219. Defendant appealed. The circuit court of appeals, after a hearing on the merits, reversed the decree, holding that the patent was void for want of novelty, or that, if sustainable at all, defendant had not infringed it. 48 Fed. Rep. 910. Thereafter the appellee filed a motion for a rehearing, and a petition that the question as to the construction of the patent should be certified to the supreme court. At the hearing of this motion the court raised the question as to its jurisdiction to entertain an appeal at the stage which the case had reached below, and as to the form of its mandate, to wit, whether it should simply order that the decree for an injunction be reversed, or should direct that the bill be dismissed; and upon these questions leave was given the appellant to file a brief. Reversed, injunction vacated, and bill ordered dismissed.

Frederick P. Fish, William K. Richardson, and James J. Storrow, Jr., for appellant.

The "Act to establish circuit courts of appeals," printed in 138 U. S. 709,¹ provides, in section 6, that "the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the district court and the existing circuit courts," (in all except certain cases,) and that "the judgments or decrees of the circuit courts of appeals shall be final * * * in all cases arising under the patent laws." Section 7 provides that "where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals."

This statute (as will be more fully set forth in the considerations upon the statute hereto annexed) provides an appeal from an interlocutory decree of the circuit court granting an injunction and referring the question of damages and profits to a master. Such a decree is made after final hearing upon the pleadings and proofs, and the merits of the cause between the parties are fully determined thereby. If upon appeal the court of appeals, having before it the entire case, is of opinion that the patent is invalid or has not been infringed, the court will follow the practice of the supreme court of the United States in reversing a final decree of the circuit court, and will send a mandate to the circuit court directing that the bill be dismissed. The invariable order of the supreme court in reversing a final decree of the circuit court sustaining a bill for infringement of letters patent is: "The decree is reversed, and the cause remanded, with a direction to dismiss the bill of complaint, with costs."

See, for example, among the recent cases which show the uniform practice: *St. Germain v. Brunswick*, 135 U. S. 227-231, 10 Sup. Ct. Rep. 822; *Yale Lock Manuf'g Co. v. Berkshire Nat. Bank*, 135 U. S. 342-403, 10 Sup. Ct. Rep. 884; *Burt v. Evory*, 133 U. S. 349-359, 10 Sup. Ct. Rep. 394; *McCormick v. Graham's Adm'r*, 129 U. S. 1-19, 9 Sup. Ct. Rep. 213; *Brewing Co. v. Gottfried*, 128 U. S. 158-170, 9 Sup. Ct. Rep. 83. The mandate sent to the circuit court corresponds to this order. See the papers on file in *Evory v. Burt*, equity docket of this circuit, case No. 2,753, which shows the form of such a mandate.

It is provided by the act to establish circuit courts of appeals, in section 10, that whenever, on appeal, a case coming from a district or circuit court is determined in the circuit court of appeals in a case in which the decision of the circuit court of appeals is final, "such cases shall be remanded to the said district or circuit court for further proceedings, to be there taken in pursuance of such determination." Under this section, where an appeal is taken from an interlocutory decree granting an injunction, and it is determined upon the merits by the circuit court of appeals that the patent is invalid, or that there is no infringement, or, in general, that the complainant's bill cannot be sustained, the decree of the circuit court must be reversed, and the cause remanded to that court, with a direction to dismiss the bill of complaint, with costs, following the practice of the supreme court. Inasmuch as the decree of the circuit court granting the injunction was made upon final hearing, and the appellate court decided upon all the pleadings and proofs that the complainant's case fails, it would obviously be insufficient to reverse the decree, only in so far as it grants an injunction, and remand the case to the circuit court, with directions only to enter a decree denying an injunction. The appellate court has decided upon the merits that the bill cannot be sustained, and any action by the circuit court, except to dismiss the bill, would therefore simply be reversed again by the court of appeals.

Reference to the well-established practice in such jurisdictions as allow an appeal from interlocutory decrees or orders, granting injunctions and other relief, shows conclusively that the appellate court, when it has the entire case before it, will dispose of the entire case whenever it can do so, and will instruct the lower court to enter such a decree as will put an end to the controversy. We note the date of each case, as showing how long the practice has been settled.

In New York (prior to the Code) an appeal was allowable from an interlocutory decree or order, and the practice was expressly settled that on an appeal from an interlocutory order the court of appeals would determine finally between the parties, if the merits of the case were fully before it, as will be seen by reference to early New York cases.

Le Guen v. Gouverneur, 1 Johns. Cas. 436, (1800.) The chancellor had made an interlocutory order, after the evidence had been taken in a cause, directing an issue to a jury to try the fact of fraud. The highest court of the state, on an appeal from this interlocutory order, decided that a previous judgment at law between the parties was binding, and the bill of complaint was accordingly dismissed. The case was very elaborately argued, and the judges delivered opinions *seriatim*.

RADCLIFF, J., says, (page 499:) "I have also no doubt that this court may proceed further, if it appear that the merits are fully in its possession, and determine finally between the parties. That such is the power and frequently the practice of the house of lords in England is evident from the cases which have been cited."

KENT, J., holds, (page 508:) "It is the settled rule of the house of lords in England upon appeals always to give such a decree as the court below ought to have given. This is the great and leading maxim in their system of ap-

pellate jurisprudence, and instances are accordingly very frequent in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided fully on the merits."

See, also, *LANSING*, C. J., page 521. The judges referred to the house of lords cases very fully, and pointed out the idleness of sending back a case for further action by the chancellor, when the entire merits are before the court on appeal. It was accordingly ordered that the interlocutory order should be reversed, and that the bill should be dismissed.

Bush v. Livingston, 2 Caines, Cas. 66, (1805.) This was similarly an appeal from an interlocutory order of the chancellor after the evidence had been taken. The order was reversed, and an order entered disposing of the case. The court referred to the preceding case, and says that the court in that case directed the complainant's bill to be dismissed "on precedents from the proceedings of the house of lords of England on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, and that it will save litigation and expense, I am myself contented to be bound with the precedent which has been made." See, also, to the same effect, *Babee v. Bank*, 1 Johns. 529, (1806.)

The same is the practice in the New Jersey court of equity, where an appeal lies from an interlocutory decree granting an injunction. *Newark & N. Y. R. Co. v. Mayor, etc.*, 23 N. J. Eq. 515, (1872.) The court points out, discussing the English and New York cases, that the appellate court will dispose of the entire controversy between the parties: "The general rule is that the appellate court will render such judgment as the inferior court, under all the circumstances, should have given."

In England this principle is so well settled that it is not discussed at all in the books; but is found to be the unquestioned practice from the earliest times. Among the early cases in the house of lords, cited by Mr. Chancellor KENT, are the following: *Governors, etc., v. Swan*, 5 Brown, Parl. Cas. 429, (1760.) Upon an appeal from an interlocutory order of the chancellor, it was "ordered and adjudged that the decree complained of should be reversed, and that the respondent's bill should be dismissed." See, to the same effect, *Ellis v. Seagrave*, 7 Brown, Parl. Cas. 331, (1760;) *Bouchier v. Taylor*, 4 Brown, Parl. Cas. 708, (1776.)

Similar cases on appeal from interlocutory decrees, where the house of lords reversed the decree and made an order terminating the controversy, remitting the case to the court of chancery to carry out the decree, are as follows: *White v. Lightburne*, 4 Brown, Parl. Cas. 181, (1722;) *Attorney General v. Wall*, Id. 665, (1760;) *Scribblehill v. Brett*, Id. 144, (1703.) Numerous other cases to the same effect can be discovered in the English books. *McCan v. O'Ferrall*, 8 Clark & F. 30, (1841.)

This decision of the house of lords shows what their well-established practice is. The case came up upon appeal from a complicated decree in Ireland with which the house of lords did not agree. The lord chancellor pointed out that the usual course of the house of lords was "to declare the principle on which the decree is to be founded, and to refer it back to the court to carry it into execution." But he pointed out that sometimes mistakes were made by the lower courts in complicated cases. "I think it more expedient and more calculated to save expense to the parties that this house in making its order should frame the decree in such a manner as to prevent the necessity of any further reference to the court below." Accordingly the house of lords made a very long order, declaring to what decree the complainants were entitled, and ordering that "the cause be remitted to the court of chancery of Ireland to make a decree conformable to the above declaration, and to carry these directions into effect."

The English cases quoted above were all decided long before the judicature acts, and show conclusively the well-established practice of courts of equity in cases where appeals from interlocutory decrees are allowed. This practice of the English chancery should be followed by this court. Rev. St. U. S. § 918, provides that "the forms of mesne process, and the forms and modes of proceedings in suits of equity, * * * in the circuit and district courts, shall be according to the principles, rules, and usages which belong to courts of equity, * * * except when it is otherwise provided by statute or by rules of court made in pursuance thereof." Under this statute it is well settled that the United States court will "adopt the principles, rules, and usages of the court of chancery of England." *Vattier v. Hinde*, 7 Pet. 253-274; *Bein v. Heath*, 12 How. 168-178.

And this principle is now embodied in an express rule of the supreme court of the United States. Equity rule 90. Accordingly this court, upon an appeal from an interlocutory decree granting an injunction, having all the merits of the case before it, will proceed finally to dispose of the case, and will remand the case to the circuit court with a direction to dismiss the bill of complaint if, in the opinion of the appellate court, the suit cannot be sustained. The object of the act in establishing the appellate court is to save trouble and expense to suitors, and this object is best attained by a mandate which will obviate any unnecessary proceedings in the court below.

This court in each case will instruct the court below to make the order or decree which it should have made upon the facts before it. If the appeal is from an order granting a preliminary injunction, and this court is of opinion that the validity of the patent is doubtful, or that the complainant will not be irreparably damaged by waiting until final hearing, it will direct the court below to rescind the order granting a preliminary injunction; then the case proceeds for final hearing. If the appeal is from an interlocutory decree granting an injunction, and this court is of opinion that the bill cannot be sustained, then it will direct the court below to dismiss the bill. In both cases the parties are put in the situation which they would occupy if the court below had decided in accordance with the opinion of the appellate court, and this is the plain intention of the statute.

Considerations upon the jurisdiction of this court under the statute.

We have been requested by the court to submit a short brief bearing upon the meaning of the statute in providing for an appeal from an "interlocutory order or decree granting or continuing an injunction." See section 7 of the act to establish circuit courts of appeals, above quoted.

The intention of congress in passing this section of the statute is made plain by the following considerations:

It was long ago settled that the supreme court had no jurisdiction to entertain an appeal from a decree at final hearing granting an injunction, and referring the cause to a master for an account, either in a patent cause or in other like causes in equity, for such a decree is only "interlocutory." The long, tedious, and expensive process of accounting had first to be gone through with, and the final decree, based on the master's report, entered, before an appeal could be taken. By the statutes of the United States, (Rev. St. § 692,) an appeal to the supreme court lies only from "final decrees."

In this respect the practice of the United States chancery courts differs from the English practice; for appeals to the house of lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute. * * * But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. *Forqay v. Conrad*, 6 How. 201-205.

And it has therefore been held in frequent cases that the supreme court has

no jurisdiction, under the acts of congress, to entertain an appeal from an "interlocutory order or decree." The cases are cited and summarized very fully in *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32. In this case the decree granted an injunction and ordered a reference to a master for an account. The court held that the decree was not a final and appealable one. So in *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. Rep. 745, it was held that a decree setting aside a sale and appointing a receiver "was interlocutory, and not final."

In accordance with the preceding cases it has been expressly held that an appeal will not lie to the supreme court from a decree for a perpetual injunction in a patent cause, with reference to a master to take accounts, such a decree being interlocutory, and not final. See *Barnard v. Gibson*, 7 How. 650; *Humiston v. Statenthorp*, 2 Wall. 106; *Railroad Co. v. Soutter*, Id. 510-521.

Under this statutory limitation of the jurisdiction of the supreme court, it often happens that great hardship is caused to a defendant, against whom an erroneous decree is rendered at final hearing by the circuit court, in that he is put to the useless expense of a generally prolonged accounting before a master, and is kept during all this period under an injunction, (the well-established practice being that the injunction stands until the appeal is decided.)

The Supreme Court Reports are full of cases like *Clark Thread Co. v. Wilimantic Linen Co.*, 140 U. S. 481, 482, 11 Sup. Ct. Rep. 846. In this case the decree in favor of the patent was rendered in May, 1879. The period from that time until June 17, 1886, was consumed in "a long contest in the master's office," and in deciding the exceptions to the master's report, at the end of which time damages to the amount of over \$150,000 were awarded by final decree of the circuit court. Thus a period of over seven years elapsed, during which the defendant was under injunction, and vast amounts were consumed in legal expenses. The case then went up to the supreme court, which reversed the decree of the circuit court, and ordered that the bill should be dismissed!

This is only one example of many to be found in the Supreme Court Reports of the great hardship caused by inability to take an appeal at once from the decree sustaining the patent and granting the injunction. No compensation could ever be awarded to the defendant in the above case for being unjustly deprived by injunction of the use of a valuable construction for seven years, nor could any of the large sums expended in useless fees during the accounting be recovered. This hardship has long been a matter of complaint among the members of the bar who practice in patent cases; and it was a cause of general satisfaction that congress, in section 7 of this act, had attempted, as was supposed by the bar, to remedy this hardship by allowing an appeal to be taken at once from the interlocutory decree granting the injunction. It may seem to the court that this general understanding among the members of the bar should have some weight in the matter, and upon grounds of public policy it is certainly desirable that the statute should be given this construction, if compatible with the intention of congress and the language of the statute.

We submit that there can be little doubt of the intention of congress. The evil complained of was the great delay of appeals during the accounting before the master. To interpret the statute as referring only to orders granting a preliminary injunction would be to take away the chief benefit of the statute. In the first place, preliminary injunctions are seldom asked for, now that it is well established that the court will only grant such injunction in cases where there has been a prior adjudication or acquiescence or some special equity; and where the court is reasonably free from doubt. Furthermore, in such cases, the court will often dissolve the preliminary injunction upon

the defendant's filing a proper bond. And again, the cause can be rapidly pushed to final hearing by the defendant. So that the hardship arising from the inability to appeal from an order granting preliminary injunction is slight, compared to the hardship arising from the inability to appeal from an interlocutory decree granting a perpetual injunction.

It is well settled that the court, in construing a statute, will endeavor to carry out the intention of congress, and will consider the circumstances which led to the passing of the statute. *Platt v. Railroad Co.*, 99 U. S. 48-64; *Kohlsaat v. Murphy*, 96 U. S. 153-160; *Heydenfeldt v. Gold & Silver Min. Co.*, 93 U. S. 634-638; *Blake v. Banks*, 23 Wall. 307-319; *U. S. v. Freeman*, 3 How. 556-565; *Wilkinson v. Leland*, 2 Pet. 627-662; *U. S. v. Wiltberger*, 5 Wheat. 76-95; *Brown v. Barry*, 3 Dall. 365-367.

It is therefore clear that this court should look at the hardship which this section was passed to remedy, and that the intention of congress should be carried out in construing this statute. Congress certainly intended to provide that the action of a circuit court in granting an injunction at final hearing may be reviewed by the appellate court before the long and expensive process of taking accounts before the master is completed, as is the established practice of the English court of chancery and many other equity courts.

We submit, further, that the meaning of the language of the statute is plain. The words are, "interlocutory order or decree granting or continuing an injunction." This language is to be interpreted according to its usual meaning at the time of passing the statute, and no construction can be given it rendering a part of the words meaningless. *Railroad Co. v. Moore*, 121 U. S. 558-572, 7 Sup. Ct. Rep. 1334; *The Abbotsford*, 98 U. S. 440-444; *Minor v. Bank*, 1 Pet. 46-64; *Maillard v. Lawrence*, 16 How. 251-261; *Platt v. Railroad Co.*, 99 U. S. 48-58; *Market Co. v. Hoffman*, 101 U. S. 112-115.

Under these settled rules of construction, we submit that there can be no doubt as to the meaning of the section here in question. The words "interlocutory order" can only refer to the order of the court granting a preliminary injunction upon affidavits. This is never properly spoken of as a decree, although some few cases may be found where the word "decree" is incorrectly used of such an order. On the other hand, the words "interlocutory decree" refer, by the well-settled usage of the courts, to the decree on the merits at final hearing, by which an injunction is granted, and the case is referred to a master for an account or other like proceedings.

If the jurisdiction of the court should be limited under this section to appeals from preliminary injunction, the words "or decree," in section 7, become not only superfluous, but also entirely incorrect.

We will first refer to the usage of the supreme court of the United States. The difference between the three different determinations of the court of equity in the progress of a suit, namely, "preliminary injunction," "interlocutory decree," and "final decree," is well shown in *Worden v. Searls*, 121 U. S. 14-19, 7 Sup. Ct. Rep. 814. This was a bill in equity upon letters patent, and the court distinguishes very clearly, as follows: "A preliminary injunction was issued and served. * * * An interlocutory decree was made, declaring that the reissue was valid, and had been infringed, and awarding a perpetual injunction, and a reference as to profits and damages. * * * On the report of the master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover," etc.

In *Lodge v. Twell*, above cited, where the court dismissed an appeal as not being from a final decree, it expressly held that the decree "was interlocutory and not final, even though it settled the equities of the bill."

In *Beebe v. Russell*, 19 How. 283-285, the circuit court had decreed that certain conveyances should be executed, and referred the case to the master. The court dismissed the appeal, holding that it was not from a final decree,

saying that no case had been decided by the supreme court "in which the distinction between final and interlocutory decree has not been regarded as it was meant to be by the legislation of congress, and as it was understood by the courts in England and this country, before congress acted upon the subject. A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision."

So, also, in *Perkins v. Fourniquet*, 14 How. 313-323, the court distinguishes clearly between an "interlocutory decree," referring the case to a master to take an account, and a "final decree" for a stated sum.

In order to ascertain what was the settled meaning of an "interlocutory decree granting an injunction" in patent causes, we have looked through the United States Reports as far back as 128 U. S., and we find the following patent cases in which a decree at final hearing, ordering an injunction and referring the case to a master for an accounting, is expressly spoken of as an "interlocutory decree," while the decree based on the master's report is called the "final decree." We have not looked any further, but do not doubt that the cases can be indefinitely increased. Our citations are sufficient to show the established meaning of this phrase.

In *Magoowan v. Packing Co.*, 141 U. S. 332-337, 12 Sup. Ct. Rep. 71, the court says: "Issue being joined, proofs were taken, and the case was heard before Judge NIXON, then the district judge, who entered an interlocutory decree in favor of the plaintiff for an account of profits and damages and a perpetual injunction. * * * On the report of the master, * * * a final decree was entered."

In *McCreary v. Canal Co.*, 141 U. S. 459, 460, 12 Sup. Ct. Rep. 40, it is said: "Upon the hearing in the circuit court, an interlocutory decree was entered in favor of the plaintiff, finding the validity of the patent, and the infringement by the defendant, and ordering a reference to a master for an account."

In *St. Germain v. Brunswick*, 135 U. S. 227, 228, 10 Sup. Ct. Rep. 822, it is said: "Replication having been filed, proofs were taken, and an interlocutory decree was entered in favor of the complainant, sustaining the patent, finding that there had been infringement, and referring the case to a master."

In *Yale Lock Manuf'g Co. v. Berkshire Nat. Bank*, 135 U. S. 342-344, 10 Sup. Ct. Rep. 884, the court says: "After replication, proofs were taken on both sides, and the case was heard. * * * An interlocutory decree was entered, adjudging reissue No. 8,550 to be valid, that the defendants had infringed those claims, and ordering a reference to a master to take an account."

In *Cornely v. Marckwald*, 131 U. S. 159, 160, 9 Sup. Ct. Rep. 744, the court says: "There was an interlocutory decree for the plaintiff, establishing the validity of the patent and its infringement, and ordering a reference to a master to take an account of profits and damages."

In *Collins Co. v. Coes*, 130 U. S. 56-64, 9 Sup. Ct. Rep. 514, it is said: "The circuit court originally granted an interlocutory decree in favor of the plaintiff, in accordance with the opinion of Judge LOWELL. * * * But a rehearing was afterwards moved for and granted, the interlocutory decree vacated, and the bill dismissed."

In *Hurlbut v. Schillinger*, 130 U. S. 456-458, 9 Sup. Ct. Rep. 584, the court says: "Issue having been joined, proofs were taken on both sides, and * * * the court entered an interlocutory decree, adjudging that the reissued patent was valid, that the defendant had infringed it. * * * The decree also ordered a reference to a master to take an account of the profits and damages."

In *McCormick v. Graham's Adm'r*, 129 U. S. 1, 2, 9 Sup. Ct. Rep. 213, the court says: "After issue joined, proofs were taken on both sides, and * * * the court made an interlocutory decree, holding the patent to be

valid as regards its first and second claims, decreeing that the defendant had infringed those claims. * * * and referring it to a master to take an account of profits and damages."

In *Brewing Co. v. Gottfried*, 128 U. S. 158-163, 9 Sup. Ct. Rep. 83, it is said: "An interlocutory decree was entered, holding the patent to be valid as to claims one and two, and to have been infringed as to those claims, and referring it to a master to take an account of profits and damages."

The distinction is also clearly pointed out in the case of *Potter v. Mack*, 3 Fish. Pat. Cas. 428, in a decision by Mr. Justice SWAYNE, of the supreme court. This case is a leading case upon the proposition that an injunction will not be suspended during the proceedings before the master. Here a decree had been made for a perpetual injunction, and directing an accounting. An application was made that the injunction should be suspended until final decree, and was refused. The court says: "He cannot appeal from the decree, as it at present stands, because, although the decision is final as to the merits of the case, it is in form an interlocutory decree only, and the rule established by the supreme court is that an appeal can be taken only from a final decree. * * * An interlocutory decree was entered, and notice of the injunction has been duly given to the defendant. Now, we are asked to suspend the operation of this injunction until a final decree is made."

Second. We would refer to the established meaning of these words, as settled by the text-books.

In Walk. Pat. §§ 644-649, the distinction is fully drawn: "An interlocutory decree in an equity patent case is a decree which adjudges that the patent sued upon is valid, and that the defendant has infringed it, and that a master in chancery take and report an account of the profits, * * * and of the damages, * * * and sometimes that the defendant be permanently enjoined from further infringement. No appeal from such a decree lies to the supreme court. Until a final decree has been made for a specific money recovery, in pursuance of an account of profits and damages, the case is within the control of the court."

The same text-book shows that the grant of a preliminary injunction is not spoken of as a "decree" at all. Walk. Pat. §§ 658-662. See, also, section 698: "A refusal of a permanent injunction will generally follow from the fact that the patent has expired at the time of the interlocutory decree."

Rob. Pat. §§ 1131, 1132, is equally clear on this subject. "An interlocutory decree is a decree in favor of the plaintiff upon the issues created by the bill and answer, and referring the cause to a master in chancery for an account of profits and an award of damages. * * * A final decree is a decree which terminates the litigation, either by awarding to the plaintiff the profits, damages, and other permanent relief to which he is entitled, or by deciding the cause upon its merits in favor of the defendant. The final decree for the plaintiff cannot be granted where an account is necessary until the account has been taken by the master, and reported to and accepted by the court."

The above citations seem to show conclusively what is the established meaning of the words "interlocutory decree." In the case at bar the court certainly entered a decree, from which an appeal was taken; and this decree certainly granted an injunction. There can be no dispute about that. And, furthermore, it was an "interlocutory decree," as is expressly settled, not only by the cases above cited, but by the cases of *Barnard v. Gibson*, 7 How. 650, and *Humiston v. Stainthorp*, 2 Wall. 106, in which it was expressly held that a decree in a patent cause, which was absolutely indistinguishable from the decree here appealed from, was not a final decree. In both cases the court said: "The decree is not final."

As the decree in the case at bar, therefore, was an "interlocutory decree,"

and "granted an injunction," it is a case which comes within the express language of section 7 of the statute, and also within the intention of congress, as above set forth.

As to the jurisdiction of the court in this particular case, we submit that there can be no question. For certainly the circuit court has entered a decree; if this decree is an "interlocutory decree," the court plainly has jurisdiction under section 7 of the statute, as the decree grants an injunction. If, on the other hand, this decree is a "final decree," then the court has, of course, jurisdiction under section 6 of the act, which makes this court an appellate court, with jurisdiction "to review by appeal or by writ of error final decisions of the district court and the existing circuit courts." The decree of the circuit court in this case must be of either one kind or the other, for there are no other kinds of decrees known to the law. We have pointed out above that in patent causes these are the only kinds of decrees, and the fact is also established by the best text-books upon general equity practice.

In Daniell's Ch. Pr. (5th Ed.) 986, it is said: "A decree is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience. It is either interlocutory or final. An interlocutory decree is when the consideration of the principal question to be determined, or the further consideration of the cause generally, is reserved until a future hearing."

This text-book, on pages 1671-1673, further makes it plain that the granting by the court of a preliminary injunction upon affidavits is not a "decree" at all, (as we pointed out above,) but is "an order for an injunction." It is said, on page 1679: "An injunction which has been granted on an interlocutory application is superseded by the decree made at the hearing of the cause. The injunction may be permanently continued, or made perpetual, by the decree."

Story, Eq. Pl. (10th Ed.) § 408a, also distinguishes between final and interlocutory decrees. Seton, Decrees, (4th Ed.) p. 2, which is the leading work upon this subject, says: "Decrees are either final or interlocutory." So, also, in Fost. Fed. Pr. § 318, it is said: "Decrees are either final or interlocutory."

Thus *quacunque via data*, the court has jurisdiction to entertain this appeal. It appears from the record, page B, that the circuit court entered a "decree for perpetual injunction, and for an accounting," from which decree the defendant appealed. If the decree was final, the court plainly has jurisdiction, under section 6 of the statute. If the decree was interlocutory, it has jurisdiction, under section 7. We believe, however, that, upon consideration of the authorities above cited, this court will have no doubt that this cause is one of those which was expressly intended by congress to be covered by section 7 of the statute.

NOTE. We have not searched the Federal Reporter for the use of the words "interlocutory decree," because of the labor involved. We will call attention to *Saddle Co. v. Smith*, 38 Fed. Rep. 414, 416, where Judge SHIPMAN says: "Let there be an interlocutory decree for an injunction and an accounting." Many other like cases could doubtless be found.

Payson E. Tucker and Charles F. Perkins, for appellee.

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

ALDRICH, District Judge. The opinion of this court, through COLT, circuit judge, was rendered upon the general merits involved, February

2, 1892, and the case is reported in 5 U. S. App. 1, 48 Fed. Rep. 910, 1 C. C. A. 144, (1st Circuit) and is now before us upon a motion for rehearing, and a petition that the questions of merit be certified to the supreme court. Upon reargument of the foregoing motion, the question is raised as to the right of this court to entertain an appeal at the stage of the proceeding reached in this cause; and, in the event that jurisdiction exists, the further question is presented whether the mandate of this court should direct a final disposition of the cause in the court below.

After considering the briefs and rearguments, we find no reason for doubting the correctness of the conclusion stated in the former opinion as to the merits, and the motion for a rehearing and the petition for certification to the supreme court are denied, and we do not feel called upon to add anything to the reasons already stated upon this branch of the case.

The questions of jurisdiction and scope of mandate, however, not having been raised on the former arguments, or considered in the opinion, seem not only to demand our attention, but that we should state our reasons at some length.

Section 7, of the act of March 3, 1891, creating the circuit court of appeals, provides:

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals; and, in order that such right of appeal should be the more highly remedial in favor of the party aggrieved, it was further provided, in the same section, that "it shall take precedence in the appellate court."

Of course, in our endeavor to ascertain the meaning of this section of the statute, we must bear in mind that, prior to its enactment, an appeal from an interlocutory injunction order was unknown in the federal courts. Having in view, therefore, this rule of law and the plain language of the statute; considering also that the purpose of the lawmaker, plainly expressed, was to give a right of appeal, not conferred by the general provisions of the statute as to appeals from final decision,—it seems to us evident that it was intended to remove the restriction, and extend the right to all that class of interlocutory orders or decrees which interfere with the possession of property, or operate in restraint of a party's business.

Since Sir William Blackstone's day, at least, decrees and orders in equity proceedings have only been subject to one division, and have been classed, generally, either as final or interlocutory decrees or orders; and an "interlocutory decree" has been repeatedly defined as any decree made before final decision, and for the purpose of ascertaining matter

of law or fact preparatory to a final decree. Blackstone says, (volume 2, p. 452:) "The chancellor's decree is either interlocutory or final;" and in Harrison's Practice in Chancery, (volume 1, p. 622,) it is said that "a decree is either final or interlocutory." Again, Barb. Ch. Pr. 326:

"Decrees are of two kinds,—interlocutory and final. An interlocutory decree is properly a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a final decree."

In Seton on Decrees, (page 1,) it is said:

"Decrees are either final or interlocutory. If the decree determined all the questions in issue between the parties, and did not adjourn any matter for further consideration, it was called a 'final decree.' In strictness, however, a decree was said to be 'interlocutory' until it was signed and enrolled. For. Rom. 183. But ordinarily it has been termed 'interlocutory' when it was pronounced for the purpose of ascertaining matter of law or of fact previously to a final decree."

It is quite clear that this single division of decrees into two classes, and two only, interlocutory and final, has been generally accepted by lawyers and judges in this country and England. 1 Newl. Ch. Pr. 322; Seton, Decrees, 2; Kerr, Inj. 11, 12; High, Inj. § 1694; Adams, Eq. 375; Daniell, Ch. Pr. 986; Fost. Fed. Pr. § 318; Walk. Pat. §§ 644, 649; Rob. Pat. §§ 1131, 1132; 2 Madd. Ch. 462; *Kane v. Whittick*, 8 Wend. 224; *Jenkins v. Wild*, 14 Wend. 539; *Forgay v. Conrad*, 6 How. 201; *Barnard v. Gibson*, 7 How. 650; *Perkins v. Fourniquet*, 14 How. 313; *Beebe v. Russell*, 19 How. 283; *Humiston v. Stainthorp*, 2 Wall. 106; *Railroad Co. v. Soutter*, 2 Wall. 510, 521; *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. Rep. 814; *Brewing Co. v. Gottfried*, 128 U. S. 158, 163, 9 Sup. Ct. Rep. 83; *McCormick v. Graham's Adm'r*, 129 U. S. 1, 2, 9 Sup. Ct. Rep. 213; *Hurlbut v. Schilling*, 130 U. S. 456, 458, 9 Sup. Ct. Rep. 584; *Collins Co. v. Coes*, 130 U. S. 56, 64, 9 Sup. Ct. Rep. 514; *Cornely v. Marckwald*, 131 U. S. 159, 160, 9 Sup. Ct. Rep. 744; *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32; *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. Rep. 745; *St. Germain v. Brunswick*, 135 U. S. 227, 228, 10 Sup. Ct. Rep. 822; *Yale Lock Manuf'g Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 344, 10 Sup. Ct. Rep. 884; *Magowan v. Packing Co.*, 141 U. S. 333, 337, 12 Sup. Ct. Rep. 71; *McCreary v. Canal Co.*, 141 U. S. 459, 460, 12 Sup. Ct. Rep. 40; *Saddle Co. v. Smith*, 38 Fed. Rep. 414, 416; *Potter v. Mack*, 3 Fish. Pat. Cas. 428; *McVickar v. Wolcott*, 4 Johns. 510; *Bennett v. Hetherington*, 41 Iowa, 142; *Morgan v. Rose*, 22 N. J. Eq. 583, 593.

It will be observed, from an examination of the cases in the supreme court of the United States, that a decree in patent cases, declaring the patent in question valid, and that it has been infringed, and for an injunction and an accounting, has uniformly been referred to as an interlocutory decree, and the cases are numerous, like *Barnard v. Gibson*, *Forgay v. Conrad*, *Humiston v. Stainthorp*, *Railroad Co. v. Soutter*, *Beebe v. Russell*, and *Iron Co. v. Martin*, *supra*, where, upon an appeal from a decree determining the general property right, granting an injunction,

and an order for an accounting before a master, it has been held that the decree was not final or appealable.

It is true, that the cases in the supreme court are based upon a different statute, and in unmistakable language deny the right of appeal from interlocutory decrees. But they are for that reason none the less significant, as showing what has been understood as the line between interlocutory and final decrees. We must assume that congress used the term "interlocutory order or decree," in this connection, in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts; and it follows that all injunction orders and decrees which were interlocutory, and not final, within the meaning of the old statute, and for that reason not appealable, are interlocutory under the new statute, and therefore, by the same logic and upon the same reasoning, are appealable.

We think the term "interlocutory order or decree" was used in its broadest sense, and that the purpose of congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory, or final.

As already said, we think the term was used in its broadest sense, and, in our opinion, full scope should be given to this provision of the statute, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal. It is plain that the policy intended to be emphasized by this statutory exception to the general provision of the statute and the rule of law, limiting the right of appeal to final decision, is this: that, as injunction orders deprive parties of the possession and control of property and business, and, in case of error, work irreparable mischief and great injustice, the party upon whom the order operates should have an early opportunity to have the record examined by the appellate court, and, if error is discovered, to have it corrected without the delay necessarily incident to litigation in its various stages before reaching final judgment.

As the statute in question undertakes to introduce a new feature in federal procedure, by conferring the right of appeal from certain orders and decrees before final decision, we have approached a consideration of its scope and effect with caution; and, in view of the doubt which always comes from entering new fields, it is very gratifying to learn that the circuit court of appeals in the fifth circuit has, in a similar case, adopted the same construction in a forcible opinion recently rendered by PARDEE, circuit judge, in *Jones Co. v. Munger, etc., Co.*, reported 50 Fed. Rep. 785, 1 C. C. A. 668.

The remaining question, however, is more troublesome, especially in view of the conclusion reached by the same court, in the same case, that the mandate to the court below should go to the injunction order merely. Although the report of the case fails to show how fully the question was considered upon argument, and the opinion presents no discussion thereof, we have given due consideration to its weight as an authority,

but still feel bound to announce a different conclusion upon the same question.

At the outset, we must notice that there are many instances where cases of this character have been before the supreme court, upon a full record, in which complete relief has not been granted. But it must be observed that the failure to afford relief resulted from the limitation in the older statute, which conferred the right of appeal from final decision only,—the court, under such statute, having no appellate jurisdiction to review and furnish either partial or full relief until after final decision. The failure to make final disposition did not result from a lack of power in a court having appellate jurisdiction to afford complete relief, but from a total lack of jurisdiction, at such a stage of the proceeding, to entertain the appeal, or to afford any relief whatever. The former decisions and practice in the federal courts, therefore, by reason of this distinction, have no force whatever upon the question whether a court having statutory appellate jurisdiction to review at interlocutory stages, and having the complete record of a full hearing upon the general merits, may proceed to correct the fundamental error, and finally dispose of the case in the manner in which it should have been disposed of in the court below.

No practice having been adopted by the supreme court upon this subject, for the reason stated, that heretofore the statutory right of appeal did not exist, we get no aid from the reported cases in that court. We must assume that congress, in furnishing equitable remedy by appeal, had reference to the equity system as understood and practiced in England, and as adopted and applied to our own institutions; and, in determining the power and the duty which result from this legislation, we must look to the English system, usage, and practice, and to the decisions of our state courts, where a similar right of appeal from such decrees has been conferred by statute. It is, of course, well understood that a court of equity is to decide on the law and fact, (*Le Guen v. Gouverneur*, 1 Johns. Cas. 500, 506;) and that an appeal in equity is an appeal upon the law and fact involved in the cause, (*Adams*, Eq. 375;) and that, "in absence of any restrictive clauses, every appellate tribunal is clothed with all the powers of the tribunal appealed from, and is bound to exercise them upon the same principles," (*Briggs' Petition*, 29 N. H. 553;) and "ordinarily, from the nature of judgments, the decision of an appellate tribunal must have as great force, at least, as the judgment of the inferior tribunal upon the same matter would have had if no appeal had been taken," (*Blake v. Orford*, 64 N. H. 302, 10 Atl. Rep. 117.)

Unquestionably the circuit court upon the hearing therein might have found the facts against the complainant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the

injunction, permit the accounting to go on, and, after the useless expense and annoyance incident to such an investigation, upon re-examination of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? In our view, the accounting could in no way aid the final execution of the right already ascertained by this court, and under such circumstances would be worse than idle; and a rule which would permit such circuitry and circumlocution is unnecessary, and would not be useful to either the parties or the court. Now, this case must be distinguished from the class of cases where the injunction is preliminary, and granted upon the bill, or where there is only a partial hearing upon the merits, or where the record is incomplete, or evidence is excluded which should have been considered. We are not called upon to decide as to the scope of the mandate under such circumstances; but it is probable that no one would contend that, as an invariable rule, it should go to a final disposition of the cause upon its merits. *Deas v. Thorne*, 3 Johns. 543; *Huntington v. Nicoll*, Id. 566.

It is quite probable, indeed quite clear, that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate court interferes reluctantly with injunctions granted *in limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause. In the case under consideration, the hearing in the circuit court upon the merits, as to the validity and the infringement of the patent, was full and complete, and the general property right was determined, so far as it could be done by that court; and the perpetual injunction, the order to account, and the appointment of the special master were based upon such determination of the property right. The record before us is complete. Everything is here for our consideration which was before the court below. We must go to the full merits, as shown by the record, in order to determine whether the interlocutory decree for a perpetual injunction is founded in error, and, if we determine the property right adversely to the complainant, the injunction should be dissolved; and no sufficient reason has been suggested why the accounting—to which the complainant is not entitled, and which would be an invasion of a right, and therefore inequitable and improper, under our view of the case—should proceed.

It is not necessary for purposes of analogy to enlarge upon the well-understood fundamental truth expressed in the constitutions, statutes, and decisions of the various states, that the system of common law and equity jurisprudence of England prevail in this country, so far as the same are not repugnant to our institutions, for the reason that rule 90 of the supreme court, (adopted by this court, rule 8,) regulating the practice of the courts of equity of the United States, provides, in effect, that, in the absence of an express rule or decision, the practice shall be

regulated by the practice of the high court of chancery in England, so far as the same may be reasonably applied, not as positive rules, but as furnishing just analogies. We do not refer to this as furnishing an absolute rule for the determination of rights, but as indicating a recognition of the system of practice ordinarily controlling equity procedure in the federal courts. It may still further be observed that, as early as 1818, the supreme court in determining a question of procedure, in *Robinson v. Campbell*, 3 Wheat., said, (page 222:)

"The court, therefore, think that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, * * * according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of those principles."

And in 1851, in *Pennsylvania v. Bridge Co.*, 13 How. 518, 563, it is said:

"The rules of the high court of chancery of England have been adopted by the courts of the United States. * * * The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

See, also, Rev. St. U. S. § 913; *Vattier v. Hinde*, 7 Pet. 252, 274; *Bein v. Heath*, 12 How. 168, 178. And to the same effect in the state courts. *Newark & N. Y. R. Co. v. Mayor, etc.*, 23 N. J. Eq. 515, 517; *State v. Rollins*, 8 N. H. 550; *Pierce v. State*, 13 N. H. 536; *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 21 Atl. Rep. 1090; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 508.

In the case last referred to Chancellor KENT says, (page 508:)

"Our system of jurisprudence is borrowed from the English system, and in all its great outlines, as well as in its subordinate parts, is happily modeled after that admirable monument of the experience and wisdom of ages."

See, also, "Note by the Court" in *Thomson v. Wooster*, 114 U. S. 112, 5 Sup. Ct. Rep. 788.

Of course, it is understood that this adoption is subject to the limitation that it must be in keeping with the principles of our institutions, and subject to the acts of congress, limiting or enlarging the same, as, for instance, the old statute limiting the right of appeal, contrary to the English system, to appeals from final decrees. But now that this limitation is removed, and the right of appeal from interlocutory injunction orders and decrees has been created by statute as in England, without any restriction as to the manner in which equity and justice shall be administered thereunder, it only remains to inquire what the chancery practice of England has been in this respect, and whether the same may reasonably be applied as consistent with our institutions, and as a matter of convenience and safety in equity procedure in this jurisdiction.

In England, any person aggrieved by a decree or order of the court of chancery is entitled as a matter of right to appeal to the house of lords, (2 Daniell, Ch. Pr., 4th Ed., 1471;) and, in practice, this right extends to interlocutory decrees, (Id. 1492; *Forgay v. Conrad*, 6 How.

201, 205;) and later (14 & 15 Vict. c. 68, § 10) this right was extended to decisions, decrees, and orders of the court of appeals. Mr. Daniell, speaking of the right of appeal from interlocutory decrees, says, (page 1492, Id.):

"Appeals from courts of equity by petition differ from appeals by writ of error from the judgments of the courts of law, which will only lie where the judgment is final. The reason for this distinction is stated to be that courts of equity often decide the merits of a case in intermediate orders, and the permitting of an appeal in the early stage of the proceedings frequently saves the expense of further prosecuting the suit."

See, also, 2 Smith, Ch. Pr. (2d Ed.) p. 40; *McNeill v. Cahill*, 2 Bligh, (N. S.) 316.

Indeed, it seems to have been the practice, from an early period, in the house of lords, to direct a final disposition of causes before it with a full record, upon appeal from interlocutory orders and decrees based upon a hearing upon the merits below, whenever it was found that there was no equity in the complainant's cause; and the action of the appellate court in this respect was not confined to causes in which it concurred with the chancellor from whom the appeal was taken, but extended to instances where the findings were reversed upon an examination of the records. *Bouchier v. Taylor*, 4 Brown, Parl. Cas. 708, (1776;); *Governors, etc., v. Swan*, 5 Brown, Parl. Cas. 429, (1760;); *Ellis v. Segrave*, 7 Brown, Parl. Cas. 331; *White v. Lightburne*, 4 Brown, Parl. Cas. 181; *Scribblehill v. Brett*, Id. 144; *McCan v. O'Ferrall*, 8 Clark & F. 30; *Rous v. Barker*, 4 Brown, Parl. Cas. 660. The case of *McCan v. O'Ferrall*, *supra*, was before the house of lords in 1840, and, although in that case the matters involved were not finally disposed of by decree, the lord chancellor states the rule, with the reasons for it, (page 66,) saying:

"Now, my lords, the usual course of proceeding in this house, in arranging the minutes of the decree, has been to declare the principles upon which the decree is to be founded. * * * That, however, has been found to lead, sometimes, to repetition of appeals. * * * Where, therefore, it is possible, I think it more expedient, and more calculated to save expense to the parties, that this house, in making its order, should frame the decree in such a manner as to prevent the necessity of any further reference to the court below."

This practice is by no means new in the equity jurisprudence of our own country. In a very early case in New York, involving interests of great magnitude,—*Le Guen v. Gouverneur*, 1 Johns. Cas. 436, (1800,)—and at a period when Chancellor KENT was a member of the court of errors, the question was under consideration as to the measure of relief to be afforded upon an appeal from an interlocutory order directing the trial of an issue at law. The appellate court determined that the complainant had no equity, and after much argument and full consideration, which involved a review of the English cases and the practice of the house of lords, proceeded to final judgment, and dismissed the bill. The question was one of new impression in the American courts, and three judges rendered opinions in the cause; KENT, J., in the course of a luminous opinion, (page 508,) saying:

"It is the settled rule of the house of lords in England, upon appeals, always to give such a decree as the court below ought to have given. This is the great and leading maxim in their system of appellate jurisprudence, and instances are, accordingly, very frequent, in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided fully on the merits."

Again he says, (page 508:)

"Their power on appeals is exercised with great latitude in dismissing the bill, or modeling the relief, or granting it conditionally, as may best answer the ends of justice and the exigencies of the case."

Again, (page 509:)

"Possessing the authority to decide finally, I think we ought to exercise it in this instance. * * * All the proofs are before us. * * * The cause is as ripe here as it was in the court below, for ultimate decision; and, if we are persuaded in our own minds that the facts before us can never support the allegations of fraud, we ought to say so, and put an end to the contention."

And in the same line and to the same effect RADCLIFF, J., says, (page 499:)

"I have also no doubt that this court may proceed further, if it appear that the merits are fully in its possession, and determine finally between the parties. That such is the power, and frequently the practice, of the house of lords in England, is evident from the cases which have been cited. * * * On similar appeals, they affirm, reverse, or alter the order for an issue, and sometimes proceed to dismiss the bill, or otherwise decree on the merits. The power of this court is the same, in this respect. I can see nothing in our constitution or laws to restrain it. * * * In this case, the propriety of making a final decree arises out of the appeal itself, which brings before us the whole merits of the cause."

Again, (page 500:)

"The power appears to me essential to a court of appeal in the last resort, and I have no doubt that it is vested here."

The authority last referred to is of unusual value, both by reason of its involving the first American discussion of the question, and from the great learning of the court rendering the opinion, and this, together with the fact that a full report of the case (Johns. Cas. 1800) is not easily accessible, would seem to justify the somewhat extensive quotations. Five years later the same court, through SPENCER, J., in *Bush v. Livingston*, 2 Caines, Cas. 66, in making a final decision of the cause, said, (page 85:)

"There remains only one point to be considered; that is, whether the court will finally decide the cause. In the case of *Gouverneur & Kemble v. Le Guen*, this court, on an appeal from the order of the chancellor, directing an issue, finally decided the cause, and directed the complainants' bill to be dismissed. It did so on precedents from the proceedings of the house of lords in England, on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, that it will save litigation and expense, I am myself contented to be bound by the precedent which has been made." See, also, *Beebe v. Bank*, 1 Johns. 529.

In 1822 the doctrine of *Le Guen v. Gouverneur* was referred to with apparent approval in *Dale v. Roosevelt*, 6 Johns. Ch. 255, 257, and, so far as known, the practice obtained in New York until the adoption of the Code; and the fact that a different practice has prevailed since the abridgment of the right of appeal, as said in *Newark & N. Y. R. Co. v. Mayor, etc.*, 23 N. J. Eq. 519, is aside from the purpose. In *Terhune v. Colton*, 12 N. J. Eq. 312, although the precise question under consideration was not involved, ELMER, J., (page 318,) speaks of an interlocutory order which involved the merits of the case; and in 1872 the precise questions which we are now considering came before the New Jersey court of errors and appeals in the case of *Newark & N. Y. R. Co. v. Mayor, etc.*, 23 N. J. Eq. 515.

The New Jersey statute provided that "all persons aggrieved by any order or decree of the court of chancery may appeal from the same or any part thereof;" and the case last referred to involved both the right of appeal from an interlocutory order, and the power of the court to conclude the cause upon its merits. These questions received careful consideration by the chief justice, who announced the opinion of the court, not only sustaining the right of appeal, but, after reviewing the English and New York cases, said, (page 521:) "In view of these authorities, I can entertain no uncertain opinion with regard to the power of this court to deal with the present case on its merits." Again: "It seems to me that this court should pass upon the question as to the equity of the bill," etc.

Under the authorities, and the equity practice to which we have referred, and upon principle, it seems to us clear that, while the appellate court is not bound by an inflexible rule so to do, it may in its discretion, and should, when equity so requires, make full direction as to the manner in which the cause shall be disposed of below. No special or peculiar conditions have been suggested as existing in this case, as a reason why the mandate should not be as broad as the decree in the circuit court; but, on the contrary, as it seems to us, there are strong equitable reasons why an accounting in a patent case, which is incident to and based upon a finding and a decree which upon the record appears to the appellate court to be erroneous, should not proceed; and it is our conclusion, as the full record is before us, upon appeal from an injunction granted by an interlocutory decree, after a full hearing, and a finding which undertakes to finally dispose of the property right involved, that we should direct a final disposition of the cause in accordance with the view which we hold upon the substantial merits. It therefore follows that the findings of the circuit court are reversed, the decree for an injunction and for an accounting is vacated, and it is ordered that a mandate issue accordingly, and with further direction that the bill be dismissed.

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO WATER CO.
et al.

(Circuit Court, E. D. Wisconsin. October 10, 1892.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—FRANCHISES.

The charter of the city of Oconto conferred the powers belonging to municipal corporations at common law, and contained the "general welfare" clause usual in city charters, (Laws Wis. 1882, c. 56.) The general law conferring on cities the power to legislate upon the construction and operation of waterworks had not been adopted by the city, so as to derive any powers therefrom. *Held*, that the city had no power to confer a franchise for owning and operating waterworks, and for other things collateral thereto.

2. CORPORATIONS—BONDS—VALIDITY—WHEN "ISSUED."

A water company put forth bonds of the par value of \$125,000, depositing \$25,000 of them with a trust company under a deed of trust, and the other \$100,000 in trust as collateral for an advance of \$40,000. Thereafter advances of \$27,000 were contracted for, and in part made. *Held*, that the bonds, although pledged and not sold, were "issued," within the meaning of Rev. St. Wis. § 1753, which declares void any bonds issued by a corporation, except for money actually received, equal to 75 per cent. of their par value; and the same were not enforceable in the hands of the pledgee.

In Equity. Bill by the National Foundry & Pipe Works, Limited, against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb, and others. On motion for receiver and injunction. Granted.

W. D. Van Dyke and Geo. H. Noyes, for complainant.

W. H. Webster, for defendants.

JENKINS, District Judge. The conceded facts upon which the present application for a receiver and for an injunction are based, so far as now necessary to state them, are these: The complainant on the 2d day of January, 1892, recovered judgment in this court in an action at law against the Oconto Water Company for \$24,250.04 damages and costs, and, upon return of execution *nulla bona*, filed this bill against the judgment debtor and others to subject its property to the payment of the judgment. The Oconto Water Company was incorporated under the Revised Statutes of Wisconsin, on the 8th day of July, 1890, for the purpose of constructing and operating a system of waterworks within the city of Oconto, and of supplying the city and its inhabitants water for protection against fires, and for domestic, manufacturing, and other purposes. On the 9th day of July, 1890, the city of Oconto adopted an ordinance whereby it was ordained "that the Oconto Water Company, its successors and assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain, and operate waterworks in the city of Oconto; to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes, bridges, or public grounds of the city, as now or may hereafter be laid out; to acquire and hold, as by law authorized, any and all real estate, easement, and water rights necessary to that end and purpose, with all necessary and proper buildings, wells, conduits, or other means of obtaining water supply, with all necessary machinery and attachments thereto, to supply the city and the inhabitants thereof with good and

wholesome water, suitable for fire and domestic purposes; and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge, or public ground under control of the city, to take up any pavement or sidewalk thereon, and make such excavations as may be necessary for the laying of such pipe and attachments." The ordinance further purports to grant continuance of the rights and privileges for a period of 30 years, and contracts for the use of hydrants and a supply of water for a like period at a specified annual rental. The city further undertakes, upon request of the water company, to adopt and maintain an ordinance protecting the company "in the safe and unmolested enjoyment of the franchise hereby granted, from waste of water by consumers," and "to carry into effect the provisions of this ordinance, and the contract thereunder entered into," and grants to the water company, "its successors and assigns,"—so runs the ordinance,—“the power to make, adopt, and enforce regulations not inconsistent with the law, for the convenience and security of said grantee, its successors or assigns, as well as that of the public, in the operation of said mains, and may enforce such regulations by cutting off the supply of water, or otherwise, and shall have the right at all seasonable hours of the day to have access to the water pipes and meters of any water takers, to protect themselves against abuse or fraud, and repair, observe, or remove the same, and may require all water takers to sign a contract to observe all reasonable regulations, as a consideration for furnishing water." The ordinance undertakes also to regulate the maximum charges to consumers, "collectible quarterly in advance, except sprinkling rates, which shall be paid in advance for the season," and provides that the company shall have the right, at will, to supply consumers at the meter rate instead of at the schedule rates, and that connections between the mains and the consumer shall be made at the expense of the consumer.

The debt of the complainant, for which it recovered its judgment, was for iron pipes furnished, to be used, and which were used, in the construction of the waterworks plant, under a contract therefor dated August 28, 1890. The pipe was delivered during the months of September, October, and November of that year, and laid in the streets of the city. On the 13th day of September the defendants Andrews & Whitcomb entered into an agreement with the water company, by which Andrews & Whitcomb agreed to loan to the company a sum not exceeding \$40,000, upon interest, to be furnished between that date and January 1, 1891. The Oconto Water Company, in consideration of the premises, agreed to make immediate transfer in trust to Andrews & Whitcomb "of the Oconto waterworks franchise as issued to said Oconto Water Company," together with the entire issue of stock of the company, amounting to \$100,000, and further agreed to issue immediately \$100,000 in the first mortgage bonds of the company, to be secured on the entire Oconto waterworks franchise, and all the rights and privileges of said company; the deed of trust to be made to some trust company thereafter to be agreed upon by the parties. The stock and bonds were to be delivered to Andrews & Whitcomb as collateral security for the money to

be advanced, and upon payment of the loan, with 7 per cent. interest, and the further sum of \$5,000, were to be returned to the company. Afterwards, and about October 1, 1890, in fulfillment of that agreement, an assignment of what is denominated in the answer "the rights and franchises acquired by said company under and in virtue of said city ordinance No. 153 of said city of Oconto" was executed by the water company, and delivered to Andrews & Whitcomb. This document was antedated to September 13, 1890, and by its terms sells, assigns, transfers, and sets over to Andrews & Whitcomb "all the rights, privileges, immunities, franchises, and powers, of whatsoever name and nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of said city of Oconto, and approved by the mayor of said city on the 9th day of July, 1890, said ordinance being entitled 'An ordinance providing for a supply of water to the city of Oconto, Wis., and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain waterworks therein.'" This contract was as security for the repayment of the loan contemplated by the agreement of September 13, 1890. Certificates for the entire issue of the stock of the company were delivered to Andrews & Whitcomb, except as to three shares made out by their direction in the names of others. The entire issue of stock was held by them as collateral security, as provided in the agreement of September 13, 1890.

At a meeting of the directors held October 29, 1890, action was had, authorizing the issue of first mortgage gold bonds of the company, to the amount of \$125,000, in sums of \$1,000 each, numbered consecutively from 1 to 125, both inclusive, payable in 25 years, with interest coupons attached; 100 of such bonds to be negotiated and sold, to provide funds for the completion of the system; the remaining bonds to be negotiated and sold, to provide funds for the extension of the system as may thereafter be deemed advisable; such bonds to be secured by trust deed to the Minneapolis Trust Company upon the franchises and rights of the company. The action of this meeting of the board of directors was confirmed at a meeting of the stockholders held subsequently on the same day. The bonds and the trust deed were prepared and executed, and bore date November 1, 1890. The trust deed was recorded in Oconto county, November 13, 1890, in volume 52 of Deeds, p. 394. On the 18th day of November, 1890, the officers of the company delivered to Andrews & Whitcomb 100 of such bonds as security, in accordance with the agreement of September 13, 1890; the other 25 bonds being lodged with the trust company. The sum of \$40,000 mentioned in the agreement of September 13, 1890, was actually loaned to the company by Andrews & Whitcomb on or prior to December 23, 1890, the last sum of \$5,000 being advanced on that day, and they received the notes of the company for the total loan pursuant to the terms of the agreement. On March 13, 1891, the company contracted with Andrews & Whitcomb for a further loan of an amount not to exceed \$12,000, to complete the work; they to hold the security then held by them as col-

lateral to the loan under the agreement of September 13, 1890, as further security for all additional loans theretofore made by them, amounting to \$4,439.79, and for the loan of \$12,000 so contracted to be made. This latter sum was advanced to the company on the 13th day of March, and was used in the purchase of material for the plant and for carrying on the work of construction. It was thereafter ascertained that further funds were essential, and on the 16th day of May, 1891, the parties contracted for another loan by Andrews & Whitcomb, not to exceed \$15,000, upon like terms to those of the contract of March 13, 1891; under which agreement Andrews & Whitcomb advanced \$8,763.33, which was used in completion of the plant.

On the 17th day of June, 1891, the loans remaining unpaid, Andrews & Whitcomb instituted suit against the Oconto Water Company in the circuit court of Oconto county, and on the 13th day of August, 1891, upon default of appearance to the suit, a decree was rendered that they recover of the Oconto Water Company the sum of \$63,887.23, the amount of the loans, with interest, and the costs of the action, which amount was declared to be a lien upon "all the rights, privileges, immunities, franchises, and powers, of whatsoever name or nature, which were granted the said defendant in and by a certain ordinance passed by the common council of the city of Oconto, Wis., and approved by the mayor of said city, July 9, 1890, said ordinance being ordinance No. 153 of said city, and being entitled 'An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain waterworks therein,' and upon \$100,000 in the capital stock of the defendant, now held in pledge by the plaintiffs, and upon \$100,000 in the first mortgage bonds of the said defendant, now also held in pledge by the plaintiffs." The decree provided for a sale of the property upon which a lien was declared, which was had, Andrews & Whitcomb becoming the purchasers. The sale was confirmed by the court on the 29th September, 1891, and an instrument was executed by the referee, conveying to Andrews & Whitcomb the property mentioned, and in the language of the decree, under which they took actual possession of the waterworks system, and have since retained possession, claiming to own the same, upon the ground that by the sale they acquired title to the franchises of the Oconto Water Company, and that the title to all tangible property essential to the use and enjoyment of the franchise passed to them therewith.

At the threshold of the inquiry, the court is confronted with the question as to what rights Andrews & Whitcomb acquired under the agreement of September 13, 1890, the instruments executed pursuant thereto, and the foreclosure of the rights thereby acquired. The grant to them was of "all the rights, privileges, immunities, and powers, of whatever name or nature, which were granted unto the said Oconto Water Company" by the ordinance of the city of Oconto. What rights could the city lawfully grant, and what were granted? The solution of the questions depends upon the powers conferred upon that municipality. The

city by its charter is vested "with the general powers possessed by municipal corporations at common law," and with certain governmental powers specifically defined in its charter, and with authority to enact and enforce ordinances under the "general welfare" clause usual in charters of municipal corporations, and specific power is vested touching various matters of municipal concern. Laws Wis. 1882, c. 56. The general power is conferred upon cities to borrow money, and to issue negotiable bonds for the purchase or erection of waterworks. Rev. St. § 942. By chapter 125, Laws 1879, (Sanb. & B. St. § 930a,) the common council of every city is authorized to permit, subject to such rules and regulations as may be imposed, the laying of pipes in the streets of the city, and their maintenance and use for the purpose of conveying water or steam under the surface of the streets. By the general statute entitled "Of Cities,"—Laws 1889, c. 326, (Sanb. & B. St. c. 40a,)—cities are authorized to own and operate waterworks, and to legislate on all matters with reference to their construction, operation, management, and protection,—section 925*n*. In the chapter entitled "Organization of Corporations," (Rev. St. Wis. c. 86,) under which the Oconto Water Company confessedly had being, it is enacted that "any corporation formed for the purpose of constructing and operating waterworks in any city or village of this state may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon, and may, by the consent of, and in the manner agreed upon with, the proper authorities of such city or village, use any street, alley, lane, park, or public grounds for laying water pipes therein; * * * and any such city or village may, by contract duly executed by the proper authorities, acquire the right to use the water supplied by such corporation, or such portion thereof as it may desire, upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village." Section 1780, as amended. These are all the statutory provisions which I have been able to find, touching the question of municipal authority and corporate franchise here presented.

It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted, or fairly to be implied. It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water; but it cannot, without express legislative authority, construct, maintain, or operate waterworks. Dill. Mun. Corp. (4th Ed.) § 27. Without like authority it cannot grant exclusive right to use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority directly granted or delegated to municipalities. So, likewise, the right to operate waterworks is of legislative origin, and can only be conferred by a municipal corporation

when expressly authorized by the supreme legislative power of the state. It cannot be doubted that the common council of the city of Oconto, in the enactment of the ordinance in question, entertained a broad and generous view of its own powers. It was pleased to confer, or attempt to confer, upon this water company, the power to "construct, own, maintain, and operate waterworks in the city of Oconto, * * * to acquire and hold, as by law authorized, all real estate, easements, and water rights necessary to that end and purpose, with all necessary and proper buildings, with conduits or other means of obtaining water supply, with all machinery and attachments thereto," in addition to the right to use the streets and public grounds of the city for its water mains and pipes, and undertook to regulate contracts and dealings between the water company and the inhabitants of the city, using water, and to bestow upon the company the right of access to the homes of consumers of water, and to regulate its exercise. If the right to confer these great privileges and franchises, and to exercise inquisitorial powers, can be pointed out, the ordinance is effective to the end designed. No ordinance, however, can enlarge, vary, or diminish the powers of a municipality.

Whence came that power? I find no legislative warrant for it. The charter of the city does not confer it. No general law applicable to the city of Oconto grants it. The chapter entitled "Of Cities" (Sanb. & B. St. c. 40a) was enacted in 1889, (Laws 1889, c. 326.) It provides that no city then incorporated shall be affected by the provisions of the act, unless it shall adopt the same for its government in the manner provided. (Sanb. & B. St. § 925d.) The present charter of the city of Oconto was enacted in 1882. (Laws 1882, c. 56.) There is no suggestion in the record that the city of Oconto has ever adopted the provisions of the general law, and we are not at liberty to assume that it has. Failing such adoption, the city is not affected by, and derives no powers from, that general law, assuming that the chapter has relation to waterworks owned and operated by a corporation other than the municipality, which may be doubtful. The city is therefore only authorized to permit the laying of pipes in the streets, and their maintenance and use. (Section 930a.) That is not a grant of power to bestow a franchise, but permission to suffer an easement. The law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the waterworks; and (2) to use the streets of the city. Sanb. & B. St. § 1780. The former power is without condition; the latter is subject to the assent of the municipality. The practical efficacy of the franchise may depend upon the discretionary act of the city. The franchise is not, however, derived from that discretion, but from the will of the legislature. The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company—as to the use of the streets—becomes operative only upon the happening of that contingency of municipal assent. That is not a grant of power to a city to confer a franchise. *Sims v. Railway Co.*, 37 Ohio St. 556. The matter is somewhat analogous to the case

of an act of the legislature taking effect only upon the assent of the people expressed at the polls, which is now generally held to be valid, upon the ground that the law derives its potency from legislative will, and not from the assent of the poll. So, here, the right to use the streets was conferred upon the Oconto Water Company by the law of its incorporation, subject to the contingency of the assent of the city. The franchise emanates from the legislature, not from the municipality. The ordinance is not an exercise of legislative power, but of the right to contract. *Indianapolis v. Gaslight Co.*, 66 Ind. 396.

The case of *State v. Madison St. Ry. Co.*, 72 Wis. 612, 40 N. W. Rep. 487, is not in conflict. The ruling there was to the effect only that, considering the terms of Rev. St. Wis. § 1862, the provisions of the ordinance there under review, by force of the statute, became part of the law of the incorporation of the railway company, and for violation of such provision an action could be maintained by the attorney general to vacate the charter or annul the existence of the railway company, under the provisions of Rev. St. Wis. § 3241. Applying the doctrine of that case to the one in hand, the most that can be said is that the conditions of the assent of the city to the use of its streets inhere in and are part of the law of incorporation of the defendant water company. None the less, however, are its franchises derived from the legislature, and not from the municipality. It is also to be noticed that there is a marked difference in the statute under consideration in that case and those in question here. Section 1862, there considered, provides that "any municipal corporation * * * may grant to any such corporation"—a street railway corporation—"such use, and upon such terms as the proper authorities shall determine, of any streets or bridges. * * * Every such road shall be subject to such reasonable rules and regulations * * * as the proper municipal authorities may by ordinance from time to time determine." There the legislation does not directly grant to the railway corporation any power to use the streets, but delegates to the municipality the right to grant the power. Here the power is in terms conferred by the legislature upon the water company, subject to the assent of the municipality. There the street railway is subject to constant municipal control. Here the water company is independent of municipal direction except in the use of its streets. It is, I think, clear that the power possessed by the city of Oconto was only to yield its assent to a legislative grant of the use of its streets, and to contract for a supply of water. The franchises of the water company were conferred by the legislature of the state, and not by the ordinance of the city.

The question then recurs, what rights passed to Andrews & Whitcomb under the instruments of transfer and their foreclosure? By their terms they convey or assign only such rights and privileges as were granted to the water company by the ordinance of the city. No other franchise or rights are attempted to be conveyed. If the right to the use of the streets may be said to have proceeded from the municipality, it was, standing alone, a mere easement. The transfer of such naked right could not carry with it the ownership of the mains, nor the title to the plant as an

entirety, nor the franchise to operate the plant, nor to the land upon which the plant was situated. So that if it be true, as is here claimed, that a naked franchise is transmissible; that the franchise is the main and the plant the incident; and that a transfer of the former carries with it the title to the tangible property essential to its use and beneficial enjoyment,—it still remains that here there was no transfer of the franchise to operate the plant, and consequently no transfer of tangible property. It therefore results that the claim of Andrews & Whitcomb to the plant is unfounded in law, and its possession by them wrongful as against the complainant.

2. The water company, in fulfillment of its agreement, issued to Andrews & Whitcomb \$100,000 of its bonds as collateral to loans made and to be made, to the amount of \$40,000. These bonds had not previously been issued. The law of Wisconsin provides (Rev. St. Wis. § 1753) that "no corporation shall issue * * * any bonds * * * except for money * * * actually received by it, equal to seventy-five per cent. of the par value thereof, and all * * * bonds issued contrary to the provisions of this section * * * shall be void." These bonds were issued in defiance of the statute. That they were pledged, not sold, cannot avail to give them validity in the hands of the pledgee. The term "issue" is here used in the sense of "deliver" or "put forth." They were delivered and put forth, by the act of pledging, as binding obligations of the company. If the pledge were valid,—if bonds not issued may be used as collateral for a debt less than 75 per cent. of their par value,—the pledgee could, upon default of the company in payment of the loan, lawfully dispose of them for any price obtainable, and they would become, in the hands of a *bona fide* holder for value, lawful obligations of the company for the full amount expressed, thus defeating the statute, which forbids their issue at less than 75 per cent. of their par value. The statute is its own interpreter. These bonds are void. They are of no binding force for any purpose in the hands of Andrews & Whitcomb. Whether a *bona fide* purchaser for value from Andrews & Whitcomb could assert the bonds against the company need not be considered. It is the province of a court of equity to prevent such a contingency.

The motion for a receiver and injunction is allowed; the injunction to provide for the deposit of the bonds with the clerk of this court for safe keeping pending this suit, or until further order of the court.

BRUSH SWAN ELECTRIC LIGHT CO. OF NEW ENGLAND v. BRUSH ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. Oct. 4, 1892.)

1. CONTRACT—MODIFICATION—EVIDENCE.

Defendant corporation, engaged in manufacturing certain patented machines, constituted plaintiff corporation its exclusive "agent" for a certain territory, the latter to receive a specified commission, and to pay for each machine ordered by it in 75 days. Thereafter plaintiff became insolvent, and, being in default for payments, an interview was had between the presidents of the two companies, which resulted, as claimed by plaintiff, in an oral agreement that it should not be required to pay until it had received payment from its customers. Plaintiff's bookkeeper testified that this was the agreement as reported to him by the two presidents at the time. Defendant claimed that the agreement was only for a modification of the regular terms in special cases, each to be determined as it arose; and it appeared that defendant continued, by letter, to urge payment according to the original contract. Afterwards another meeting was had between the presidents, and in a letter from defendant to plaintiff the result was stated in substance to be that when any variation from the old contract was necessary in order to make a sale the terms thereof should be reported to defendant with the order, and defendant would then promptly determine whether it would accept the same. The letter also urged payment of existing debts. To this plaintiff replied that the matter as thus expressed was "quite satisfactory." *Held*, that there was never any modification of the contract, except as last stated.

2. SAME—SPECIFIC PERFORMANCE.

The original contract provided that if at any time plaintiff's pecuniary responsibility became impaired so as to render it unsafe for defendant to transact its business through plaintiff, defendant might abrogate the contract, the question of financial responsibility being first determined by arbitration. Afterwards plaintiff became insolvent, and, being largely in arrears to defendant, the latter refused to fill further orders unless security was given in each case. The demand for security not being complied with, defendant requested an arbitration, but no answer was made thereto, and later it declared the contract abrogated, and refused to fill further orders. *Held*, that as plaintiff had itself violated the modified contract in the matter of payments, and was apparently unable to comply therewith in the future, it was not entitled to specific performance of defendant's agreement to furnish machines.

3. SAME—ARBITRATION.

Plaintiff not being in a position to demand specific performance, it was immaterial, in a suit therefor, that defendant had based its request for an arbitration on the ground that plaintiff had refused to furnish security, whereas the contract did not require any security.

In Equity. Bill by the Brush Swan Electric Light Company of New England against the Brush Electric Company for specific performance of a contract. This relief was denied by the circuit court on the ground that the contracts were of such a nature as to render specific performance impracticable, but the bill was retained for the purposes of injunction and an accounting, which were accordingly decreed. 41 Fed. Rep. 163. A rehearing was subsequently denied. 43 Fed. Rep. 225. Afterwards leave was given to file a cross bill, (Id. 701,) and, a hearing having been had thereon, it was held that the same could not be maintained, and that the original decree should not be disturbed. 49 Fed. Rep. 8. Defendant appealed. Reversed.

Albert Stickney and Gilbert H. Crawford, for appellant.

James C. Carter and Wm. G. Wilson, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a final decree rendered by the circuit court for the southern district of New York, which

was in general accordance with some of the prayers of the complainant's bill for the specific performance of a contract. On May 21, 1878, the Telegraph Supply Company, now known by the name of the Brush Electric Company, and hereinafter called the Cleveland Company, the defendant in this case, entered into a contract with Rowley & Montgomery, to whose rights the complainant, the Brush Swan Electric Light Company of New England, hereafter called the Brush Swan Company, succeeded. It was accepted as a contracting party in the place of its predecessor by the Cleveland Company on July 12, 1882. The Cleveland Company was the manufacturer of dynamo electric machines and apparatus, which were made under sundry patents which it also owned. By virtue of the contract of May 23, 1878, and its amendments of June 21, 1880, and February 23, 1882, the Brush Swan Company became the exclusive licensee to sell these machines and apparatus within a specified territory. Its business was to furnish local electric companies or manufacturers or individuals, who required an extensive plant for electric lighting, with the electrical machinery, apparatus, engines, wire, and equipment which they respectively needed, and with the labor necessary to put the same in position, and, as a rule, under a single contract for an entire plant. It bought from the Cleveland Company its machines, at a discount from the price which was fixed by said manufacturer of at least 20 per cent., and was to accept drafts therefor payable in 75 days from delivery of the machinery at Cleveland, and to pay the drafts at maturity. The agreement was to continue for 17 years from April 24, 1877, unless sooner abrogated by mutual agreement or by the decision of arbitrators. The ninth article provides as follows:

"Ninth. If at any time the pecuniary responsibility of the party or the second part becomes so impaired as not to be sufficient to enable the party of the first part to safely transact their business in said territory through them, then this contract may be abrogated, provided that the question of the afore-said pecuniary responsibility of the party of the second part must first be determined by the board of arbitration hereinafter named."

If the Cleveland Company sold its machinery within the specified territory, it was to pay the Brush Swan Company the stipulated discount or commission thereon, which thus became, as a rule, the exclusive purchaser from the manufacturer of its apparatus for use within such territory. It and the manufacturer had the exclusive right to sell, and it could be therefore styled an agent, but it was not an agent upon a *del credere* commission; its contracts with its customers were contracts to furnish an entire plant, and it bought like any other purchaser from the Cleveland Company upon its own credit. On October 27, 1887, the Cleveland Company declared the contract abrogated and annulled, and refused to deliver apparatus to the Brush Swan Company, or to fill its orders. To compel a specific performance of the contracts this suit was thereafter instituted by the Brush Swan Company.

The decision as to the propriety of the defendant's act in annulling the contract turns upon questions of fact, which relate to the extent of a modification of the conditions of the original agreement in regard to the

time of payment. If these conditions were substantially unmodified, they were not complied with by the Brush Swan Company, and its part of the contract was persistently left not performed, but, if they were modified so that the complainant was not required to pay for its purchases until it collected from its own customers, it did not violate its contract, and was not guilty of any substantial breach, so far as is disclosed by the testimony. The circuit court was of opinion that the contract was modified to the extent and in the particulars which have been indicated. This is the crucial point in the case.

When the Brush Swan Company entered into its contract relations with the Cleveland Company, it did so with high expectations of commercial success from a new storage battery to be brought out by the Cleveland Company, which it was expected would be efficient both in arc and in incandescent lighting. These expectations were based upon the confidence and the prophecies of the Cleveland Company; contracts were entered into upon faith therein, but the battery was commercially a failure, and Mr. Brush turned his attention to other mechanism for incandescent lighting, which was not perfected until June 1, 1885. Meanwhile, the Brush Swan Company's business had waned in consequence of this failure, and its debts had increased until it owed the Cleveland Company about \$107,000, and about \$7,600 to other creditors. Its assets were nominally about \$176,000. Their real value did not appear. The two corporations, on June 15, 1885, agreed upon a settlement by which the Cleveland Company took these assets and the Brush Swan's notes for \$17,500, which were subsequently paid, discharged its own debt, and agreed to pay the other outstanding debts. This left the Brush Swan Company with a debt of \$17,500 and its material of about \$4,000 in value on hand, and its contracts with the Cleveland Company, which were unaltered.

In the summer and fall of 1885, friction took place between the two companies in regard to the amount of discount and the time of payment for purchases. The Brush Swan Company was in a limping financial condition, as sufficiently appears from the letter dated November 4, 1885, of Col. Strong, its president. An interview between the presidents of the two companies took place on December 5, 1885, which resulted in a verbal modification of the contract. The terms of this alteration are in dispute. Mr. Spear, the bookkeeper of the Brush Swan Company, who is conceded to be an honest witness, and to whom the alleged modification was orally communicated by the two presidents, says that, as to all apparatus furnished by the Cleveland Company for the erection of new plants, it was to wait for payment until the Brush Swan's customer had actually paid, though the customer's term of credit might have expired. The Cleveland Company claims that the terms of payment were to be modified only in special instances, each case to be separately considered upon its merits. Mr. Spear is the only person who testifies on the subject; the deposition of the president of the Cleveland Company was taken, but he was not examined on this point. The subsequent correspondence of the parties does not sustain Mr. Spear's recollection. For example,

on June 23, 1886, the Cleveland Company wrote to the Brush Swan Company as follows: "We must, therefore, ask that hereafter in each case, where you require any departure from the contract rate, either in time of payment, [75 days,] or in amount of commission, [20 and 20 percent,] that you accompany the request for it with full information and a copy of the proposition or contract. We will then advise you what we can do in the premises." To this letter the Brush Swan Company replied on June 30th: "Your understanding, as expressed in yours of the 23d, is correct, so far as I can understand from Mr. Strong." Again, on July 2, 1886, the Cleveland Company wrote to the complainant: "It is absolutely necessary that we should know the terms and conditions of any sale that you make, in which you are to ask us for anything more than the regular 20 and 20 per cent. on 75 days' time. * * * Where, therefore, you do not give us the information to the contrary, we will assume that the order is made on the basis of 20 and 20 per cent. and 75 days' time." In view of Mr. Spear's positive testimony, and the fact that the Cleveland Company's president did not deny it, the question of the terms of the modification of December 5th would probably rest upon Spear's testimony, but the result of that conversation is not of vital importance, for in September, 1886, another interview took place in New York between the officers of the respective companies, which resulted in an agreement which, on the part of the Cleveland Company, was stated in a letter to the Brush Swan Company, dated September 17, 1886, as follows: "You are expected to sell to purchasers at the best prices obtainable under all the circumstances, not to exceed 20 per cent. discount from our list price. When you do sell, however, at anything above this discount to the purchaser, you are to state on the order which you send to us for the apparatus just what discount you will need in order to enable you to make the sale, and you are also to specify on the order any terms regarding time of payment which will require a longer time to be given by us than the regular 75 days of your contract. * * * We will then promptly advise you whether the order is accepted by us, and there will thus be no delay whatever in filling it." The letter says further: "We trust that you will not let these matters [debts due to the Brush Company] go by default, as, if you do, the loss will be yours, and not ours." On October 25, 1886, the Brush Swan Company replied to this letter as follows: "The matter as expressed by you in your communication of the above date is quite satisfactory, and we will endeavor to abide by the arrangement as closely as possible." The letters of the Cleveland Company of July 21, August 25, September 24, October 3, and October 15, 1887, all tend to show that payment from the Brush Swan Company of the amount due upon its several orders, irrespective of the receipt by it of payment from its customers, was demanded. It was not, so far as appears from the correspondence which is in evidence, until October 4, 1887, that the Brush Swan Company made the point that another time or mode of payment had been agreed upon. The conclusion from the entire series of letters between the parties which commenced on September 17, 1886, is that the original con-

tract in regard to terms of payment was not changed, except in the particular instances in which a special modification was made, and that the Brush Swan Company's obligation to make payment upon a credit of 75 days continued, irrespective of the fact of nonpayment to it, except as modified in particular instances.

During the summer of 1887, the Cleveland Company was in a state of great irritation, in consequence of nonpayment on the part of the Brush Swan Company, from which it received from May 26, 1887, to September 15, 1887, only the sum of \$1.50. It received no promise of money, except that, in July, the general manager of the Brush Swan Company said he thought he would send \$1,000 upon the existing indebtedness, which was not done. During this summer, payment of two large orders for machinery to be furnished by the Brush Swan Company to a company in Scranton and to the Erie Railroad Company was guaranteed by the Brush Illuminating Electric Company, which owned a large portion of stock of the complainant. In July and August interviews were had with the president and vice president and secretary of the Brush Swan Company, in which security for the payment of its orders was requested, and the absolute unwillingness of the Cleveland Company to fill orders without security or definite prospect of payment was stated, but without avail, until on September 24th the Brush Swan Company was informed by letter in a positive manner that the Cleveland Company must know that payment would be made, and must ask for security in view of the insolvency of the complainant, or it would not fill orders which had not theretofore been accepted.

The facts in regard to the financial condition of the complainant are as follows: In June, 1885, it owed \$17,500. In June, 1887, it owed \$56,578.26, of which \$24,395.36 was due to the Cleveland Company. Its deficiency was \$12,473.67. On September 1, 1887, its whole liabilities were \$66,554.82, of which it owed the Cleveland Company \$32,873.94. On November 5, 1887, it owed the Cleveland Company \$31,389.92, of which \$22,715.29 was for plants, payment for which had not been made to the Brush Swan Company. In this state of things, the letters of the Cleveland Company of August 13, 25, September 6, 16, 19, 24, 29, October 1, 3, 11, and 15, 1887, show its persistent attempts to induce the Brush Swan Company to make exertions in regard to payment. This urgency was met with both apparent indifference and inability to gain financial strength. It is perfectly true that unless aid from outside sources or increased capital should be furnished to the Brush Swan Company, its capacity to pay its liabilities depended entirely upon the amount it should receive from its own debtors, and that those payments were probably delayed from various causes beyond its control; but, on the other hand, the Cleveland Company, unless it had modified the contract, was reasonably unwilling to fill orders from an insolvent company, which was unable to pay its overdue debts, and without substantial hopes of ability in the future. An arbitration was called for by the Cleveland Company, in technical compliance with the conditions of the ninth article of the contract, by letters of October

3d, 13th, 15th, and 19th. The complainant made no reply in regard to arbitration, and on October 27th the Cleveland Company declared the contract abrogated, and thereafter refused to fill orders sent by the Brush Swan Company.

The fact that the call for an arbitration was placed by the Cleveland Company upon the refusal of the other party to furnish security is criticised by the complainant, upon the ground that the contract did not compel the complainant to give security for the performance of its undertaking. This criticism would be a just one if the conduct of the Brush Swan Company in the violation of its agreement had not been such as to fully justify the Cleveland Company in declaring the contract at an end. The correspondence shows that the Cleveland Company's claim, that the Brush Swan Company had broken its contract respecting the terms of payment for the amount due upon its purchases, had been reiterated, and the request for security was made in the hope that a total cessation of contract relations might be avoided. Inasmuch as the Brush Swan Company is in a court of equity asking for a specific performance of a contract which it has broken, and which it cannot promise to observe in the future, it is useless to rely upon the point that the other party had made a technical slip in the reason it gave for abrogation. As the circuit court truly said, "a clearly defined failure to perform on the part of the complainant would have made proceedings under this [9th] clause wholly unnecessary, as the contracts could then have been terminated by reason of the complainant's breach, although its financial condition at the time might have been good beyond all question." The circuit court having found that the Brush Swan Company had committed no breach of its contract, as modified, reasonably thought that the request for an arbitration on the ground of failure to furnish security was an improper request. Inasmuch as we are of opinion that the company had broken its contract, which was not modified, and that it is therefore not in a position to ask for a specific performance by the other contracting party, the particular phraseology in which that party placed its final demand for arbitration seems unimportant.

In our view of the testimony, the complainant is asking a court of equity to compel the specific performance of a contract, which it has not kept, which it cannot truthfully assert that it will keep, and which apparently it cannot help violating, and desires to compel the defendant to furnish it with merchandise which it cannot pay for, and the ultimate payment for which it cannot attempt to secure.

The decree of the circuit court is reversed, and the bill is directed to be dismissed, with costs in the circuit court and in this court.

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO WATER CO.

(Circuit Court, E. D. Wisconsin. October 3, 1892.)

1. MECHANICS' LIENS—PROPERTY SUBJECT TO—WATER COMPANIES.

Rev. St. Wis. § 3814, par. 3, which provides that, in case any person shall purchase machinery to be placed on premises in which the purchaser has not an interest sufficient for a lien, the person furnishing the machinery shall have a lien on it and a right to remove it, does not apply to the pipes of a water company, laid through the streets of a town, and connected with the pumping works of the company. The plant of the company is an integer, and cannot be separated under a vendor's lien.

2. SAME.

The public policy of Wisconsin is independent of that of other states, and under it the property of *quasi* public corporations is subject to the general lien laws. In this respect a water company does not differ from a railroad company. *Hill v. Railroad Co.*, 11 Wis. 215, followed.

3. SAME.

The entire plant of a water company, including piping laid in the streets of a city and the interest of the company in the premises, are, by Rev. St. Wis. § 3814, par. 1, subject to the lien of the material man furnishing the piping.

4. SAME—PROPERTY OF QUASI PUBLIC CORPORATIONS—ENFORCEMENT OF LIEN—FRANCHISE AND PLANT.

Where the law gives the material man a specific lien upon a certain plant, and the plant and franchise, being that of a water company, cannot be separated by judicial sale because of their peculiar public use, a court of equity has power to decree the sale of both plant and franchise in satisfaction of the lien.

In Equity. Bill by the National Foundry & Pipe Works, Limited, to foreclose a lien upon the plant and premises of the Oconto Water Company. Decree directing a sale of the plant, premises, and franchises.

Geo. H. Noyes and *Wm. D. Van Dyke*, for complainant.

W. H. Webster, for defendant.

JENKINS, District Judge. The complainants sold and delivered to the defendant, for the stipulated price of \$22,483.41, certain iron pipe, to be used, and which was used, in the construction of a waterworks plant, designed to supply the city of Oconto and its inhabitants with water. The pipe was laid under the surface of various streets in the city, and connected with hydrants located upon the streets, and also with the pumping works, the latter being in turn connected with a well. This well and these pumping works are situated upon certain premises in the city of Oconto. No part of the material furnished by the complainant was laid upon the premises, with the possible exception that one length of pipe was placed within the limits of Chicago street, extended, abutting the premises in question, and formed part of the connection of the water mains in Chicago street proper with the pumping works. The legal title to the land whereon the pumping works are situated is vested in the municipality of Oconto, the defendant corporation entering into and holding possession under contract with the city for its conveyance. The complainant duly filed a claim for a lien upon the waterworks plant and the interest of the defendant company in the premises whereon the pumping works and well are situated, and to which the pipes are

connected. This bill is filed to foreclose that lien, and for a sale of the plant and the defendant's interest in the land.

The defendant corporation was organized under the laws of the state of Wisconsin for the sole purpose of constructing and operating a system of waterworks within the city of Oconto, and of supplying the city and its inhabitants water for protection against fires, and for domestic, manufacturing, and other purposes. Under the power granted by Rev. St. Wis. § 1780, it contracted with the municipal corporation for its requisite consent to the use of its streets for laying water pipes therein, and for supplying the city with water. This contract took the form of an ordinance adopted by the mayor and common council of the city, and its terms were accepted by the defendant corporation. The city therein contracted for the use of a designated number of hydrants, and of a proper supply of water for use in public buildings and fountains and for the extinguishment of fires, at a specified yearly rental to be raised by annual tax upon all the taxable property within the limits of the city. The maximum rates to be charged the inhabitants for the use of water were regulated and established by the ordinance, and the right was reserved to the municipality to purchase the waterworks plant at the expiration of ten years, or any subsequent term of five years, upon a valuation to be determined by arbitration.

The lien law of the state of Wisconsin, (Rev. St. Wis. § 3314,) so far as it is applicable, if at all, to the case in hand, is as follows: The first paragraph provides:

"Every person who * * * furnishes any materials * * * in or about the * * * construction * * * of any building, * * * any machinery erected or constructed so as to be or become a part of the freehold upon which it is to be situated, * * * or in digging or constructing any well, * * * shall have a lien thereupon and upon the interest of the owner of such building, * * * machinery, * * * well, * * * in and to the land upon which the same is situated, * * * used, or designed for use, in connection with such building, * * * machinery, * * * well, * * * not exceeding one acre."

The third paragraph of the section provides:

"In case any person shall order or contract for the purchase of any machinery to be placed in or connected to or with any building or premises, and such person, not having an interest in such building or premises in or connected with which such machinery is placed, sufficient for a lien, as provided for in this chapter, to secure payment for such machinery, the person furnishing such machinery shall have and retain a lien upon such machinery, and shall have the right to remove from such building or premises such machinery, in case there shall be default in the payment of such machinery when due, leaving such building or premises in as good condition as they were before such machinery was placed in or on the same."

It is insisted for the complainant that, under the first paragraph of the section, it has a lien upon the waterworks plant, considered as an entirety, or, failing that, under the third paragraph, upon the pipe itself, as machinery.

It is contended for the defendant (1) that the lien laws refer only to

such property as can be levied upon by execution, and that its property, being such only as is appurtenant and essential to the use and enjoyment of its franchises, cannot be taken on execution, and is therefore not comprehended within the statute; (2) that the plant of a water company is, from considerations of public policy, exempted from the operation of the lien statute; and (3) that the plant is an entirety, and the pipe furnished is not "machinery," within the meaning of the third paragraph of the statute.

1. I am satisfied that the case does not fall within the third paragraph of the section. The plant must be treated as an entirety with respect to any sale under judicial process. The defendant is a *quasi* public corporation. The apparatus by which a whole city is supplied with water cannot be permitted to be dismantled and sold in fragments, upon the claims of those furnishing the divers parts of the complicated and extended machinery. Whether this pipe is or is not technically "machinery," within the meaning of this third paragraph of the statute, it was sold with knowledge of the character of the defendant as a *quasi* public corporation, and with the design and intent that it should be permanently affixed to and incorporated with the plant as a part of an entire thing. The plant is the integer. The pipe, hydrants, pumping works, and well are integral parts. Separation of the parts would destroy the efficiency of the whole, working destruction to all interests concerned. The detached parts would prove of little value, the entire enterprise would be aborted, the interests of both creditor and debtor sacrificed, and the public interest unnecessarily imperiled. It cannot be assumed that it was the legislative intent that this third paragraph should include such structures. Indeed, this paragraph would seem to be applicable only when the purchaser of machinery has no interest in the building or premises in or connected with which such machinery is placed, sufficient for a lien. The statute is a declaration that in such case the attaching of personalty to realty shall not be effective to defeat the lien. The purchased machinery remains personalty, as between vendor and purchaser. Here the defendant had an interest in the premises under contract for a conveyance. The structure here is of the class of which canals, street railways, railroads, telegraph, telephone, electric light, and gas plants are examples, and can only be dealt with as an entirety. *Gue v. Canal Co.*, 24 How. 257; *Brooks v. Railway Co.*, 101 U. S. 443, 451; *Meyer v. Hornby*, 101 U. S. 728; *Hammock v. Trust Co.*, 105 U. S. 77; *Improvement Co. v. Wood*, 81 Wis. —, 51 N. W. Rep. 1004; *Fond du Lac Water Co. v. City of Fond du Lac*, 82 Wis. —, 52 N. W. Rep. 439.

2. It is contended that the property of a corporation, *quasi* public, is, from considerations of public policy, exempted from the operation of the lien laws of the state. We must seek for such public policy, if it exist, in the legislation of the state whose law is under consideration, and in the course of decision by the ultimate judicial authority of that state. It is of no moment to inquire touching the public policy of other states. If in antagonism to Wisconsin upon any given subject of public policy,

that of the state of Wisconsin would be the only criterion of judgment here. Thus the supreme court has declared its conviction that lien laws should not be interpreted as applicable to the property essential to the operation of a franchise by a quasi public corporation, (*County Com'rs v. Tommey*, 115 U. S. 122, 128, 5 Sup. Ct. Rep. 626, 1186,) but yields to the decisions of the courts of a state in the construction of its statutes, and asserts such lien when sanctioned by the ruling of the courts of a state, (*Brooks v. Railway Co.*, 101 U. S. 443, 452.) Looking, then, to the legislation of the state of Wisconsin, we discover a general policy to grant a lien for the construction of every article used, and for all labor bestowed, in the erection of structures upon land, and for all labor and material employed in the construction, production, alteration, or repair of personal property. The architect who prepares the plan for the house, the surveyor who measures the ground, the material man and the laborer, are alike protected, and, as well, the cook who provides the food for the logger. Rev. St. Wis. c. 143. The state has been liberal in the exemption from execution of the personal property of the head of a family, but declares such exemption to be subject to payment of the purchase price of the exempt property, and of domestic labor performed for the family. Id. § 2982. The established policy of the state is that no one shall obtain property or labor without compensation; and, with respect to structures upon land, and many articles of personal property, payment is secured by specific lien.

Is there a public policy of the state of Wisconsin exempting the property of this defendant from the operation of the general lien law of the state because of its quasi public character, and because its business is intimately connected with the welfare of a locality? In *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. Rep. 816, it was ruled that lien laws do not apply to the property owned by municipal corporations and held for public use. In that case a lien was sought to be asserted upon machinery constituting a part of the city waterworks, owned by the municipality. The court declared the case to rest upon the same principle which exempts courthouses, jails, and other public buildings owned by the public, from the operation of lien laws. The decision accords with the rulings of most of the states, and finds its support in considerations of public inconvenience flowing from even a temporary suspension of the usual means for the exercise of governmental authority. Such public policy denies to the creditor the particular remedy of the statute by reason of the injury resulting to the public from its allowance. "It is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many." The creditor is, however, assured of a certain and adequate remedy for the collection of his debt in the enforceable exercise of the power of taxation, continued until his debt be discharged. *State v. Milwaukee*, 25 Wis. 122. Otherwise the law of exemption would be a reproach upon the justice of the state.

This principle of exemption, so far as respects the state of Wisconsin, is limited to property held for public use, and owned by the state, or by one of its subordinate agencies of government. In *Hill v. Railroad Co.*,

11 Wis. 215, (decided in 1860,) it was held that the lien law of the state was applicable to railroads. The same doctrine of public policy here asserted was there invoked to defeat the lien, and was thus denied by the court, (page 223:)

"It is said the public are interested in preserving railroads in an operative condition, and that if these liens are allowed to attach to their buildings, or creditors allowed to levy upon and sell their cars or other personal property necessary to the operation of the road, they will be rendered incapable of subserving the public interest; and several cases are referred to in which it has been held that judgment creditors could not levy on and sell the cars or any other personal property of the company necessary for the operation of the road, upon the ground that the railroad must be considered as an entire thing, and public policy required that these articles should not be severed from it. But, whatever merit there may be in this doctrine, we are clearly of the opinion that it cannot have the extent here claimed for it; and, on the contrary, it cannot be applied at all, except so far as the property has become entirely the property of the company, divested of all specific liens. When that has been done, if there is any reason for saying that a general creditor must take all or nothing, that is one thing; but it is an entirely different thing to say, when the company, by the very act of acquiring a particular portion of property, either by contract or by the force of law, creates a specific lien in favor of the vendor or manufacturer, or would create it unless hindered by public policy, that such lien shall not attach for that reason."

And, further on, the court declares:

"And there can be no conceivable reasons of public policy that should prevent the enforcement of such specific lien, by means of which the company had acquired the very property itself. And we can see no distinction, upon principle, between allowing such a lien to be created by the mortgage of the company, and allowing it to be done by the force of the statute. A building built for a railroad company is as clearly within the letter and spirit of the statute as any other building. The object was to furnish a protection to those who expended their labor and materials in improving the property of others. Is there anything in public policy that requires or should permit railroads to build, at the expense of defeating this object? If there is, we fail to perceive it, and shall recognize no such policy till the legislature enacts it into a positive law."

In *Purtell v. Bolt Co.*, 74 Wis. 132, 42 N. W. Rep. 265, (decided in 1889,) the lien laws were held to comprehend a railroad bridge, although it was part and parcel of the railway, and essential to its operation. The court observes, at page 135, 74 Wis., and page 266, 42 N. W. Rep.:

"But there is no public policy prevailing in this state against enforcing a laborer's lien upon any bridge or other structure of a railroad company, for work performed thereon, no matter whether such structure is or is not part and parcel of the railway, or to what extent the enforcement of a lien thereon may interfere with or impede the operation of the railway, or the exercise by the company of its corporate franchises. On the contrary, the public policy of this state is to enforce such a lien, and the company operates its railway and uses its franchises subject to the obligation to pay the claim of the lienor as established by the judgment. All this was settled by this court in *Hill v. Railroad Co.*, 11 Wis. 214, and the rules there established were not abrogated or shaken by the judgment in *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. Rep. 816, and have not been disturbed by any other adjudication of this court."

It thus appears that for more than a quarter of a century the public policy of the state has been to apply the lien laws to the property of *quasi* public corporations, and that no consideration of public convenience has been permitted to defeat the security accorded to all who labor or furnish materials for another's use in the cases comprehended within the statute. But it is said there is a line of distinguishment between such corporations as railway companies and those dealing directly with matters of municipal concern, and that the latter class comes within the principle declared in *Wilkinson v. Hoffman*. This claim is based upon two grounds—*First*, because the former has an estate in land, and not a mere easement; and, *second*, that in the one case the corporation is organized and its property operated for and exclusively devoted to the purposes of the public safety and the public health, while in the other the public convenience and business dispatch are merely incidents.

I conceive the first ground wholly untenable. The defendant here is in possession of the premises upon which the pumping works and well are situated, under contract for a conveyance. That is an interest sufficient for a lien. *Crocker v. Currier*, 65 Wis. 662.¹ In that regard the defendant stands upon precisely the same footing as any other *quasi* public corporation owning property which under some form of judicial procedure may be subjected to the payment of debts. It is, moreover, to be noticed that the statute provides that the lien granted "shall also attach and be a lien upon the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto." The well and pumping works having been placed upon the premises with the knowledge and consent of the municipality, it would seem that the interest of the city of Oconto in the land might be also chargeable with the lien. *Heath v. Solles*, 73 Wis. 217; 40 N. W. Rep. 804. The lien here, therefore, if it exist at all, comprehends as well the legal as the equitable title, proper proceedings being had to so charge the property, and if the land, remaining the property of the municipality, but not held for public use, is subject to the lien of the statute, (see *Darlington v. Mayor, etc.*, 31 N. Y. 164;) questions not presented by the record here.

With respect to the second ground urged, I am not able to perceive the distinction that is said to exist. It was urged upon the court, in an able and eloquent argument, that the railway is merely an economizer of time, and a promoter of comfort; that it does not deal with the actual necessities of the public; that without it, in the language of counsel, "commerce flourished, vast armies were equipped and moved, the arts reached their highest perfection, and the conditions of existence were as tolerable, relatively, then as now." This view of the public character of the railway is altogether too narrow. True it is that the world has done without the railway. So, also, has it done without aqueducts. But in the march of events, and under the intense conditions of life imposed by modern civilization, the mere conveniences of the past have

¹ 27 N. W. Rep. 825.

become necessities of the present. We must deal with the present. The world will not be relegated to primitive conditions. Its motto is that of the state of Wisconsin, "Forward." The past has no charm to stay the advance of civilization. The railway is a public necessity. The railway corporation is charged with the undoubted duty of government, to provide and maintain highways. It is one of the governmental agencies of the state. It is clothed with the power to exercise the right of eminent domain. This delegation of an attribute of sovereignty can be sustained only upon the ground that such corporation is essentially public in its character. Upon like grounds is upheld the authority of the legislature to regulate the rate of tolls and tariffs which may be demanded for the carriage of passengers and the transportation of freight. *County Com'rs v. Tomney*, 115 U. S. 122, 128, 5 Sup. Ct. Rep. 626, 1186. The railroad is intimately connected with public needs and public necessities. Its relation to society cannot be better stated than in the language of Mr. Justice PAINE in *Whiting v. Railway Co.*, 25 Wis. 167, 219, receiving the sanction of Mr. Chief Justice RYAN in *Attorney General v. Railway Co.*, 35 Wis. 425, 581:

"Railroads are the great public highways of the world, along which its gigantic currents of trade and travel continually pour,—highways compared with which the most magnificent highways of antiquity dwindle into insignificance. They are the most marvelous invention of modern times. They have done more to develop the wealth and resources, to stimulate the industry, reward the labor, and promote the general comfort and prosperity of the country, than any other, and perhaps than all other, mere physical causes combined. There is probably not a man, woman, or child whose interest or comfort has not been in some degree subserved by them. They bring to our doors the productions of the earth. They enable us to anticipate and protract the seasons. They enable the inhabitants of each clime to enjoy the pleasures and luxuries of all. They scatter the productions of the press and of literature broadcast through the country with amazing rapidity. There is scarcely a want, wish, or aspiration of the human heart which they do not in some measure help to gratify. They promote the pleasures of social life and of friendship. They bring the skilled physician swiftly from a distance to attend the sick and the wounded, and enable the absent friend to be present at the bedside of the dying. They have more than realized the fabulous conception of the eastern imagination, which pictured the *genii* as transporting inhabited palaces through the air. They take a train of inhabited palaces from the Atlantic coast, and with marvelous swiftness deposit it on the shores that are washed by the Pacific seas. In war they transport the armies and supplies of the government with the greatest celerity, and carry forward, as it were on the wings of the wind, relief and comfort to those who are stretched bleeding and wounded on the field of battle."

If added strength could be given to this vivid characterization, I would venture the suggestion that in a broader sense, and on a higher plane, the railway is intimately connected with the public welfare. It is a potential factor in our national life. It has, as I think, been a means of molding into indissoluble national union the states and the peoples of this land, more effective than written compact or the devices of statesmanship. It has bound the states in a network of interlacing bands of iron and steel that would prove most difficult to be severed. It brings

into constant and familiar intercommunication the peoples of different nationalities, foreign to each other and to us, that have sought homes here, fusing them with us into a homogeneous people, with like interests, like aims, and like destinies. It has harmonized the discordant interests of states widely separated, and made them interdependent. The personal welfare of each citizen has thus been made to coincide with the maintenance of the Union, and so the active and powerful agency of self-interest fortifies love of country to perpetuate nationality.

Counsel has drawn a lurid picture of the effects of a water famine in great centers like the cities of London, Paris, and New York, and therefrom would deduce the conclusion that water-supplying corporations are more immediately and more intimately connected with the public welfare than railway companies, and should therefore be clothed with the exemption of municipal corporations. The picture is possibly not overdrawn. Would not, however, the cessation of railway facilities, cutting off the food supply of those cities, be equally distressing? The late siege of the city of Paris furnishes fitting answer. Its investment, it is true, was accompanied with less distress than was anciently the result of siege, but because, and only because, the railway rendered possible the accumulation of vast supplies in anticipation of the event. Food supply and water supply are equally liable to be interrupted by the act of God or by the act of man, entailing privation and suffering. The vast populations of great commercial centers are as dependent upon the railway for food supply as upon aqueducts for water supply. The food supply, as the water supply, must be daily and continuous. The temporary interruption of railway traffic results in want and distress. Its permanent stoppage has for consequence famine, starvation, and death. I can perceive no ground of public policy that is not as applicable to the one as to the other. I search the legislation and course of decision of the state of Wisconsin in vain for a suggestion that a corporation organized for private gain, although dealing with subjects essentially public, is not to be subjected to the lien laws of the state. Its property, privileges, and franchises are liable to taxation, although devoted solely to the supply of public needs. *Fond du Lac Water Co. v. City of Fond du Lac*, *supra*. By what right, then, can it claim exemption from the enforced collection of honest debts? The policy of the state accords with the highest equity. I concur with the supreme court of Ohio in *Coe v. Railroad Co.*, 10 Ohio St. 372, that "the true policy of the state requires that just demands should be met, and that the property of those against whom they exist should be applied for that purpose," and with Judge PAINE in *Hill v. Railroad Co.*, *supra*, that, notwithstanding the great public interest in railroad and waterworks, "sound public policy does not require them to be built any faster than can be done consistently with justice and the preservation of private rights." Failing legislative exemption of any *quasi* public corporation, I am not disposed to sanction a doctrine that leads to inequality and injustice.

8. It is further urged that the statute does not apply, for the reason that no part of the material furnished by the complainant was laid upon

the land of which the defendant is in possession under its contract of purchase, and upon which the pumping works and well are situated. This piping was attached to the pumping works, and laid throughout the streets. The plant is an entirety. The pumping works are so constructed as, in the language of the statute, "to have become part of the freehold upon which they are situated." The piping is merely an extension and continuation of the apparatus for the production and distribution of the water supply; is a part of it, and not separable from it without destroying the efficiency of the whole. In my judgment, it is so joined to the other parts that it must be deemed a part of the apparatus situated upon the premises of the defendant. The entire plant, with the interest of the defendant in the land, would pass under judicial sale upon foreclosure of the lien. The lien granted by the statute is upon the machinery, the plant, and upon the interest of the owner in the land. We need not now inquire how far the lien might be affected if that interest in the land should be overborne by superior title. Possibly a remedy might be found in the statute of betterments. Rev. St. Wis. § 3096. It suffices here that foreclosure of the lien would pass title to the plant and to the interest of the owner in the land. The principle announced has authoritative support. In *Com. v. Gaslight Co.*, 12 Allen, 75, and in *Gaslight Co. v. State*, 6 Cold. 311, it was held that gas pipes laid in the streets of a city constituted part of the apparatus. In *Manufacturing Co. v. Gleason*, 36 Conn. 86, a blowpipe, conveying air from a blower to a forge, was held part of the blower. In *Derrickson v. Edwards*, 29 N. J. Law, 469, a flume 100 feet in length, for the conveyance of water from a pond to a wheel within a mill, was declared to be "as necessary and as fixed contrivance for making paper at that establishment as the water wheel and the breast shaft and the grinding engines are," and covered by a lien upon the mill. In *Kenney v. Apgar*, 93 N. Y. 589, a lien upon a building and land was sustained for the expense of a sidewalk in the street adjoining the premises, although the owner's title extended only to the sidewalk; the sidewalk being declared an appurtenant to the land, within the meaning of the act. In *Beatty v. Parker*, 141 Mass. 523, 6 N. E. Rep. 754, a lien was asserted upon a house for a drain pipe connecting the house with a sewer in an adjoining street. The court remarked that it made no difference whether the owner of the house had any interest in the land through which the pipe was laid, except the mere right to lay the pipe therein. The drain pipe was necessary to the use of the house, and a part of it; hence the lien would lie. In *Re Des Moines Water Co.*, 48 Iowa, 324, the land, building, and water mains of the company were held to be real estate, and that the mains, although not laid upon the lot, were appurtenant to the main structure, and would pass as an incident to the principal thing. See, also, *Capital City Gaslight Co. v. Charter Oak Ins. Co.*, 51 Iowa, 31, 50 N. W. Rep. 579. In *Steger v. Refrigerator Co.*, 89 Tenn. 453, 14 S. W. Rep. 1087, the defendant erected machinery on its land to manufacture and furnish vapor for cold storage. The cold

vapor was conveyed in pipes laid through the streets. It was held that the pipes, being essential to the enterprise, with the license of easement under which they were laid, would pass under a sale of the property as an entirety. A lien was allowed upon the lot and plant for material and labor furnished in respect of the pipes. In *Badger Lumber Co. v. Marion Water Supply, etc., Co.*, 29 Pac. Rep. 476; on rehearing, 30 Pac. Rep. 117,—the supreme court of Kansas adjudged a mechanic's lien upon an electric power plant, and the premises upon which the plant was situated, for poles placed in the public streets, and upon which were stretched the wires connected with the electric light machinery. In *Brooks v. Railway Co.*, 101 U. S. 443, a lien for materials and labor upon one section of a railway was extended over the entire road. This is an instructive case. The company was organized to build a railroad from Burlington, Iowa, to some point on the Missouri river. From Burlington to Viele the company used the track of another company; from Viele to Bloomfield the company built and paid for its own track; from Bloomfield to Moulton the company used the track of another company; and from Moulton, Iowa, to Unionville, Mo., it built its own road. The materials and labor for which a lien was claimed were furnished and done upon this latter piece of road. It was urged in resistance of the claim that the road was built in sections, and that there was such a separation in space and time that they could not be considered as one improvement. The lien was, however, declared upon the road, right of way, stations, etc., of the company, from Viele junction to the south state line of Iowa; the court asserting that "the intersection of fourteen miles of another road between Bloomfield and Moulton does not destroy the identity of the improvement, nor convert it into two railroads."

The supreme court of Wisconsin, in considering the statute in question, has adopted a like liberal construction of the law, with a view to securing the benefit of a lien to those whose rights were sought to be protected. The statute accords a lien to one who furnishes labor or materials in or about the construction of the building or machinery, "constructed so as to become part of the freehold upon which it is to be situated." Notwithstanding this language, that court, in *Spruhen v. Stout*, 52 Wis. 517, 524, 9 N. W. Rep. 277, allowed a lien for a draft tube, procured and designed to be attached or permanently annexed to the mill, but which, in fact, had not been attached. The effect of this decision is that, if the principal structure be a part of the freehold, there exists a lien thereon for parts furnished with the intent to be affixed, but not in fact attached. With greater reason should a lien be allowed upon the principal structure for piping attached and constituting an essential and indispensable part of the plant. The case of *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 South. Rep. 25, stands opposed to the cases cited, and to the holding here. It is only necessary to observe, with respect to that case, that, as I think, it gives but narrow interpretation to the statute, and evidences adherence to the strictest letter of the

law, in despite of its manifest purpose. The decision is in sharp contrast with the holding in *Brooks v. Railway Co.*, and the liberal construction adopted by the supreme court of Wisconsin.

I am persuaded to the conclusion that the fact that the piping is laid within the streets presents no objection to charging its cost as a lien upon the plant and the parcel of ground upon which the pumping works and well are situated.

4. It is further insisted that the lien statute has reference only to property that may be sold on execution, and that the plant here, being such only as is essential to the use and enjoyment of the franchise, cannot be taken in execution, and is therefore exempted from the operation of the law. In support of this contention the court is referred to the following authorities: *Foster v. Fowler*, 60 Pa. St. 27; *Guest v. Water Co.*, 142 Pa. St. 610, 21 Atl. Rep. 1001; *Foundry Co. v. Bullock*, 38 Fed. Rep. 565; *Harrison & Howard Iron Co. v. Council Bluffs City Waterworks Co.*, 25 Fed. Rep. 170. The first is the leading case. *Guest v. Water Co.* is but an echo. *Foundry Co. v. Bullock* is rested solely upon grounds of public policy, citing in support *Foster v. Fowler*, and the decision of the supreme court of Wisconsin in *Wilkinson v. Hoffman*; not, however, distinguishing between a corporation municipal and one quasi public, nor referring to *Hill v. Railroad Co.*, where the distinction is asserted. *Harrison & Howard Iron Co. v. Council Bluffs City Waterworks Co.* does not pass upon the question. In *Foster v. Fowler*, a water company incorporated for the purpose of introducing water into certain boroughs, for the use of the inhabitants of those boroughs, was sought to be subjected to the operation of the mechanic's lien law of Pennsylvania, with respect to its property essential to the operations of its franchise. The court declared against the lien, saying that corporations "for the building of bridges, turnpike roads, railroads, canals, and the like," are agencies of the public, "directly interested in the results to be produced by such corporations in the facilities afforded to travel and the movements of trade and commerce," and that the use of the franchise "is not to be disturbed by the seizure of any part of their property, essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public." The court quotes approvingly the remarks of SERGEANT, J., in *Canal Co. v. Bonham*, 9 Watts & S. 27, that—

"The privileges granted to corporations to construct turnpike roads, etc., are conferred with a view to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution, and sold by a creditor, because to permit it would defeat the whole object of the charter, by taking the improvements out of the hands of the corporation, and destroying their use and benefit."

The court further observed:

"We think the remark of LOWRIE, J., in *Williams v. Controllers*, 18 Pa. St. 275, is in point here, 'that, where there can be no execution, there can be no action,' and that is as true in this case, if we are right in the character we have assigned to this corporation, as it was in that."

In the case referred to, a mechanic's lien was denied for materials furnished in the construction of a public schoolhouse; the quoted remark of Judge LOWRIE being used in this connection:

"Where there can be no execution, there can be no action, and as a *levari facias* is the only execution proper on a judgment on a mechanic's lien, and as that sort of execution is not allowed against a county, it follows that this form of action cannot be sustained, if these defendants come within the meaning of the word 'county.'"

Judge LOWRIE then proceeded to show that the statute exempts from execution all public corporations.

I have quoted at length from the opinion in *Foster v. Fowler* because it becomes important to ascertain the precise reasons upon which that decision is grounded, with a view to ascertain whether the principles declared can be applied to conditions prevailing within the state of Wisconsin. The supreme court of Pennsylvania, it will be perceived, bases its holding upon two grounds: *First*, because of the public character of the enterprise; that therefore, as the corporation itself cannot voluntarily deprive itself of its property essential to the purpose of its organization, so it cannot be taken by creditors; and, *second*, and quite incidentally, that, "where there can be no execution, there can be no action."

With respect to the first ground, if I have correctly interpreted the decisions of the supreme court of Wisconsin, the public character of the enterprise is not allowed to defeat the application of the general laws of the state to a private corporation. The policies of the two states in this regard would seem to be widely divergent, and the decision of the one cannot be allowed to control the policy of the other. It would also appear from the observation of Judge SERGEANT that in Pennsylvania a *quasi* public corporation cannot voluntarily deprive itself of its property essential to the exercise of its franchise, and that the right of the creditor to take corresponds with the right of the debtor to alienate. It is not so in Wisconsin. Here the corporation may "take and hold property, both real and personal, * * * and sell, convey, or otherwise dispose of the same;" may "mortgage its franchises, tolls, revenues, and property, both real and personal, to secure the payment of its debts, or to borrow money for the purposes of the corporation," (Rev. St. Wis. § 1748, subds. 6, 7,) and may lease, sell, convey, or assign its franchises and privileges conferred by law to any corporation, where such rights would be in direct aid of the business of the purchasing corporation, (Id. § 1775a, as amended by chapter 127, Laws 1891.) In the exercise of these powers of alienation, the corporation stands upon like footing with an individual, and subject to like liability to involuntary alienation. In the absence of express legal exemption, "it is an inseparable incident to property that it should be liable to the debts of the owner, as it is to his alienation." *Hough v. Cress*, 4 Jones, Eq. 295, 297. No such exemption is expressed upon the statute book. To the contrary, it is most manifest that the legislature designed that the property of all private corporations, purely private or *quasi* public, should be subject to sale for the payment of debts. In the case of the latter

class, to avoid arrest of the enterprise, and public inconvenience resulting from alienation, voluntary or involuntary, the law enacts that the purchasers of the franchise of any corporation, by purchase at sale under mortgage, in bankruptcy, or under judgment, order, decree, or proceedings in any court, may organize anew, and shall be vested with the rights, privileges, and franchises of the old corporation. Rev. St. Wis. § 1788. I conclude, therefore, that the ruling in *Foster v. Fowler*, as to the first ground upon which it is based, is not applicable here.

With respect to the second ground upon which the decision of that case is placed, that, "where there can be no execution, there can be no action," it has been seen that the phrase occurs in Judge LOWRIE's opinion, holding that a mechanic's lien cannot be enforced against a municipality. Not content to rest his judgment, as it might well have been rested, upon the broad ground of public policy, he prefers to base his conclusion on the more technical objection that by the statute of the state a mechanic's lien could only be enforced by *levari facias*,—a writ peculiar to the state of Pennsylvania,—and such a writ could not by law issue against a public body. Such ground of decision is wholly inapplicable in the state of Wisconsin, where the lien is foreclosed in equity, and the sale is under decree, and property of corporations may be sold under decree to enforce payment of debts. Upon this phrase, so employed, rests the whole contention that the lien laws apply only to property that can be sold under a writ of execution. It must be borne in mind that in Pennsylvania there exists no separate equity jurisdiction, as here. All judgments there are enforced by some sort of writ of execution, and are not, so to speak, self-executing, as is a decree in equity here. The phrase must be interpreted in the light of that fact. The term "execution" is there employed, as I think, in a broad sense, comprehending all means by which the judgments or decrees of courts are enforced. In such sense, the phrase is well enough as a test, whether an asserted right is given by statute, although modern legislation, permitting actions against federal and state governments without power of enforcement by the courts, presents an exception to the rule. In general the right to judgment or decree necessarily carries with it the right of enforcement of satisfaction, and where, by reason of public policy, the right cannot obtain, it is held the statute does not embrace the particular right asserted. Property exempt from sale under any judicial proceeding, upon grounds of public necessity, is not within the operation of the lien laws, and for the like reason, unless the law so expressly declares. In other words, the exemption goes to the character of the use of the property, and not to the form of the writ or proceeding by which the right is enforced.

Judge Dillon correctly apprehends the rule when he says, speaking of the exemption from the operation of the lien laws of municipal property held for public use: "It is only such property as can be sold under judicial process that is subject to such liens. Laws creating liens in favor of mechanics are enacted with reference to that class of property." Dill. Mun. Corp. (4th Ed.) § 577. In *Badger Lumber Co. v. Marion*

Water Supply, etc., Co., (Kan.) 30 Pac. Rep. 117, the rule is thus stated: "The general rule is that property of a corporation which may be sold under a mortgage or specific lien given by the owner may be subjected to a mechanic's lien." In whatever variety of language the rule may be formulated, the right to the lien corresponds with the right of the debtor to alienate, subject only to limitation founded upon grounds of public policy. In most states the lien is enforced by writ of execution; here by foreclosure, as in case of a mortgage. All other lienholders for construction may join as plaintiffs, or, refusing, be made defendants. All subsequent lienholders or purchasers are to be made parties, and foreclosed of their interests. The sale is by decree, and absolute, without redemption, as in the case of a sale under execution. Rev. St. Wis. §§ 3321, 3324, 3326. If there can be no action where there can be no common-law writ of execution, the lien law of Wisconsin would be wholly inoperative, and inefficient for any purpose. The contention cannot be upheld. The lien law of Wisconsin applies to all property which is the subject of alienation by the debtor, and of sale under whatever form of judicial writ or proceeding. It does not apply to the property of municipal corporations held for public use, because such property is not the subject of judicial sale while so held. But the property of all corporations, private or *quasi* public, is so subject under some form of judicial proceeding. I discover in the statutes no exemption. Actions against them may be brought as against natural persons, (section 3204;) and, after judgment at law and return of execution *nulla bona*, the court may sequester the stock, property, and effects, and appoint a receiver, (section 3216,) and distribute its property among the creditors, (section 3217.) In the case of toll-taking corporations, the franchise and the property may be sold upon execution in the manner prescribed. (Sections 3229, 3235.) A *quasi* public corporation being, then, not exempt by reason of any public policy, and expressly subjected to the laws for the enforced payment of debts, the case of *Foster v. Fowler* cannot be applied here. The lien of the statute obtains unless the objection next to be considered avails to defeat the right.

5. It is lastly urged that the plant is essential to the use and enjoyment of the franchise, and inseparable from it, and that therefore the lien of the statute cannot be enforced. It was said by Mr. Justice CASODAY in *Improvement Co. v. Wood*, 81 Wis. —, 51 N. W. Rep. 1004:

"The rights, franchises, and plant essential to the continued business and purposes of such corporations are not to be severed, broken up, or destroyed, without express legislative authority, but, on the contrary, are to be preserved in their entirety."

It was also asserted by Mr. Justice PINNEY in *Fond du Lac Water Co. v. City of Fond du Lac*, 82 Wis. —, 52 N. W. Rep. 439, 441:

"In virtue of the intimate and necessary relation of the lots and the mains, pipes, and hydrants, which extend to most parts of the city, with the franchises and privileges of the plaintiff, it would seem that, as a subject of taxation, as well as of sale under judicial process, they are to be regarded as an entirety; and, as the plaintiff is a *quasi* public corporation, a dismember-

ment,—a separation of the entire plant,—under such proceedings, cannot be allowed.”

I fully concur with the declarations of these able jurists. I assume that the term “franchise,” as there employed, refers to the privilege to maintain and operate the plant, and not to the franchise to exist as a corporation; the former being the subject of transfer, the latter not transmissible. *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 619, 5 Sup. Ct. Rep. 299. When then results? The incorporation of the material for which a lien is here claimed into a plant operated under a franchise was the act of the defendant. The plant and franchise may not be severed by judicial sale, because of the peculiar public use to which the plant is devoted. The law gives a specific lien upon the plant for the material incorporated into it. Does the inseparable character of franchise and plant present an insuperable obstacle to the enforcement of a right given by the law? I think not. The defendant operates its plant “and uses its franchise subject to the obligation to pay the claim of the lienor.” *Purtell v. Bolt Co.*, 74 Wis. 132, 135, 42 N. W. Rep. 265. Since, then, the act of union was by the procurement of the defendant, and by severance of franchise and plant, the latter would become of little worth, and the paramount public welfare forbids their separation, in the interest of both creditor and debtor, in the interest of the public, and as a matter of common equity, plant and franchise should be decreed to be sold as an entirety. I think it within the inherent powers of a court of equity to so decree; not that the lien embraces the franchise, but because plant and franchise have, by act of the defendant, been rendered inseparable. The plant has been applied to a public use. The public welfare requires that use to be uninterrupted. A court of equity may therefore well require that the right to the use shall follow the tangible property devoted to that use, and dependent upon it. It may well be required that, upon subjection of the plant to sale in satisfaction of the lien granted by the law, the franchise to maintain and operate it for the public use shall be sold with it, as an essential incident to it; treating plant and franchise as an entirety. Otherwise, a judicial sale would work destruction to both plant and franchise. The course suggested is conformable to equity. It conserves the public welfare. It preserves this property to public use, giving to the purchaser the estate as the defendant has it. It renders to the complainant a right given it by the law. It operates not unjustly upon the defendant, since thereby its property, subjected by the law to sale, is preserved from sacrifice necessarily resulting from separation of franchise and plant. It is demanded by the exigency of the occasion that equity should supplement and effectuate the law. Indeed, if, as a matter of strict legal right, the franchise to operate does not inhere in the tangible property necessary to its use, as an essential incident to it, I think that in a court of equity the defendant may well be deemed, by his act of devoting this plant to public use under its franchise, thereby rendering it inseparable therefrom, to have assented that upon its sale, voluntary or involuntary, the franchise to operate should pass with it.

The case is peculiar and somewhat novel. I believe the course proposed to be grounded on acknowledged principles of equity. I think, also, that it has the support of high authority. It is recognized in the statute which authorizes reorganization of purchasers of the franchise at sale in bankruptcy or under judicial decree. Rev. St. Wis. § 1788. In *Drawbridge Co. v. Shepherd*, 21 How. 112, upon bill filed to enforce payment of a judgment at law against a bridge company, the court held that it was within the province of a court of equity, without statutory sanction, to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and to cause them to be applied in discharge of the judgment. In *Gue v. Canal Co.*, 24 How. 257, 264, Mr. Chief Justice TANEY, without ruling upon it, suggests the precise remedy here asserted. In *Railroad Co. v. James*, 6 Wall. 750, on appeal from this court, complainant had obtained judgment at law against the La Crosse & Milwaukee Railroad Company, and filed his bill to declare the lien of his judgment and for a sale of the road. The court entered a decree declaring the lien, and directing a sale. The report of the case upon appeal does not disclose the terms of the decree, but, as appears from the records of this court, it directed a sale of—

"All and singular, the railroad property known as the 'La Crosse & Milwaukee Railroad,' from Milwaukee to Portage City, its depots, station houses, and buildings, together with all its rolling stock, franchises, and appurtenances now in possession of or claimed by the Milwaukee and Minnesota R. R. Co."

Upon appeal the decree was affirmed; the court observing, after declaring the lien of the judgment:

"We do not doubt that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole interest of the company existing at the term of its rendition to the purchaser."

There would seem to be no escape from the binding authority of this case. The lien of a judgment and that arising under the mechanic's lien laws are at least of equal dignity, both being the creatures of statute, and there is no distinction in principle between the creation of lien by mortgage or by statute. *Hill v. Railroad Co.*, 11 Wis. 223, 233. If, in the enforcement of the lien of a judgment upon the real estate of a corporation *quasi* public, its franchises to operate the property for public use may be sold with the property, I fail to understand why similar action may not be taken by a court of equity with respect to the enforcement of a mechanic's lien. In *Railroad Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. Rep. 1009, it was ruled that the franchises of a railroad company, which can be parted with by mortgage, will pass to the assignee in bankruptcy, and may be sold under decree. The court declares, (page 510:)

"It follows that, if the franchises of a railroad corporation can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

And there, as here, the surrender or subjection of the property to the creditor was involuntary, and by compulsion of law. In the case of

Hammock v. Trust Co., 105 U. S. 77, 89, the court held that state laws authorizing redemption from sales of real estate could not be applied to the real estate of a corporation operating its property under a franchise and for public use. The court decreed an absolute sale, because "a sale of the real estate, franchise, and personal property separately might in every case prove disastrous to all concerned, and defeat the ends for which the corporation was created." In *Steger v. Refrigerator Co.*, *supra*, the supreme court of Tennessee declared "that the pipes, and the license or easement under which they are laid, would certainly pass under a sale of the property as an entirety, and for operating purposes, no reservation being made." So, also, in the case of *Railroad Co. v. Parker*, 9 Ga. 377, where judgment creditors were proceeding to sell separate portions of the railroad, a court of equity arrested the executions, and decreed a sale of the road, "with all the rights, franchises, and property connected therewith," and distributed the proceeds among creditors according to their respective rights. The eminent Judge LUMPKIN, reviewing this decree, observes:

"The chancellor, then, in taking this matter in hand, and directing a sale of the entire interest for the benefit of all concerned, was but invoking the powers of equity to aid the defects of law, and applying analogous principles to the existing emergency; and, so far from transcending his authority, he is entitled to the thanks of the parties and the country for the correct and enlightened policy which he adopted. Had he faltered, or shunned the responsibility thus cast upon him, he would have shown himself unworthy of the high office which he filled. As it is, this precedent will stand in bold relief as a landmark for future adjudications."

I follow these landmarks, guiding me, as I think, to a correct conclusion.

Let there be a decree for complainant, declaring a lien for its debt upon the waterworks plant and upon the interest of the defendant in the premises in question; directing a sale of the plant, and such interest in the lands, and of the franchise of maintaining and operating the plant for the uses to which it is devoted by the law of the defendant's incorporation, as an entirety, and that the proceeds of sale be brought into the registry of the court, for distribution among all who may show right thereto.

SAN DIEGO COUNTY v. CALIFORNIA NAT. BANK *et al.*

(Circuit Court, S. D. California. October 3, 1892.)

1. BANKS AND BANKING—DEPOSITS—COUNTY FUNDS.

Where the treasurer and tax collector of a county, without authority of law, deposit county moneys in a bank, and receive certificates of deposit marked "Special," the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors.

2. SAME—EQUITABLE REMEDIES.

The county's rights in such case are enforceable only by a bill in equity, for there is no privity of contract between it and the bank. *National Bank v. Insurance Co.*, 104 U. S. 54, followed.

In Equity. Bill by the county of San Diego against the California National Bank and Fredrick N. Pauly, as receiver thereof, to recover certain moneys deposited in the bank by the county treasurer and the tax collector. Heard on demurrer to the complaint. Overruled.

Works & Works, for complainant.

M. T. Allen, for defendants.

Ross, District Judge. This suit was originally brought in the superior court of San Diego county against the defendant bank, a national bank organized under and pursuant to the laws of the United States, and which became insolvent and suspended payment on the 11th day of November, 1891, and against Fredrick N. Pauly, the duly appointed and acting receiver of the assets and property of the bank, on whose motion the suit was transferred to this court. The complainant is a municipal corporation of the state of California, and by its bill charges that on the 15th day of August, 1891, its then duly elected, qualified, and acting treasurer, C. R. Dauer, made with the defendant bank a deposit of the moneys of the complainant then in his custody as such treasurer, of \$5,975.70, lawful money of the United States, and took from the bank a certificate of deposit therefor, in the words and figures following, to wit:

"5,975.70

The California National Bank.

"Dollars.

"San Diego, Cal., August 13, 1891.

"No. 6,700.

"C. R. Dauer, Co. Treas., has deposited in this bank five thousand nine hundred seventy-five and seventy one hundredths dollars, payable to the order of same, on return of this certificate properly indorsed.

"G. N. O'BRIEN, Cashier."

Other similar deposits by Dauer, as such county treasurer, aggregating \$10,000 additional of complainant's money, are also alleged, for which similar certificates of deposit are alleged to have been issued by the bank, and taken by the treasurer. The bill further charges that on the 2d of November, 1891, the then duly elected, qualified, and acting tax collector, H. W. Weineke, of the county complainant, made with the defendant a deposit of the moneys of the complainant then in his custody as such collector, of \$6,114.85, lawful money of the United States, and took from the bank its certificate of deposit therefor in the words and figures following, to wit:

"6,114.85

The California National Bank.

"Dollars.

"San Diego, Cal., November 2, 1891.

"No. 6,891.

"H. W. Weineke, Tax Coll'r, has deposited in this bank six thousand one hundred fourteen and eighty-five one hundredths dollars, payable to the order of same on return of this certificate properly indorsed.

"G. N. O'BRIEN, Cashier."

Other similar deposits by Weineke, as such county tax collector, aggregating \$20,000 additional of complainant's money, are also alleged, for which similar certificates of deposit are alleged to have been issued by

the bank, and taken by the tax collector. The bill further alleges that between the 2d and 10th days of November, 1891, the aforesaid tax collector of complainant made with the defendant bank deposits of the moneys of the complainant then in his hands as such collector, in various amounts, aggregating \$24,532.75, for which no certificates of deposit were taken by him. It is averred that all of the moneys so deposited by the treasurer and tax collector of the complainant county were held by its officers in trust for the complainant, and were deposited by them, and received by the bank, without authority of law; that the deposits were made by the officers named, for safekeeping; that the bank knew at the time that the moneys so deposited were the moneys of the complainant, held by the treasurer and tax collector, respectively, as public officers, and in trust for the complainant; and that each of the certificates issued therefor was indorsed "Special," because of the fact that the moneys were public and trust funds. It is alleged that no part of the moneys so deposited has been repaid, except the sum of \$2,453.27; that the defendant receiver has, since his appointment, received of the assets of the bank a sum sufficient to pay and satisfy the amounts deposited by the treasurer and tax collector, but refuses to pay the same to complainant; that there is not sufficient moneys or assets of the bank to pay its indebtedness in full; and that the receiver is about to, and will, unless restrained from so doing, apply a part of the funds now in his hands, and alleged to belong to complainant, to the payment of the general indebtedness of the bank, thus depriving complainant of its alleged right to receive the amount of its funds in full.

The defendants, by demurrer, urge two objections to the bill: *First*, that complainant has a plain and adequate remedy at law; *second*, that the bill contains no equities entitling complainant to any relief against the defendants, or either of them. It is very clear that if the bill states a cause of action at all it is of an equitable nature, and enforceable in a court of equity only. A similar point was raised in the case of *National Bank v. Insurance Co.*, 104 U. S. 54. In that case one Dillon was the agent of the insurance company. He kept an account with the bank; the account was entered on the bank books with him as general agent. As agent of the insurance company he collected, and it was his duty to remit, the premiums. In the course of his dealings with the bank he borrowed money on his personal obligation. Finally, the bank sought to appropriate his deposits to the payment of this debt. The insurance company filed its bill in equity to recover the amount of those deposits, as equitably belonging to it. The fact that they were premiums received for the insurance company was shown. The court said:

"It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them between the bank and the insurance company. The latter would not have been liable for an overdraft by Dillon, as was decided by this court in *National Bank*

v. Insurance Co., 103 U. S. 783; and, conversely, for the balance due from the bank no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor; and the balance due on the account is only a debt, yet the question is always open, 'To whom, in equity, does it beneficially belong?' If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account."

See, also, *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. Rep. 118; *Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. Rep. 519.

In the present case, not only did the defendant bank, according to the averments of the bill, have knowledge that the depositors of the moneys in question were, at the time of such deposits, officers of the complainant county, and that the moneys so deposited belonged to the complainant, and were therefore held by the officers depositing the same in trust for the county, but the bank is chargeable with notice of the fact that the law of the state made it illegal for those officers to make, or the bank to receive, such deposits. *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. Rep. 767.

The bank, therefore, acquired no title to the moneys so deposited, as against the complainant, and they continued impressed with the trust in complainant's favor. It is true that the moneys in question were not made as a special, as contradistinguished from a general, deposit, as those terms are understood in banking matters; that is to say, it was not agreed between the officers making the deposits and the bank that the identical moneys deposited were to be returned. The moneys deposited by the officers of complainant were no doubt mingled with the moneys of the bank, and their identity thus lost; but can such fact destroy the trust in complainant's favor, or prevent the enforcement of it by a court of equity? The bank being insolvent, the question is between the complainant and the general creditors of the bank represented by the receiver. The ordinary creditors became such voluntarily; they deposited their money with the bank with their eyes open. But the money of the complainant was deposited by its officers, and received by the bank, not only without the knowledge of complainant, but contrary to law. To put the complainant on the same plane with the ordinary creditors is to make the former share in a loss to which it did not voluntarily subject itself, and to give to the latter a share in money which never in equity became the property of the bank. This is certainly not just. It was said by Mr. Justice BRADLEY in *Frelinghuysen v. Nugent*, 36 Fed. Rep. 239:

"Formerly, the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire

mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

This rule was recognized as correct and applied by the supreme court in *National Bank v. Insurance Co.*, 104 U. S. 56, 67; *Peters v. Bain*, 133 U. S. 694, 10 Sup. Ct. Rep. 354; and its application to the facts alleged in the bill in the present case is sufficient to sustain it. Demurrer overruled.

AUGUSTA, T. & G. R. Co. et al. v. KITTEL.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1892.)

No. 41.

1. RAILROAD COMPANIES—MORTGAGES—AUTHORITY OF PRESIDENT—ESTOPPEL.

When the president of a company chartered by the state of Florida for the construction of a railroad, under the authorization of the board of directors, mortgages the company's land, and the money, which is loaned in good faith, is used by the officers of the company for company purposes, and the validity of the transaction is recognized by payment of interest, and the transaction is brought to the notice of the directors, both actually and by recordation of the deeds, and there is no repudiation of the mortgage or denial of the authority of the president in the premises, a subsequent resolution by part of the directors, made long afterwards, disapproving and annulling the president's authority, does not invalidate the transaction or prevent a foreclosure, since the company tacitly ratified the act of the president, by not promptly disaffirming the transaction.

2. SAME—MORTGAGE OF LAND GRANT—TITLE.

The land was granted to the company by the state of Florida, to which it had been donated under the swamp and overflowed lands act, (Act Cong. Sept. 28, 1850.) The mortgage conveyed all and any interest the company might have in the land. Held, that if the company did not have a legal title to the land, by reason of the absence of a patent in the original grant to the state, it had a full equitable title, and the mortgage passed whatever title the company had.

3. SAME—ACTS OF SECRETARY DE FACTO—ESTOPPEL.

When an assistant secretary of a railroad company acts as the secretary in fact, transacting the business of the company, with the knowledge of the directors, and, as such *de facto* secretary, attaches the seals of the company to mortgages executed by the company on its land, it is not necessary for the mortgagee, in establishing the validity of the mortgages, to show that he was an assistant secretary *de jure*.

4. SAME—CONSTRUCTION CONTRACT—VALIDITY—FRAUD.

The mere fact that the president of a railroad company, unknown to the other directors, is interested in a construction contract let by the company, does not make the contract void, if it is otherwise free from fraud.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill by Joseph J. Kittel against the Augusta, Tallahassee & Gulf Railroad Company and others to foreclose a mortgage. Decree for complainant. Defendant company alone appeals. Affirmed.

J. B. C. Drew, for appellant.

H. Bisbee, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDUE, Circuit Judge. With the appellant were joined as defendants, in the court below, the trustees of the internal improvement fund of the state of Florida, and William Clark. As these last-named defendants were not substantially affected by the decree of the court below, they did not join in the appeal. Severance being had as to defendant Clark, the railroad company alone appealed.

The Augusta, Tallahassee & Gulf Railroad Company was chartered by the legislature of the state of Florida to construct a railroad from the city of Carrabelle, on the Gulf of Mexico, to the Georgia state line, by way of Tallahassee, and thence onwards to the city of Augusta, Ga., under a charter obtained from the last-mentioned state,—a distance of about 300 miles. The legislature of the state of Florida granted the railroad company 15,000 acres of land per mile, of the lands donated to the state under the swamp and overflowed lands act, enacted by congress in 1850. Prior to the matters giving rise to the present suit, the company had constructed and equipped 11½ miles of its line, from the gulf to a point on the west bank of the Ocklocknee river, for which they had received, under the land grant aforesaid, a certificate (No. 13,909) entitling the company to 108,971 acres of swamp and overflowed lands. Under the charter of the company, the board of directors was to be composed of nine stockholders, each the *bona fide* owner of not less than five shares of the stock of the company. On May 24, 1889, there seemed to be but seven directors,—Henry A. Blake, R. B. Symington, Charles M. Zeh, William Clark, W. Campbell Clark, Henry Gamble, and Robert Cumming. Of these seven directors, Blake was president; William Clark, the purported capitalist of the company; and the other five, apparently, representatives of William Clark's interest,—all but Dr. Zeh being his clerks and partners, and Dr. Zeh, his family physician. Such of them as were examined on the hearing of this case showed by their testimony that they were, in the main, perfunctory directors, following the lead and wishes of William Clark.

In this state of the directory, on May 24, 1889, the record shows that a stockholders' meeting and a meeting of the board of directors were held. At the stockholders' meeting, so far as the evidence in this case discloses, the following proceedings were had:

"A meeting of the stockholders of the Augusta, Tallahassee & Gulf Railroad was held at No. 400 Broadway, this day, at 3 o'clock P. M., pursuant to adjournment; a majority of all the stockholders being present. First, referring to the bonding of some of the property of the railroad company, the following resolution was presented and unanimously adopted, to wit: 'And, for the purposes aforesaid, the board of directors are also empowered to dispose of and sell all the said bonds, or any part of them, and also to dispose of and sell any of the capital stock of this company not already issued and subscribed for, in such manner as the board may deem to be expedient for the best interests of the company; or, in case the board should deem it expedient for the best interests of the company to sell, pledge, mortgage, or otherwise use the whole or any part of the lands now owned or coming unto this company from and under the said land grant from the state of Florida, or in any other manner than as heretofore authorized, either permanently or tempora-

rily, they are empowered so to do. Resolved, that resolutions or parts of resolutions inconsistent herewith are hereby rescinded and annulled.'"

The board of directors, at their meeting, (whether one continuous meeting or in adjourned sessions does not appear,) resolved as follows:

"New York, May 24, 1889, a meeting of the board of directors of the Augusta, Tallahassee & Gulf Railroad Company was held at No. 400 Broadway, this day, at 4 o'clock P. M., pursuant to adjournment; a majority of the board being present. First, reciting and providing for carrying out provisions in the resolutions of the meeting of the stockholders of the same date, it is further provided, in the event, however, that the president should at any time deem it expedient to negotiate, sell, pledge, mortgage, or otherwise use the whole or any part of the lands now owned or coming to this company from and under the before-mentioned land grant from the state of Florida, and in any other manner and form than as heretofore authorized, either permanently or temporarily, he is hereby empowered, in his discretion, so to do; and the proper executive officers of the company are hereby empowered and instructed to execute and deliver any necessary and proper papers, and to do any and all proper and necessary things, under the direction of the president, to carry this provision into effect. The president is further authorized and empowered to make or to cause to be made any contract for the construction and equipment of the proposed line of road of this company from its present terminus to Augusta, Georgia, or any part of it, together with all things usual, necessary, incident thereto, upon such terms and conditions as he deems best, and to therein contract for the payment or sale of any or all said bonds, stock, and lands."

It further appears, from the same record of proceedings, that the following resolution was presented and unanimously adopted, to wit:

"Resolved, that William Bailey, of St. Louis, Mo., be and hereby is elected a member of this board, to fill one of the vacancies now existing, and also that said Bailey be and hereby is elected to be vice president of this company, to fill the existing vacancy."

On the same day a resolution was passed, authorizing the president to appoint a general manager of the company, and to fix his salary. On May 28, 1889, four days following, the president of the company, Blake, negotiated and executed a construction contract with one Frank M. Green, represented by his attorney in fact, William Bailey, for the construction of the road. By the terms of the contract, Green was to be paid for constructing the railroad to Augusta, in bonds and shares of the company, to wit, \$16,000 first mortgage bonds, \$7,000 second mortgage land-grant bonds, and \$20,000 stock of the company, for each completed mile. William Bailey, the newly-elected vice president, not only appears as attorney for said Green in the said construction contract, but for the sum of one dollar, and other valuable considerations, he guaranteed the performance of the contract on the part of Green. This construction contract was signed by the Augusta, Tallahassee & Gulf Railroad Company, by Henry A. Blake, president, John L. Rooney, secretary, with the seal of the company attached. After the making of the said contract, it appears the president, Blake, appointed Contractor Green assistant general manager of the company.

About the middle of September following, the appellee, Joseph J. v.52f.no.1—5

Kittel, something of a capitalist, according to his own evidence, became interested in the affairs of the company. According to the evidence, about the time mentioned, he was approached by a broker to loan money, and was by him (the broker) introduced to Bailey, vice president, and afterwards to Blake, president. The result of the negotiation was that, on the 18th of September, Kittel loaned the railroad company the sum of \$25,000, receiving as evidence thereof three several promissory notes, wherein the said company promised to pay to Kittel, or his order, the aforesaid sum of \$25,000, with interest from the date of the loan at 5 $\frac{1}{2}$ per cent. per annum, in gold coin of the United States, at its then standard value, in the amounts and at the times specified, that is to say: One note for \$10,000, payable 6 months after date, with interest aforesaid from September 18, 1889; one note for \$7,500, payable 7 months and 10 days after date, with interest aforesaid from October 28, 1889; and one note for \$7,500, payable 8 months and 10 days after date, with interest aforesaid from November 27, 1889. To secure the payment of the said several promissory notes and the said sum of \$25,000, with the interest to accrue thereon, the railroad company executed and delivered to Kittel a mortgage of the 109,000 acres of land heretofore referred to. Said mortgage contained various provisions, not necessary to recapitulate.

This transaction was entered into on the part of Kittel under the advice of counsel, after an examination of the books and records of the company in regard to the power and authority of Blake, president, to make the loan and execute the mortgage. The evidence shows that the said sum of \$25,000 was paid over, according to the contract, in four different checks drawn by Kittel, on the Union Trust Company, to the order of the railroad company, Blake, president, indorsing for \$10,000, and M. W. Hayward, assistant treasurer, for \$15,000, thereof. On the same day that the notes and mortgage were executed, and as a part of the same transaction, an agreement was entered into between Frank M. Green, of Kansas City, Mo., represented by William Bailey, his attorney in fact, William Bailey, individually, and Henry A. Blake, of the city of New York, parties of the first part, Joseph J. Kittel, of the city of New York, party of the second part, and the Augusta, Tallahassee & Gulf Railroad Company, party of the third part. This contract recited that, in consideration of the loan that day made by Kittel to the railroad company, of \$25,000, and as an additional inducement to and simultaneously with the making of the loan aforesaid, the parties of the first part, claiming to be the only persons who had any interest in or right to the construction contract hereinbefore referred to, transferred and set over to the said Kittel, party of the second part, one tenth interest in the construction contract made between the railroad company and Green on the 28th day of May, 1889. The party of the third part, the railroad company, stipulated in said contract to retain one tenth of each and every one of the installments due and to grow due to the said Frank M. Green, or his assigns, by virtue of the agreement for the construction of the railroad, until such time or times as the said party of the second part

shall, by written instrument to that effect, prescribed by him, consent to such payment; it being stipulated in the said contract that, while the said Kittel was to receive one tenth of the proceeds of the said contract, from the said one tenth was to be deducted one tenth of the actual cost of construction.

About the time of the making of the aforesaid mortgage and contract, it seems that the president, Blake, appointed Joseph J. Kittel land commissioner, although there is no direct proof of the same in the record; and thereafter it appears that Kittel went to Europe, according to his testimony, on private business. During his absence, and on October 30th, at an informal meeting, in which the Clark directors participated, Kittel was chosen a director of the railroad company. On his return, December 14, 1889, he was served with a notice of such election as director. It does not appear that he was a stockholder in the company, and eligible as a director, that he accepted the appointment, or ever in any way acted as a director of the railroad company; and on February 14, 1890, he tendered his resignation, in a communication, under the advice of counsel, as follows:

"Robert Cumming, Esq., Secretary and Treasurer, &c.—DEAR SIR: There being some doubt in my mind whether I am a director and 'general land commissioner' in your railroad, in order to clear the matter, I hereby tender my resignation as director and 'general land commissioner,' in the Augusta, Tallahassee and Gulf Railroad Company, the same to take effect immediately.

"Yours, etc.,

J. J. KITTEL."

In December, 1889, during Mr. Kittel's absence in Europe, the mortgage granted to him by the railroad company was recorded in different counties in Florida in which the land lay, by the direction of Kittel's attorney, Judge Bischoff, on a report from Bailey that Blake, president, in connection with others, was depredating on the lands. On January 25, 1890, the said Kittel made another loan to the railroad company, of \$4,450, on a promissory note payable 52 days from the date thereof, with interest at $5\frac{1}{2}$ per cent., and by writings made the same day the railroad company granted Kittel a further mortgage upon the 109,000 acres of land aforesaid; and President Blake, Frank M. Green, and William Bailey, in consideration of the loan of \$4,450, transferred to said Kittel an additional interest of one twentieth in the construction contract; the railroad company, by Blake, president, appearing in the contract, and guarantying and stipulating to hold one twentieth of the proceeds of the construction contract, less the one tenth cost of actual construction, to the account of said Kittel. The mortgage granted at this time appears to have been duly recorded in Florida, February 3, 1890.

On March 18, 1890, the note due in six months by the contract of September 18, 1889, fell due; and under the stipulations of the mortgage the company had the right to renew the same. This appears to have been done by the payment of the interest due on the part of the company, and the execution of a new note in the sum of \$10,000, payable in six months from date; and on the same day the note for \$4,450

fell due, and was renewed, under the terms of the mortgage, for a period of six months, by the company paying the interest to that date, and executing the proper writing. April 28, 1890, the note for \$7,500, secured by the first mortgage, falling due in 7 months and 10 days from date, fell due, and was renewed, and a new note given by the railroad company, Blake, president. And, again, on May 28, 1890, the note for \$7,500, secured by the first mortgage, due in 8 months and 10 days from date, was likewise renewed, on the payment of interest and the execution of a new note. All the renewal notes secured by both first and second mortgage were at maturity unpaid, and were duly protested; the last one on the 1st day of December, 1890. In March, 1890, on account of differences between Blake and Bailey, the said Frank M. Green threw up and abandoned the construction contract, and notified the company of his inability to comply with and carry out the contract; and, about April 12th, Bailey resigned as a director, vice president, and general manager of the defendant company. And in September following the following proceedings appeared to have been had:

"At a meeting of the board of directors September 11, 1890; at the office of the company, 10 Wall street, at 1 P. M., pursuant to adjournment,—present: H. A. Blake, R. B. Symington, Chas. M. Zeh, Jno. E. Jarvis, Wm. Sheriff, and Henry Gamble,—on motion of R. B. Symington, seconded by Mr. Henry Gamble, Mr. Chas. M. Zeh was duly and unanimously elected president of this company. M. W. Hayward offered his resignation as assistant secretary, which, upon motion made and carried, was duly accepted."

At a meeting of the board of directors held at New York on November 17, 1890, at which were present directors Zeh, Symington, Cumming, Jarvis, Gamble, and Sheriff, it was resolved that—

"The purported records of meetings of this board, contained on pages 6, 7, 8, and 64 of the record books be, and the same are, hereby disapproved, annulled, and declared void and of no effect."

The records of the meetings thus rescinded include a part of the proceedings of the board of directors held on May 24, 1889, in which authority was given to the president to mortgage the land grant, and to make a contract for the construction and equipment of the road.

In July, 1891, Kittel filed his bill for foreclosure of the aforesaid mortgage. In addition to proper averments, setting forth the issuance of the notes and the granting of the mortgages and default, he averred that one William Clark claimed to have a judgment at law, entered on default, against the said railroad company, in the sum of \$432,228.42, which, it was averred, said Clark claimed as a lien on said property, covered by the mortgage prior thereto. The prayer of the bill was for an account as to the amount due upon the promissory notes given by the railroad company to Kittel, the foreclosure of the mortgage given to secure the said notes, and the sale of the property described in the mortgage; for a decree against William Clark, postponing his alleged lien to that of the mortgage, and an injunction restraining him from selling or attempting to sell any of the lands mentioned and described in the mortgage, in satisfaction of his judgment. The railroad company and William Clark

appeared, and severally filed demurrers to the bill, for want of equity, and because, according to the bill, the title to the land in which the mortgage is sought to be adjudged is in the United States, and also because the title to the land upon which the mortgage lien is sought to be adjudged and enforced is in the state of Florida. These demurrers, after hearing, were overruled by the court, and thereupon Clark and the railroad company filed separate answers, substantially setting up the same facts, denying the indebtedness to complainant, admitting the company's ownership to the tract of land described in the mortgage, denying the recording of the mortgage, setting forth the construction contract between the railroad company and Frank M. Green, and averring that Green was a brother-in-law of Bailey; that, at the time of the execution of the contract, Bailey was a director and vice president and general manager of the company,—and, upon information and belief, charging that Blake, president, and Bailey, vice president, were secretly and jointly interested in the construction contract with Green, for a division of the inordinate profits of the same between themselves and such other persons as might thereafter become associated with them; that all the negotiations resulting in said contract were conducted by the said Blake and Bailey; that the said Bailey was really the contractor, and was known to be such by the said Blake; that the agreement between Bailey, Blake, and Green for division of the profits of the construction contract was entirely unknown to the other directors and officers of the defendant company, and remained unknown to them until after a copy of the agreement made between the complainant, Kittel, Bailey, Blake, and Green was furnished to counsel, after the resignation of Blake, president, in November, 1890; that there was a fraudulent and corrupt combination between Kittel, Bailey, Green, and Blake, to loan money to the railroad for the use of the construction company, and at the same time to retain possession of the land grant; that in pursuance of such combination the notes and mortgages and agreements were executed; that part of the \$25,000 advanced by Kittel under the contract was paid to Blake, and by him paid to Bailey and Green in carrying out their contract for constructing the defendant's railroad, and that some of the money was received by the said complainant, Kittel, and the said Bailey, on a claim for brokerage; that the resolutions alleged as having been passed at the meeting of stockholders, and approved by a meeting of the directors, authorizing the mortgage of the land grant, were never passed or approved by any meeting of the directors; that the person who signed the said mortgage and agreements as assistant secretary of the company, and attached the seal of the company thereto, was not the secretary of the company, and had no authority to act as the secretary; that the said notes and mortgage set forth in the bill of complaint were without the authority and knowledge of the directors, stockholders, or officers of the defendant company, except Blake, Kittel, Bailey, and Green, and are void and of no effect.

The answers further allege that in March, 1890, the said Frank M. Green abandoned the construction contract, and notified the company

of his inability to comply with and carry out the same, and about the same time Bailey resigned as director, and afterwards, in the month of September, Blake resigned as director and president, and thereupon Charles M. Zeh was chosen president of the company, and that the company was greatly damaged, and its credit ruined, by the actions and doings of the alleged copartners, Kittel, Bailey, Blake, and Green, in their reckless conduct of the management of the defendant company's interest, and the total failure to construct the defendant's road, and in the pretended incumbrance placed upon the defendant company's land grant, for their own selfish uses and purposes.

The decree in the court below was in favor of the complainant, recognizing and foreclosing the mortgages sued on, finding the sum of \$33,-270.86 due, ordering the company to pay within a short day, and, in failure thereof, that the mortgaged property be sold, after public advertisement, by a special master of the court.

The railroad company, in bringing the case to this court, assigns the following errors: (1) The court erred in overruling the demurrer interposed to the bill of complaint herein by the said defendant; (2) the court erred in rendering a decree against the above-named defendant.

The demurrer interposed by the defendant railroad company states the inconsistent propositions that the legal title to the lands mortgaged is in the United States and also in the state of Florida. The counsel for the company contends in this court that the bill shows the legal title to the lands sought to be sold to be in the United States, and claims that what passed under the grant of 1850 was the legal title to swamp and overflowed lands, and what were and what were not swamp and overflowed lands was a question of fact, to be hereafter determined, when the question should be raised in the courts, upon proofs submitted; and he further contended that the certificate of the trustees guarded the United States upon this point, and that the company received its certificate upon the express condition mentioned, and that the company, as well as the mortgagee, are bound by it; and that, in order for the court to sell the lands under this decree, it must, by some form of proof, determine that the land is in fact swamp land, under the act of 1850. The appellee contends that the legal title to the land passed to the state by the act of congress of September 28, 1850, without any patent, citing *Wright v. Roseberry*, 121 U. S. 488-503, 7 Sup. Ct. Rep. 985; and further, as follows:

"By the act of the legislature of Florida, January 6, 1856, this legal title passed to the board of trustees, defendants, who have not appealed from the decree; and the trustees say in their answer they will convey to appellant the remainder of the lands as soon as they receive the patent. They could convey before. The legal title passed by the grant to every acre of land that is swamp and overflowed land, in point of fact. The appellant admits, by its mortgage, it is all swamp and overflowed land. The trustees admit, by their answer and exhibit thereto, it is swamp and overflowed lands, and are estopped from and do not seek to controvert it. If at any future time the government of the United States should contend that any single piece of the one hundred and nine thousand acres is not swamp and overflowed land, it will

be time enough to settle that controversy, whenever it arises. The defendant company, the appellant here, cannot and has not raised any such question in its answer. Apart from this, a mortgagor can never raise a question of title, and say it had no title, as against the mortgagee. The latter is entitled to have the property mortgaged sold to pay his debt, and the purchaser will get such title as the mortgagor holds."

In our opinion, if the company has not a legal title to the lands mortgaged, it had a full equitable title. The language of the mortgages, in the granting part, is full and complete, conveying any and all interest of the railroad company in the lands, and passed whatever title the railroad company had. It was sufficient to mortgage land held by a full equitable title, as well as that held by a legal title. *Railroad Co. v. Hamilton*, 134 U. S. 296-305, 10 Sup. Ct. Rep. 546; *Trust Co. v. Kneeland*, 138 U. S. 414-419, 11 Sup. Ct. Rep. 357.

Whether the decree appealed from was correctly rendered in favor of the complainant, Kittel, depends upon the undisputed facts hereinbefore recited, and upon several contested propositions of law and fact, which may be stated and answered as follows:

1. Was M. W. Hayward the assistant secretary of the company from March 24, 1889, to September 11, 1890, and as such authorized to attach the seal of the company to the mortgages granted to complainant, Kittel? It appears that he was employed about the office of President Blake; that he was appointed by President Blake assistant secretary and assistant treasurer about February 1st, 1889; that up to the time of his resignation he acted as secretary, though signing as assistant secretary, transacting the business of the company, with the knowledge of most if not all of the directors, and that in fact he transacted all the business of the secretary during the time mentioned. It is not necessary to determine whether he was an assistant secretary *de jure*, since it clearly appears that with the consent and knowledge of the president and board of directors, during the time mentioned, he was *de facto* secretary of the company.

2. Whether the board of directors authorized the president, Blake, to borrow money for the uses of the company, and to mortgage the land grant of the company to secure the repayment of sums borrowed. The minutes of the board, kept by Hayward, as secretary, show a resolution to that effect, passed at a meeting held on the 24th day of May, 1889. Other proceedings had that day, at the reported meetings of the board of directors, are undisputed, such as the appointment of Bailey as director and vice president; the authorization of the president to make a contract for the construction and equipment of the proposed line of the road to Augusta, Ga.; to authorize the president to appoint a general manager,—the minutes of all of which were recorded by Hayward, while the stockholders' meeting reported to have been held the same day is disputed. That it was not held, is not proved. The record book does not appear to have been produced in evidence. The extracts given from it are not in chronological order, or as in any wise attempting to give an insight into the manner in which the book was kept. Whether

the resolution authorizing the president to mortgage the lands granted by the state of Florida was passed, depends upon the credit given the testimony of Directors Robert Cumming, William Henry Gamble, Robert B. Symington, Charles M. Zeh, and William Clark, which testimony is negative,—not recollecting the meeting,—rather than positive,—recollecting that no such resolution was passed.

3. Was Kittel a director of the company? There is no doubt he was elected at an informal meeting, during his absence in Europe; that he was notified in writing of the appointment very soon after his return; and that, about two months thereafter, he resigned as director. He was not the owner of any stock in the company, and was therefore ineligible. He never in any wise acted as director, and his resignation was given under the advice of counsel, and in order to clear the matter of doubt, as to whether he was or was not a director.

4. Was Kittel acting in good faith in the loans he made to the company? The evidence shows that he acted under advice of experienced counsel, after a full examination of the records of the company as to the authority of the president to borrow on behalf of the company, and to give as security the mortgage on the land grant. There is no evidence whatever to show that he doubted the legality or honesty of the transaction; that he suspected the president's authority to borrow, or his authority to grant the mortgage; or that, to his knowledge, the money was in any wise intended to be used otherwise than directly for the needs and benefits of the company; or that he had any idea that the money he loaned was money loaned to and for the benefit of the construction company, otherwise than as the construction company would be aided by funds in the hands of the railroad company. The loan does not appear to have been in any wise secret, for even Mr. William Clark, the moneyed man of the concern, admits that he was informed by Blake of the loan, just after it was made. The only suspicion with regard to the *bona fides* of Kittel in the whole transaction arises from the fact that, as part of the consideration for loaning the company money at an extraordinarily low rate of interest, considering the enterprise and the security offered, Kittel was granted, in all, a three-twentieths interest in the construction contract. In our opinion, this circumstance is of small weight. The construction contract was authorized by the board of directors. They were charged with notice that Bailey, a director, was, at the making of the contract, interested in the same. President Blake's interest, even if unknown to the board of directors, would not render the contract absolutely void, if otherwise free from fraud or undue advantage. This contract had been made for four months; was apparently in process of execution, with the knowledge of all concerned; and Kittel's acceptance of an interest therein falls far short of showing that he was making himself a party to any contract or scheme to defraud or injure the railroad company. The construction contract, on its face, does not, as defendants Clark and the company claim, carry with it marks of extortion or fraud or bad faith, by reason of the compensation to be given for construction. In enterprises like the one then in hand, which seem to con-

sist of building and equipping a railroad on the proceeds of land grants, subsidies from favored towns, and the sale of securities on the railroad to be built, the second mortgage bonds are nearly always rated at a nominal value, the stock is nominal, and only the first mortgage bonds are valued at anything near par. Certainly, no experienced financier would value \$16,000 per mile first mortgage bonds, \$7,000 per mile of second mortgage land-grant bonds, and \$20,000 per mile of nominal stock, on a line of railroad to be built from the city of Carrabelle to Augusta, Ga., as worth in cash anything more than from sixteen to eighteen thousand dollars per mile.

At the date of contract the company had succeeded in constructing 11½ miles. How this construction was paid for—whether by mortgage bonds or sales of stock—does not appear; but the record does show that Mr. William Clark has recovered a judgment against the company, presumably for sums advanced for constructing that part of the road built at the date of the contract, for the sum of \$432,228.42, which is at the rate of over \$37,500 per mile.

5. As to the laches of the company. The evidence shows that the money loaned by Kittel was paid over to the railroad company, and used by the officers of the company for company purposes; that the knowledge of the first loan, of \$25,000, was communicated to the principal director, Clark, a few days after the loan was made; that in December, 1889, about three months after its date, the mortgage was recorded in the state of Florida, and knowledge of that recordation was brought home to the directors other than Blake and Bailey. Until the answer was filed in this case, March 9, 1891, there was no repudiation of the loan and mortgage, no denial communicated to Kittel, on the part of the board of directors, of the authority of the president to execute the notes and grant the mortgage. True it is that in November, 1890, after Blake's resignation as president, the directors, by resolution, rescinded the minutes of the meeting of May 24, 1889, so far as they showed a resolution authorizing the president to execute a mortgage of the Florida lands; but this action was not notified to Kittel, nor followed by any proceedings to nullify the mortgage or return the loan. In the mean time the company spent the money, and recognized the validity of the transaction by paying interest and renewing the notes, and Director Clark obtained, by default, his large judgment against the company.

On the whole case, it seems to us that as Kittel loaned his money and took the mortgages in good faith, as the company had the benefit of the same, as the directors and officers of the company, by permitting Blake, president, to manage and control the affairs of the company without oversight and scrutiny, and by neglect of their duties and responsibilities enabled Blake and Bailey to deceive Kittel, if he was deceived, and as the directors and officers, after discovering the loan by and mortgage to Kittel, failed to take prompt action of disaffirmance, and otherwise were guilty of laches, the transactions had between Kittel and the company should be treated as fully ratified on the part of the company.

In Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256,

7 Sup. Ct. Rep. 542, it was held that where a board of directors, when notified of what had been done by their agents, did not disaffirm their action within six months, the disaffirmance came too late. This doctrine was affirmed in *Pennsylvania Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371-381, 9 Sup. Ct. Rep. 770, as follows:

"When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his acts."

And the same doctrine was again affirmed in *Construction Co. v. Fitzgerald*, 137 U. S. 109, 11 Sup. Ct. Rep. 36.

The decree appealed from should be affirmed; and it is so ordered.

CITY OF NEW ORLEANS v. PEAKE.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1892.)

No. 46.

1. APPEALABLE DECREE—FINALITY—CONFIRMATION OF SALE.

A creditor of the drainage fund held in trust by the city of New Orleans caused a receiver of the fund to be appointed, to whom, by order of court, a regular notarial transfer of its assets was made. Thereafter the receiver sold the property, and the court confirmed the sale. *Held*, that the decree of confirmation was a final decree, from which an appeal would lie to the circuit court of appeals, since it finally disposed of the possession and ownership of the property.

2. APPEAL—PARTIES.

It appearing from the record that the city was the main defendant in the court below, and that it claimed to be a large creditor of the fund, and entitled to preference over other creditors, it had an interest entitling it to appeal from the decree, notwithstanding that its title to the property was divested by the notarial transfer.

3. JUDICIAL SALE—VALIDITY—VARIANCE BETWEEN ORDER AND ADVERTISEMENTS.

The order of sale directed the delivery to the purchasers of good and valid titles free from all liens, mortgages, or incumbrances. In the advertisements of the sale the words "and taxes" were added. *Held* that, in the absence of objection by the purchaser, this variance was immaterial, especially as it appears to be the duty of the receiver, under Rev. St. La. § 3147, to either sell property free of taxes, or see that the taxes are paid before passing title.

4. SAME—SALE IN BLOCKS—STREETS.

The fact that the property was advertised and sold in blocks intersected by public streets does not show that the court either ordered or approved a sale of the fee in the streets, when it appears that the sale was in the same lots or blocks existing when the city acquired title, and when the property was transferred to the receiver by the notarial act, and that a large plat, showing the position of the streets, was exhibited at the sale, thus charging the purchasers with notice of their location.

5. SAME—SUBDIVISION.

It was not unlawful to sell the property in such blocks, when it appears that to survey and subdivide it would be very expensive, and without substantial benefit.

Appeal from the United States Circuit Court for the Eastern District of Louisiana.

In Equity. Bill by James W. Peake, a judgment creditor of the drainage fund of New Orleans, in his own behalf, as well as in behalf of other parties similarly situated, against the city, as trustee of the

fund, to close and liquidate the trust. A receiver was appointed to sell the property belonging to the fund, and the court below confirmed the sales made by him. The city appeals. Affirmed.

For decisions in prior litigation between the same parties, see 38 Fed. Rep. 779, and 11 Sup. Ct. Rep. 541.

E. A. O'Sullivan and Henry Renshaw, for appellant.

Richard De Gray and Chas. Louque, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The appellee, a large judgment creditor of the drainage fund held in trust by the city of New Orleans, filed his bill in the circuit court to close and liquidate the trust. After proceedings had thereon, a receiver was appointed, who caused an inventory of the property and assets of the fund to be made, and filed in the record. The court afterwards compelled the city of New Orleans to make a regular notarial transfer of these assets to the receiver. Thereafter the receiver applied to the court as follows:

"The petition of J. W. Gurley, receiver, in the case of *James W. Peake v. The City of New Orleans*, No. 12,008, with respect shows: 'That an act of transfer and assignment, executed in conformity to the orders of this honorable court, of dates 13th June, 1891, and December 5, 1891, and December 31, 1891, by the defendant, the city of New Orleans, of the property involved in this cause, is now on file, together with an inventory of the property transferred, made by Jos. D. Taylor, notary public; that it is necessary, in the interest of all parties, that said property be sold, and the proceeds thereof be brought into court to abide its further order; wherefore he prays for an order directing him to sell the said property at public auction, after due advertisement, for cash, and authorizing and empowering him to execute and deliver to the purchasers thereof good and sufficient titles, free from all liens, mortgages, and incumbrances, at the expense of such purchasers, if any.' "

And thereupon the following order was granted:

"Let the receiver sell the property contained in the said inventory, as prayed for, after advertisement in two newspapers, published in the city of New Orleans, viz., one published in the English and one in the French, for the term required by law for judicial sales of real estate at public auction, to the highest bidder for cash; and let the receiver be authorized and empowered to execute and deliver to the purchasers good and valid titles, free from all liens, mortgages, or incumbrances, if any there are.

[Signed]

"EDWARD C. BILLINGS, Judge."

In accordance with the order thus obtained, the receiver advertised for sale and made sale of a large portion of the lands embraced in the inventory. After the sale the receiver made full report, showing, among other things, what he had sold, and the prices received for the different lots. The aggregate receipts for all the lots sold were \$3,380. Upon this report the court ordered that the same be filed, and noted of record; and, further, that, if no opposition to the confirmation of said report of sales be made within eight days from the filing of said report, the same be and stand confirmed, and that the receiver proceed to

give title to the purchasers. Thereupon the city of New Orleans filed an opposition to the report of the receiver, setting forth the grounds of objection at length. After hearing evidence the court confirmed the sale, except as to one square of ground, on which the Dublin street draining machine is located. From this decree the city appealed.

In this court the motion is made to dismiss the appeal, on the grounds:

"(1) That the judgment appealed from is not a final judgment under section 6 of the laws of congress establishing the circuit courts of appeal, approved March 3, 1891. That no appeal lies to this court, except from a final judgment. (2) That the city of New Orleans shows no interest to appeal, inasmuch as she divested herself of all interest in the property sold by the act of transfer executed by her before J. D. Taylor, notary public, on the 11th of February, 1892."

This motion to dismiss is not well taken. The decree appealed from finally disposes of the possession and ownership of property. *Forgy v. Conrad*, 6 How. 201; *Ex parte Norton*, 108 U. S. 237, 2 Sup. Ct. Rep. 490. The record shows that the city of New Orleans is not only the main defendant in the suit below, but that she claims to be a creditor of the drainage fund to a large amount, and entitled to be paid by preference over other creditors; thus showing a direct interest in the funds to be obtained by the sale of the property in question.

The following is the assignment of errors:

"(1) That, there being a variance between the order of sale and the advertisement herein, in this: that the order of sale directed the delivery to the purchasers of good and valid titles, free from all liens, mortgages, or incumbrances, whereas the advertisement reads, 'free of all liens, mortgages, incumbrances, and taxes,'—the court erred in holding, as it did, that the said variance could be cured by the assumption by the purchasers of such taxes as might be due. (2) That the court erred in holding, as it did, that the advertisement under which the receiver proceeded to sell was legal, adequate, and sufficient to furnish the basis of acts translatable of property; and that the court erred especially in confirming, as it did, sales of property which, according to said advertisement, include the public streets of the city of New Orleans, said streets being inalienable. (3) That the court erred in not holding as unlawful the including of many pieces of property under a single head, as forming one block, and in not holding to be unlawful the offering for sale and adjudication herein of the aggregated pieces of property in block. (4) That the court erred in overruling the objections made by the city of New Orleans to the receiver's report, and to the confirmation of the alleged sales, in said report mentioned, and that, according to the evidence and the law applicable thereto, there should have been a decree in favor of opponent, the city of New Orleans, maintaining its opposition in all and singular the parts thereof, with costs."

1. The variance suggested between the order of sale and the advertisement as made does not prejudice the appellant. Besides, it appears to be the duty of the receiver, under the state law, (Rev. St. La. § 3147,) to either sell property free from taxes, or to see that the taxes are paid before passing title. Selling the property free from taxes tended to enhance the selling price. As the purchaser seems to be satisfied, there is no ground for contest.

2. The examination of the record shows that the receiver advertised and sold the property in lots according to the inventory which he had filed in court, and according to the act of transfer of the city of New Orleans to the receiver. In addition to this, it appears that the receiver was authorized by the court to employ, and did employ, a surveyor, who made a large plan, which was exhibited at the sale. The purchasers were thus fully charged with notice with regard to the public streets which intersected and subdivided some of the tracts of land sold; and, as said above, the purchasers, with full notice, seem to be satisfied. The contention that by the sale of the property under the advertisement the court either ordered or approved the sale of the public streets is not tenable.

3. As stated above, the sale of the property was made in the same lot or blocks as it was acquired by the city of New Orleans, the trustee of the drainage fund, and as transferred by the city to the receiver. The record shows that to have it surveyed and subdivided in smaller lots would be very expensive, and without substantial pecuniary result.

4. This is a general assignment that the court erred, the particular grounds being covered by the first three assignments. The opposition of the city of New Orleans to the confirmation of the sales made by the receiver is not accompanied with any averment that the property has been sold at an inferior price, or that a resale would furnish an advanced price, while the weight of the evidence is to the effect that the property brought fair prices, considering its character and location, and that a re-advertisement and sale would cost more than any possible increase of price that could be obtained. We conclude that there is no error in the decree appealed from prejudicial to the appellant, and the same is affirmed.

FLORIDA LAND & IMP. CO. v. MERRILL *et al.*

(Circuit Court of Appeals, Fifth Circuit. June 24, 1892.)

No. 48.

1. SALE—RESCISSION—FRAUDULENT REPRESENTATIONS.

A large tract of land was sold at an agreed price, a certain portion to be paid in cash and balance to be secured by mortgage. Subsequently the seller was induced, by false representations in regard to the solvency of a bank, to accept stock in it as part payment of the balance of the purchase price. The purchaser, who was president of the bank, organized a joint-stock company, and conveyed the land to it, taking mortgage bonds in payment, which were delivered to the bank in consideration of prior indebtedness to it. The bank and the intermediate parties knew of the fraudulent transaction. The bank soon after was declared insolvent, and a receiver appointed. *Held* that, since the bank was the real vendor of the stock, the seller was entitled to a complete rescission of the fraudulent sale.

2. SAME—SALE OF BANK STOCK—RIGHTS OF CREDITORS.

When bank stock is fraudulently sold, and the proceeds are turned over to the bank, and a receiver is subsequently appointed, no creditor of the bank can be said to have any such interest in the proceeds as would prevent restitution and a rescission of the sale; and such appointment of a receiver does not in itself show that there are creditors of the bank who had prior equities.

B. SAME.

A decision rescinding the sale, so as to restore to the purchaser the proceeds of the stock fraudulently sold, does not necessarily involve a decision that the purchaser is not liable to an assessment on the stock, if necessary to pay debts.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill by the Florida Land & Improvement Company against T. B. Merrill, as receiver of the First National Bank of Palatka, W. J. Winegar, and the Florida Land & Lumber Company, for the rescission of a fraudulent sale of bank stock. Bill dismissed on demurrer. Complainant appeals. Reversed.

H. Bisbee, for appellant.

J. N. Stripling, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This is an appeal from a decree dismissing the complainant's bill. The facts stated in the bill and exhibits thereto, and admitted by demurrer, briefly stated, are as follows: Appellant was the owner of about 104,819 acres of land in the county of Volusia, state of Florida, and at or about December 29, 1890, W. J. Winegar, one of the appellees, purchased said lands, paying at the time of purchase all the price except \$21,409.56, to secure which said Winegar was, according to the contract, to execute to appellant his promissory note secured by mortgage on said lands. Shortly after the contract of sale Winegar proposed to appellant to pay part of said balance of purchase money in the stock of the First National Bank of Palatka, Florida, of which said bank said Winegar was at that time and has ever since been president. Appellant, not being acquainted with the condition of said bank, requested Winegar as president to make a statement of its condition. The officers of the appellant company, the Florida Land & Improvement Company, resided in the city of Philadelphia, and had no means of knowing the condition of said bank except from the statements made by said Winegar. In reply Winegar wrote a letter, (Exhibit B of the amended bill of complaint,) saying the paid-up capital of the bank was \$150,000, with a present surplus of \$23,600, and deposits to the amount of \$250,000; and further saying that the dividends during the year 1890 were 7 per cent., and that it was expected that the next dividend would be at the rate of 5 per cent. for the half year, in order to bring up the average to 8 per cent. for last year, and that the present value of the stock was about from \$115 to \$120. These statements were false, and Winegar knew at the time of making them that they were false, and said bank was at that time utterly and hopelessly insolvent. Appellant, relying upon the statement of the said Winegar, president of said bank, accepted 100 shares of stock at \$115 per share, and took a mortgage for the balance of the purchase money, \$9,909.56, on the lands mentioned. This mortgage has been paid and satisfied. At or about the time of accepting the stock of said bank, ap-

pellant executed and delivered to said Winegar a good and sufficient deed of conveyance of the lands mentioned.

Winegar, soon after these lands were conveyed to him, organized the defendant company, the Florida Land & Lumber Company, of which company he became and still is the president. To this company Winegar conveyed the lands mentioned, and the Florida Land & Lumber Company then issued a series of bonds, to the amount of about \$108,400, par value, secured by a mortgage or deed of trust on said lands, said mortgage or deed of trust being given to the Manhattan Trust Company as trustee for the bondholders. The Manhattan Trust Company, though made defendant, has never been served with process, or otherwise brought into court. These bonds were given to Winegar in payment for the lands, and also a large quantity of capital stock of said defendant company was given to him. All, or nearly all, of the bonds and stock mentioned were delivered to the First National Bank of Palatka, in consideration only of past indebtedness of the said Winegar to the said bank, and no new consideration was paid by said bank for said bonds; and the bill charges said bank with full notice of the fraud practiced on appellant by said Winegar in imposing said worthless stock upon it; and also charges the receiver and all creditors and stockholders of the bank with full notice of said fraud. The Florida Land & Lumber Company, to whom said Winegar conveyed these lands, is also charged with full notice of said fraud through its president, Winegar. The bill further charges that the said shares of stock of the First National Bank of Palatka sold to Winegar by appellant were, at the time they were sold and delivered, the property of the bank; and that the said Winegar delivered the same for the benefit of the bank, and in order to obtain an appearance of assets for the said bank which, as before said, was totally insolvent.

The First National Bank of Palatka was declared insolvent on July 17, 1891, about six months after the making of the statement contained in Exhibit B, and the defendant T. B. Merrill was appointed receiver of the same on the ——— day of August, 1891. The receiver has in his possession the bonds and stock above referred to, and claims to be entitled to payment of said bonds before appellant is satisfied for the balance of the purchase price of said lands. The bill shows that the officers of the appellant company were not informed and knew nothing of the condition of the said bank until within a very short time before the filing of its bill of complaint. Appellant claims, on the state of facts set forth in the bill, to be entitled in equity to a vendor's lien on the lands conveyed to Winegar, superior to the claims of holders of bonds issued by the Florida Land & Lumber Company, for the balance of said purchase money due for said lands, and, as incidental to this relief, it asks that Merrill, as receiver of the bank, be restrained from selling, or in any wise disposing of, said bonds. Appellant further asks that said receiver be enjoined from levying or collecting any assessment on said bank stock, as against appellant. Alternative relief is also prayed in the bill, if for any reason the particular relief as mentioned should not

be proper. Defendants T. B. Merrill, as receiver, etc., the First National Bank of Palatka, and W. J. Winegar demurred to the bill on the general ground that there was no equity in it, and, on hearing, this demurrer was sustained, and a decree dismissing the bill was entered.

On the facts as stated, all admitted by the demurrer, the appellant has been defrauded of a property right, and is entitled to relief, unless, in the mean time, the rights of innocent third parties have intervened. The learned judge presiding in the circuit court gave no reasons in writing for his decision, and we are left to infer what they may have been. It is suggested in the briefs that the court held that, by the declaration of insolvency of the bank and the appointment of a receiver, the rights of innocent third parties, to wit, creditors of the bank, have intervened; and that as the receiver represents the creditors of the bank as well as the bank, although it did not appear that there were any creditors of the bank who had given credit to it on the faith of the bonds issued on the lands in controversy, yet the court would infer from the fact that the receiver had been appointed that there were creditors of the bank who were prior in equity to the appellant. As it is admitted that the bank stock, when fraudulently sold and delivered to the appellant, was the property of the bank, and that the proceeds of the fraudulent sale were at once turned over to the bank, and are now held by the receiver as the property of the bank, we do not understand how it can be that any creditor of the bank can have such an interest as would prevent restitution. The receiver representing creditors has only the rights of property possessed by the bank. It does not appear, nor it is to be inferred, that the receiver or the creditors of the bank have parted with anything of value upon the faith of the bonds fraudulently held by the bank, and to allow the receiver, on the theory that there may be some *bona fide* creditor of the bank, to retain the proceeds of the fraudulent sale, would be to give the creditors of the bank the fruits of a gross fraud, which, by taking and holding, would make them *particeps criminis*. 1 Story, Eq. Jur. 193a; Kerr, Fraud & M. 233.

Counsel for appellees contends in this court "that the capital stock of an incorporated company is a fund set apart for the payment of its debts;" citing *Sanger v. Upton*, 91 U. S. 56. And he says further:

"Under this principle the interests of the insolvent bank and its stockholders are secondary and contingent. They have no interest until the last obligation of the bank to its creditors shall have been fully discharged. After the payment of all debts they are entitled to the residuum. The creditors are interested parties, and under the circumstances the bill should allege that they had notice of the alleged fraud, and that the credit was not extended upon the faith of the bonds in question, nor upon the faith of appellant being a stockholder. Fraudulent misrepresentations of the officers of a bank made to stockholders at the time of purchase constitute no defense after its insolvency, and the appointment of a receiver."

Citing Benj. Sales, par. 709; Kerr, Fraud & M. pp. 48, 49; *Ogilvie v. Insurance Co.*, 22 How. 380; *Upton v. Tribilcock*, 91 U. S. 45; *Farrar v. Walker*, 3 Dill. 506, and note; *Upton v. Englehart*, Id., 496; *Duffield v. Barnum*, (Mich.) 31 N. W. Rep. 310; *Moore v. Jones*, 3 Woods, 53.

In our opinion these arguments and authorities do not apply in this case. This is not a case of subscription to the capital stock of an incorporated company, nor a case of transfer of stock by an ordinary stockholder, but it is a case where the bank as an actor made a fraudulent sale of its own stock, and now by its receiver holds the proceeds thus acquired. In other words, the receiver of the bank holds property that does not belong to the bank, to which neither he as receiver nor the creditors of the bank are entitled in equity and good conscience.

Further than this, on counsel's theory of the bill that the stock sold was Winegar's, and not the bank's, it is to be noticed that the scope of the bill covers two distinct subjects for equitable relief,—the one being to restore the appellant to the equitable right of which it has been divested, the other to protection from assessments and charges as a stockholder in the First National Bank of Palatka; appellant may be entitled to the one and not to the other. To withhold from the demands of the creditors of the bank property fraudulently acquired by the bank does not necessarily require a denial of an assessment on the stock of the bank, if necessary to pay debts. And in this view of the case we are clearly of the opinion that appellant is entitled to a rescission of the sale of stock in question, as against Winegar, the Florida Land & Improvement Company, and the First National Bank of Palatka; and also as against the receiver of the bank, at least so far as to restore to appellant the vendor's lien upon the lands described in the bill for the amount of the purchase price still unpaid, leaving the receiver to collect assessments on stock from such stockholders as under the law may be liable. Considering, however, as we do, that the bill charges and the demurrer admits that the bank was the real vendor of the stock, we think that in equity the appellant is entitled to have a complete rescission of the fraudulent transaction complained of. The decree sustaining the demurrer and dismissing the bill should be reversed; and it is so ordered.

UNITED STATES v. CULVER *et al.*

(Circuit Court, W. D. Arkansas. June 29, 1892.)

1. PUBLIC LANDS—CANCELLATION OF PATENT—MINERAL LANDS.

Section 2318 of the Revised Statutes of the United States provides "that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." In such case, the title of the lands in defendants could not be held valid because acquired against the law.

2. SAME—FRAUD.

If the lands are valuable for mineral, and they were purchased by defendants as agricultural lands, with the knowledge that they were mineral lands, the patent issued by the government would convey no title, because issued unadvisedly, or by mistake of an officer of the government while acting ministerially. In such a case, the parties purchasing the land are guilty of a fraud, and upon that ground a court of equity will pronounce the patent void.

3. SAME—PURCHASE IN GOOD FAITH.

Although there may be no fraudulent concealment by purchasers of the public land at cash entry, yet if, under the law, the lands were reserved from sale, it is the well-settled rule that purchasers obtain no title by their purchase; the sale is absolutely void.

(Syllabus by the Court.)

In Equity.

Statement by PARKER, District Judge:

This is a suit brought by the United States for the purpose of procuring the cancellation of two certain patents issued by the government to the defendants to certain lands named in the complaint. The complaint alleges that the lands are mineral, and were known to defendants to be such at the time they were purchased, and that the defendants made the government officers at the time of the purchase certain false and fraudulent statements relating thereto. The lands were purchased by defendant Culver under the proclamation of President Hayes, dated October 8, 1877, offering them, together with a large quantity of other lands, for sale, and were purchased by defendant Culver at the Camden land office, at private sale, about July 7, 1878. They were purchased as agricultural lands. Patents were issued on the 9th day of July, 1878, and on February 12, 1881, to Culver, and on May 11, 1881, Culver, by deed, conveyed the lands to his codefendant, Julian S. Rumsey, for a nominal consideration. That Rumsey was not an innocent purchaser from Culver, but that Culver was simply acting either as partner or agent of Rumsey, and that they both had full knowledge of the mineral character of the lands in question.

W. H. H. Clayton, U. S. Dist. Atty.

Sandels & Hill, for defendants.

PARKER, District Judge, (after stating the facts.) I am satisfied the evidence shows that the lands described in the complaint are lands valuable for mineral. That they are mineral lands, and that Charles E. Culver, the party who actually bought them by private cash entry, knew their mineral character at the time he bought them, and that Julian S. Rumsey, the ancestor of the other defendants, knew of their mineral character at the time Culver conveyed them to him. In fact, while the lands were entered in the name of Culver, they were entered for Culver and Rumsey. That they bought the lands because they desired to hold them as mineral lands. That they both had examined the lands in question, and had had them examined by a mineral expert, who reported to them his belief as to their mineral character. Their act in buying them by cash entry as agricultural land, with such knowledge as to their true character, would vitiate the sale by the government to these parties, and they would not be entitled to hold the land against the government, because of the fraud perpetrated by them upon the officers of the government. It is claimed by the defendants that these lands were thrown open to purchase by cash entry by the proclamation of President Rutherford B. Hayes of October 8, 1877. If they were lands valuable for mineral, they were not so thrown open to purchase by the said proc-

lamation, as the same expressly exempted from sale "all lands appropriated by law for the use of schools, military, or other purposes." If the lands were valuable for mineral by section 2318, Rev. St. U. S., they had already been appropriated for other purposes, and consequently they were not within the proclamation of the president. Section 2318 of the Revised Statutes of the United States provides "that in all cases lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law." If these lands were valuable for mineral, the defendant could have no title against the plaintiff, as the lands purchased by defendant Culver were not liable to purchase as agricultural land at the time of the purchase. In such case, the title of the lands in defendants could not be held valid, because acquired against the law. *Stoddard v. Chambers*, 2 How. 284. If the lands are valuable for mineral, and were knowingly purchased as agricultural lands, the patent issued by the government would convey no title, because issued unadvisedly, or by mistake of an officer of the government while acting ministerially. In such a case, a court of equity will pronounce the patent void. *U. S. v. Stone*, 2 Wall. 525. It is clearly a case where the executive officer had no authority to issue the patent, because the lands were not subject to cash entry as agricultural land. *Minter v. Crommelin*, 18 How. 87. If there was no fraudulent concealment by Culver and Julian Rumsey, but, under the law, the lands were reserved from sale, the rule is well settled that the defendants obtained no title by their purchase; that the sale is absolutely void. *Morton v. Nebraska*, 21 Wall. 660; *Sherman v. Buick*, 93 U. S. 216; *Stoddard v. Chambers*, *supra*. The preponderance of evidence shows that the lands are valuable for mineral, and that the defendant Culver and Julian Rumsey, the ancestor of the other defendants, knew this fact at the time of the purchase of the land.

Upon both legal grounds set out above, the patent must be held void, and a decree should be entered for the cancellation of the same, and it is so ordered.

FINN v. HOYT, Commissioner.

(District Court, D. Alaska. May, 1892.)

COMMISSIONERS' COURT OF ALASKA—JURISDICTION—MANDAMUS—OREGON STATUTES.

By section 5 of the act of May 17, 1884, providing a civil government for Alaska, four commissioners are to be appointed, who shall exercise all the duties and powers conferred on justices of the peace under the general laws of Oregon, which laws in force at that time are adopted as the laws of the district, so far as applicable. Code Civil Proc. Or. 2057, provides that a civil action in a justice court is commenced and prosecuted to final judgment in the manner provided for similar actions in courts of record. Sections 906 and 907 provide that justice courts are always open for the transaction of business, and that the rules of proceeding and evidence are the same as in courts of record. Section 940 declares that, when jurisdiction is conferred on a court or judicial officer, all the means to carry it into effect are given, and that, if no method of proceeding is specified, any suitable mode or process may be adopted. *Held*, that where a commissioner's court has obtained jurisdiction of a cause, but the commissioner is necessarily absent on the

day set for trial, he has authority to again bring the parties before him by issuing a proper action, and on his refusal to do so *mandamus* will lie to compel action looking towards final judgment.

Application by W. A. Finn for a writ of *mandamus* to compel W. R. Hoyt, United States commissioner, to proceed with the trial of a cause. Granted.

TRUITT, District Judge. This is an application by the petitioner for a writ of *mandamus* to issue out of this court, directed to said United States commissioner, commanding him "to proceed, adjudicate, and exercise his judicial functions and discretion," in a certain action pending in his court, by "rendering some judgment therein, and exercising his jurisdiction in said action until the same shall be legally disposed of by him." The facts as stated by the petition are that on the 18th day of December, 1891, the petitioner, as plaintiff, commenced an action in the said United States commissioner's court at Juneau, in this district, against the Eastern Alaska Mining & Milling Company, a private corporation, as defendant, for the recovery of the sum of \$241.78; that on the same day the action was commenced a summons and copy of the complaint in said action were duly served upon said defendant, requiring him to appear and answer said complaint, in the said court, on the 24th day of December, 1891. It further appears that for some reason no trial was had upon the day set therefor, but that thereafter the cause was continued from time to time, until January 9, 1892, "when, upon the application of defendant," the cause was duly continued until March 4, 1892, in order to enable defendant to take the deposition of one William Ebner to be used by defendant on the trial of said action; that on said last-mentioned day this deposition had not been received by the court, and at the "request of defendant's counsel plaintiff entered into stipulation with defendant," whereby the action was again continued until the 7th day of April, 1892, on which day it was set for trial by the court; and that some time after this, and before the 7th day of April, 1892, the said United States commissioner, "in obedience to the process issued out of the United States commissioner's court at Sitka, Alaska," left Juneau to appear there, and did not return home until the 8th day of April, 1892, the day after the one set for the trial of said action. From these facts it appears that the said commissioner was necessarily absent from his office on the day when this action should have been tried, but the plaintiff was there ready to proceed, and is certainly guilty of no laches in the matter. Upon this statement of facts the petition alleges that by reason of said absence at Sitka on the said 7th day of April, 1892, the day appointed for the trial of said action, the said United States commissioner "refuses to further act in said case, and render some judgment therein," or otherwise legally dispose of the same.

The organic act providing a civil government for Alaska, which was approved May 17, 1884, in section 5 thereof provides—

"That there shall be appointed, by the president, four commissioners in and for said district, who shall have jurisdiction and powers of commissioners of the United States circuit courts in any part of said district, but who shall reside, one at Sitka, one at Wrangel, one at Ounalaska, and one at Juneau City. Such commissioners shall exercise all the duties and powers, civil and criminal, now conferred on justices of the peace under the general laws of the state of Oregon, so far as the same may be applicable in said district, and may not be in conflict with this act or the laws of the United States."

Thus by an act of congress the general laws in force at that date in the state of Oregon were adopted as the laws of the district of Alaska, so far as applicable and not in conflict with the act itself or the laws of the United States, and as that part of said act which confers the jurisdiction of justices of the peace of said state upon said commissioners is applicable in this district, and not in conflict with the organic act or the laws of the United States, it is the law of the district; and we must therefore look to the laws of Oregon relating to justices of the peace for the jurisdiction, powers, and duties of these commissioners, when acting under or by virtue of the authority conferred by this part of said act, and, wherever the supreme court of said state has made decisions defining and prescribing them, such decisions should be received by said commissioners as the correct and binding interpretation of these laws.

A justice's court in Oregon is one of inferior and limited jurisdiction, deriving all its powers and authority by statute, without any of the presumptions in favor of the regularity of its proceedings which are indulged in favor of a court of record, and for these reasons it is necessary to examine the statutes to ascertain what its powers and duties are. Section 2051, Code Or., is as follows:

"The civil jurisdiction of justices' courts, and by whom and where and how holden, is prescribed by title 4 of chapter 11 of the Code of Civil Procedure."

In this title it is provided as follows, in sections 906 and 907 thereof:

"There are no particular terms of such court, but the same is always open for the transaction of business, according to the mode of proceeding prescribed for it. The mode of proceeding and the rules of evidence are the same in a justice's court as in a like action or proceeding in a court of record, except where otherwise specially provided."

And section 2057 provides that—

"A civil action in a justice's court is commenced and prosecuted to final determination, and judgment enforced therein, in the manner provided in the Code of Civil Procedure for similar actions in courts of record, except as in this act otherwise provided."

Now, it would hardly be claimed that a court of record in Oregon, having obtained jurisdiction of a cause, would lose the same by death, resignation, or absence of the judge of such court, and the last-named section gives a justice's court the same power to maintain its jurisdiction that a court of record has, except when otherwise provided. But the same question that is raised in this case has been before the supreme court of Oregon in the case of *Knapp v. King*, 6 Or. 243, where it is decided that, as a justice's court is always open for the transaction of busi-

ness, when it once acquires jurisdiction of the subject-matter of an action, there is always a court to exercise such jurisdiction until it is terminated in some legal manner. In a late case (*Southern Pac. Co. v. Russell*) reported in 20 Or. 459, 26 Pac. Rep. 304, this decision is approved. In this case a judgment, in form, was entered in the justice's court, but it proved to be void for want of jurisdiction of the person of the defendant, and the court vacated it, took up the original complaint, set a day for trial, and issued another or *alias* summons, and proceeded thereafter to render judgment against the defendant, who took a writ of review to the circuit court, which said court dismissed, and the defendant appealed to the supreme court. But the action of the circuit court was sustained and its decision affirmed. In closing the decision, LORD, J., says:

"It is clear, then, both on authority and principle, that the power of the justice was not exhausted or the case terminated, but that he was authorized to issue an *alias* summons and acquire jurisdiction of the defendant, which when obtained continued until the case was disposed of legally."

But in the case presented by this application the court not only has jurisdiction of the subject-matter of the action, but also of the defendant, who appears to have been in court, and took measures to secure the deposition of a certain witness on its behalf at one time, and at another time asked and secured a continuance of the cause, and for aught that appears is ready at any time, upon reasonable notice, to appear and proceed with the trial. I think the petitioner is entitled upon the showing made in the petition to have a writ of *mandamus* issued to the commissioner's court, directing it to take some action in the case named therein, and proceed according to law to dispose of the same in some way. Code Or. § 593, and also Wood on *Mandamus*, page 19, where it is stated:

"This writ lies to compel the performance of ministerial acts, and is also addressed to subordinate judicial tribunals, requiring them to exercise their judicial functions by rendering some judgment in cases legally before them, where there would be a failure of justice from a delay or refusal to act."

As an act of courtesy to the lower court, and to ascertain the facts more fully, I would have ordered the issuance of an alternative writ; but Judge Hoyt appeared by counsel when the petition was presented in open court, and it is admitted that the allegations therein are true, and that, as there has been a doubt in his mind as to his authority and jurisdiction in the matter, a ruling of this court upon the same is desired, and that with as little delay and expense to parties as possible. In the action now pending in the lower court, I think section 940 of the Oregon Code gives it ample power to bring the parties before it:

"When jurisdiction is by the organic power of this state, or by this Code or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

I think, under this provision, the court below might issue a notice requiring the defendant to be present at a certain hour of some day named, and not less than 6 nor more than 20 days from the date and service thereof, and stating that at said time said action would be taken up by said court and disposed of according to law. The writ of *mandamus* will therefore be issued as in the petition prayed for.

DWYER *et al.* v. ST. LOUIS & S. F. R. Co.

(Circuit Court, W. D. Arkansas. June 29, 1892.)

1. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

If a case is one which fairly depends upon the effect or weight of evidence, a court has no right to withdraw the case from the jury, unless the testimony be of such a conclusive character as to compel it, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it. The court may direct a verdict for the defendant, if the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside.

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—DANGEROUS PREMISES—NOTICE.

A yard master in the service of a railroad company is not required to quit the service of such company, or fail or refuse to perform the work devolving upon him, although he knew of the dangerous condition of the company's car yard, provided the same was not so far dangerous as to threaten immediate injury, or the condition of the car yard was not so dangerous but that the yard master, as a reasonably prudent man, could come to a well-grounded conclusion that he could safely perform his duty for the benefit of his employer. If the above conditions exist, and the yard master is killed in the discharge of his duty, without contributory fault on his part, his wife and children may recover of the company.

3. FEDERAL COURTS—DIRECTING SPECIAL FINDINGS—FOLLOWING STATE STATUTES.

The federal courts are not bound by a clause in the Code of a state with regard to the duty of courts to direct a jury to make special findings.

4. EXCESSIVE DAMAGES.

A court cannot interfere with a verdict of a jury on the ground of excessive damages, unless the damages are so excessive as to lead to the conclusion that the same is the fruit of passion or prejudice. To warrant a conclusion of that kind, the damages must be shocking to the sense of justice, or it must be manifest that the same are unreasonably large.

At Law. On motion for a new trial. Denied.

Rogers & Read, for plaintiffs.

B. R. Davidson, for defendant.

PARKER, District Judge. Suit against defendant by plaintiffs, as the wife and children of James Dwyer, deceased. Recovery prayed for on the ground that defendant negligently caused the death of James Dwyer, employe of defendant, in the capacity of yard master, at Ft. Smith, Ark. Jury trial had. Verdict for plaintiff for \$17,820. Defendant, by its counsel, files a motion for new trial. The first ground of said motion is that the court erred in overruling defendant's motion to require plaintiffs to elect on which count of complaint they would rely. There is no error in this action of the court. The plaintiffs relied on a state of negligence created by defendant. They simply set out in the

two counts of their complaint the facts upon which they relied to show a condition of negligence. There is here but one cause of action, and it arises from the negligence of defendant in killing James J. Dwyer. But if there were two separate causes of action they might be joined, and the plaintiffs could proceed to try both of them at the same time, as, where two causes of action of the same nature exist, they may be joined in the same complaint. Section 5014, Mansf. Dig. Laws Ark. par. 6, which provides "that all claims arising from injuries to persons or property may be joined," and, when so joined, they may, of course, be tried in the same suit; so I can see nothing in this ground for a new trial.

The second ground is that the court erred in admitting testimony over objection of defendant; and the third is that the court erred in excluding testimony offered by defendant. I do not consider either of these causes as having any weight, especially as no specific errors of this kind have been pointed out by counsel.

The fourth cause is that the court erred in overruling defendant's motion to instruct the jury to find the issues for the defendant. This cause is not one upon which a new trial can be granted, because there were facts on the side of plaintiff of such proving power as made it necessary that they should be passed on by the jury. The case is not of that character that can be taken by the court from the jury. It is one which, in my judgment, fairly depends upon the effect or weight of evidence, and such a case could not be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it. *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18; *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533; *Township of Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. Rep. 403. If the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant. Such is the rule laid down in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. Rep. 806; *Harris v. Railroad Co.*, 35 Fed. Rep. 116; *North P. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266. I am not able to say that the facts in this case warrant the application of the rule asked for by defendant.

The fifth cause for new trial is that the court erred in giving its charge to the jury as the law of the case over the objection of the defendant, the objectionable provisions at the time being specified or pointed out. Without dwelling in detail on the charge of the court as given, and on the propositions the court refused to give, I think the law was clearly and fully declared. To my mind, both reason, justice, and authority sustain the charge of the court. The following part of the charge is in relation to the fact that deceased was not called on either to quit the service, or fail or refuse to perform the work devolving on him, although he knew of the dangerous condition of defendant's car yard, provided the same was not so far dangerous as to threaten immediate injury, or

the condition of the yard was not so dangerous but that the deceased, James J. Dwyer, as a reasonable and prudent man, as he was, could come to a well-grounded conclusion that he could safely perform his duties for the benefit of his employer. If that was the case, then he acted with prudence and care, as measured by the acts of a man possessing these characteristics. In such a case, there would not be that case of patent, flagrant danger that would signal deceased to take no chances, or, if he took them, he did so at his peril. If the danger was no greater than that described in the charge of the court, then reasonable and prudent men in the performance of duty would confront such danger, and what such men would do, under such circumstances, the deceased might do without being chargeable with contributory negligence, as the rule for his guidance is derived from what reasonable men would do under the same circumstances. The above remarks apply with equal force to that part of the charge relating to the construction of the foreign fruit car, upon which rests one ground of the negligence of the defendant, as set out in the complaint. The authorities sustaining this principle are very numerous. The proposition is very clearly stated by Judge WALLACE in *Railroad Co. v. Young*, 49 Fed. Rep. 723, and many authorities are there referred to as sustaining the principle. Beach, Neg. 373, and notes; *Soeder v. Railway Co.*, 100 Mo. 673, 13 S. W. Rep. 714; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. Rep. 937.

The sixth cause is that the court erred in refusing instructions asked for by defendant numbered 6, 8, 9, and 10, and requiring instruction No. 10 to be qualified before giving same. There is no error in this, as the law relative to the case was fully given in the charge of the court, and the propositions asserted as named in this cause for new trial were properly refused.

The seventh cause is that the court erred in refusing to require the jury to make special findings as requested by defendant. The court is not bound by the clause of the Code of the state, in regard to the duties of courts, to direct special findings. In a case of this kind such findings can answer no good purpose. They may be used to put the jury in an inconsistent position, and thus afford a ground for an attack on their verdict by the court. It was no error for the court to refuse to instruct the jury to make special findings. *Association v. Barry*, 131 U. S. 120, 9 Sup. Ct. Rep. 755; *Railroad Co. v. Horst*, 93 U. S. 291; *Nudd v. Burrows*, 91 U. S. 426.

The eighth cause is that the verdict was contrary to and not supported by the evidence. I am not prepared to say that the verdict was against the evidence, or rather against its preponderance, nor can I correctly assert that the position set up in the ninth cause for new trial, that the verdict is contrary to the law as given by the court, is well taken.

The tenth cause is that the damages assessed were excessive, appearing to have been rendered under the influence of prejudice or passion. Excessive damages, appearing to have been given under the influence of passion or prejudice, are a good cause for a new trial, under the Code of the state. Section 5151, Mansf. Dig. At common law, if damages

given by a jury were so extravagant as to make it probable that the jury was actuated by passion or prejudice, a verdict might, upon this ground, be set aside. *Shumacher v. Railroad Co.*, 39 Fed. Rep. 174, and authorities there referred to. This is, substantially, the rule of the statute. When can a court interfere with a verdict on this ground? When can a court say the amount of damages is so excessive as to lead to the conclusion that the same is the fruit of passion or prejudice? The answer is, when the same is shocking to the sense of justice, or it is manifest the same is unreasonably large. *Railroad Co. v. Cella*, 42 Ark. 528.

Is that the case here? Is a verdict of \$17,820, as the compensatory price of the life of a man like Mr. Dwyer, so large as to shock the sense of justice? Or is it unreasonably large? He was a man of large experience in his calling. He was prudent, sober, industrious, careful with his earnings, devoted to his occupation, faithful in all respects to his family, with ability to earn from \$85 to \$90 per month. Physically, he was a strong, healthy man, with, according to the evidence, a life expectancy of 32 years. What is the life of such a man worth to his family? Take his earnings at \$85 per month for 32 years, and you have \$32,640. Or take off 10 years for old age, disability, and loss of time, and you have for 22 years, at \$1,020 per year, \$22,440. Making a liberal allowance for present payment, that is, for discounting the price of a human life, and when you take what the jury found, you do not have an amount shocking to the sense of justice. Nor is it manifest from their finding such an amount that the damages are unreasonably large. This is the test for the court, and it can be governed by no other. When we have a statute so barbaric, and almost brutal, as to prohibit the consideration by the jury of that terrible agony, grief, and suffering of the faithful wife and little children for their loss by death of such a husband and father as Dwyer, we should award fairly compensatory damages. The award should be made with a reasonably liberal spirit. Under this statute, man is considered only as an animal, a beast of burden, like a horse or a mule, with nothing to be considered when he is killed by negligence but his earning capacity. Then, under such a condition, when his earning power is fairly shown, and manifestly the jury have not gone beyond it in giving damages to his wife and children, we cannot infer that they have done that which is shocking to our sense of justice, or that they acted from passion or prejudice.

The eleventh ground, based upon the allegation of newly-discovered evidence, is not sustained as required by the law. I think the law on all the propositions involved was fairly given, and the subject-matter in controversy was fully stated. The evidence pro and con was weighed by the jury. I am not prepared to say the jury could not find from the evidence the truth of the propositions as claimed by plaintiffs. Upon the whole case, I can see no ground for interfering with the verdict. The motion for new trial is therefore overruled.

REUSENS v. STAPLES.

*(Circuit Court, W. D. Virginia. April 23, 1892.)***DEEDS—EXECUTION AND ACKNOWLEDGMENT—EFFACEMENT OF SEALS.**

Deeds executed in Massachusetts in 1800 and 1838 conveying land in Virginia, the signing and ensealing whereof were acknowledged and verified according to the registry acts then in force, (Acts Va. Dec. 1792, and Feb. 1819,) and duly admitted to record in pursuance thereof, must be held to have passed the legal title, although no seals appear upon the deeds at this date; for it will be presumed that the waxen seals then in use, and which were liable to be effaced, were properly affixed.

At Law.

Statement by PAUL, District Judge:

This was an action of ejectment brought by G. Reusens, a citizen of New York, against A. P. Staples, a citizen of Virginia, to recover 16,649 acres of land lying in Patrick county, Va. In the course of the trial the plaintiff offered in evidence, by way of tracing his title, two deeds, the first of which was from John Soley, of Boston, Mass., conveying 50,000 acres of land in Patrick county, Va., to John Miller Russell, of Charlestown, in the state aforesaid. (This deed also conveyed several other tracts of land lying in Bath and other counties in Virginia from said John Soley to said John Miller Russell, Joseph Russell, and John La Farge, but the said lands are not involved in the suit at bar.)

The attestations on said deed are as follows:

"In witness whereof the said John Soley, Jun'r, hath hereunto set his hand and seal this twentieth day of March, in the year of our Lord one thousand and eight hundred. JOHN SOLEY, Jun'r.

"Signed, sealed, and delivered in the presence of

"GEORGE BLAKE.

"WILLIAM ALLINE,

"JOHN PRYOR, Jr."

"*Commonwealth of Massachusetts, Suffolk:* On this twentieth day of March, in the year of our Lord one thousand eight hundred, before me, Wm. Alline, a justice of the peace for the county of Suffolk aforesaid, personally appeared Mr. John Soley and acknowledged the within written instrument by him subscribed to be his voluntary act and deed, and consented that the same should be entered of record. WM. ALLINE, Justice of Peace."

"*Commonwealth of Massachusetts, Suffolk—sc.:* At the supreme judicial court, begun and holden at Boston, within and for the county of Suffolk, on the third Tuesday of February, being the eighteenth day of said month, A. D. 1800, personally appeared before the court George Blake, William Alline, and John Pryor, Jun'r, the witnesses to this instrument, and severally make oath that they saw the said John Soley, Jun'r, sign, seal, and deliver the same as his free act and deed, and that they severally subscribed their names thereunto at the same time. JOHN TUCKER, Clerk."

"I certify that Tucker, Esquire, signer of the above, is now, and was at the time of signing the above acknowledgment, clerk of said supreme judicial court, and that full faith and credit are and ought to be given to his attestations as such. ISAAC PARKER, Chief Justice of said Court.

"Boston, August 19th, 1815."

(Here follows the certificate of the clerk of the county court of Bath county, Va., that said deed was admitted to record in his office on 19th February, 1818.)

"PATRICK COUNTY CLERK'S OFFICE, February 26th, 1818.

"*Virginia, to wit:* This instrument of writing from John Soley, Jun'r, to Miller Russell, and from said Russell to Joseph Russell and John La Farge, with the certificates indorsed thereon, was presented in said office and admitted to record.
SAMUEL STAPLES, Clerk."

The second of said deeds was from John Miller Russell, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, conveying to Henry O. Middleton, of Fredericksburg, in the state of Virginia, 50,000 acres of land lying in Patrick county, Va., described as being the same tract of land which was conveyed by "John Soley to this grantor by deed the 20th day of March, in the year of our Lord one thousand eight hundred."

The attestation clause of this said deed is as follows:

"In witness whereof the said John Miller Russell hath hereunto set his hand and seal this twentieth day of July, in the year of our Lord one thousand eight hundred and thirty-eight. JOHN MILLER RUSSELL.

"Signed, sealed, and delivered in the presence of

"HENRY M. CHAMBERLAIN.

"NATHAN FISKE."

"JULY 27TH, 1838.

"*Commonwealth of Massachusetts, Middlesex—ss.:* We, Nathan Fiske and Henry M. Chamberlain, justices of the peace in and for said county of Middlesex, do hereby certify that John Miller Russell, named grantor in the above instrument, personally appeared before us and acknowledged the same to be his act and deed on the day and year above written.

"NATHAN FISKE,

"HENRY M. CHAMBERLAIN,

"Justices of the Peace."

"JULY 27TH, 1838.

"*County of Middlesex, Commonwealth of Massachusetts:* I hereby certify that Nathan Fiske and Henry M. Chamberlain are and were magistrates at the time of taking the acknowledgment of the grantor in the above deed. In testimony whereof I, Elias Phinney, clerk of the supreme judicial court of the commonwealth of Massachusetts for the county of Middlesex, have hereunto set my hand and affixed the seal of said court this 27th day of July, 1838.

"ELIAS PHINNEY."

"25TH JANUARY, 1840.

"*In Patrick Clerk's Office:* This deed from John Miller Russell to Henry O. Middleton with the certificate of acknowledgment thereon indorsed (authenticated according to the act of congress) was presented in the clerk's office aforesaid, and admitted to record.
A. STAPLES, Clerk."

To the introduction of these deeds as evidence objection was made by the defendant on the ground that said deeds were not under seal, and instructions on this point were asked for by defendant's counsel.

P. Bouldin, Jr., D. S. Pierce, and E. E. Bouldin, for plaintiff.

N. H. Hairston and Berryman Green, for defendant.

PAUL, District Judge, (*after stating the facts.*) The Virginia act of assembly, passed December 13, 1792, provided as follows:

"1. That no estate of inheritance or freehold or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed, and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her, or their act before the general court, or the court of that district, county, city, or corporation in which the land conveyed, or some part thereof, lieth, or in the manner hereinafter directed within eight months after the time of sealing and delivering, and be lodged with the clerk of such court to be there recorded."

* * * * *

"5. If the party who shall sign and seal such writing reside not in Virginia, or in the district or county where the lands conveyed lie, the acknowledgment by such party, or the proof by the number of witnesses requisite, or the sealing and delivering of the writing, before any court of law, or the mayor or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court or mayor or chief magistrate in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within eighteen months after the sealing and delivering, where the party resides out of this commonwealth, and within eight months after the sealing and delivery where the party resides within this commonwealth, shall be as effectual as if it had been in the last-mentioned court."

So, also, the Virginia act of assembly, passed February 24, 1819, after re-enacting, in substance and without change so far as the case at bar is concerned, provided in its seventh section as follows:

7. Any deed may in like manner be admitted to record upon the certificate under seal of any two justices of the peace for any county or corporation within the United States, or any territory thereof, or within the District of Columbia, annexed to such deed, and to the following effect, to-wit:

"(*County or Corporation,*) *sc.*: We, A. B. and C. D., justices of the peace in the county (or corporation) aforesaid, in the state (or territory or district) of ———, do hereby certify that E. F., a party (or E. F. and G. H., etc., parties) to a certain deed, bearing date on the ——— day of ———, and hereto annexed, personally appeared before us, in our county (or corporation) aforesaid, and acknowledged the same to be his (or their) act and deed, and desired us to certify the said acknowledgment to the clerk of the county (or corporation) court of ———, in order that the said deed may be recorded. Given under our hands and seals this ——— day of ———.

"A. B. [Seal.]
"C. D. [Seal.]"

Now, the deed from John Soley, Jr., to John Miller Russell, dated 20th of March, 1800, was acknowledged and proved in a court of record of the state of Massachusetts in compliance with the requirements of the Virginia statute, (section 5, Act Dec. 13, 1792,) and it conveyed to said John Miller Russell the legal title to the land described in said deed. The deed from John Miller Russell to Henry O. Middleton, dated 27th day of July, 1838, was acknowledged before two justices of the peace in the state of Massachusetts, in compliance with the provisions of section

7 of the act of assembly of February 24, 1819, and conveyed the legal title to the land to the grantee, and not an equitable interest only, as contended by the defendant. The contention of counsel for the defendant that these deeds were not properly executed, because the seals do not appear attached to the signatures of the grantors, the attesting witnesses, and the justices before whom acknowledged, cannot be sustained. We must remember that at the time these deeds were executed the usual way of affixing a seal was by an impression in wax. The scroll, as used now, had not come into general use. The seals, being of wax, were liable to be effaced or broken off; hence the necessity of having witnesses to the signing and sealing. If, at this remote day from the execution of these ancient documents, we are at liberty to ignore their sanctity as sealed instruments, because the impression in wax is not to be found on them, or the scroll, its legally authorized substitute, in its stead, though we have the highest record evidence that the seals were attached to the documents at the time of their execution and delivery, it would go very far towards converting into equitable, what have been for a century regarded as legal, titles.

"A deed executed in Boston in December, 1798, by parties living there conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a person describing himself as clerk of the court, though no seal is attached to it." *Smith v. Chapman*, 10 Grat. 445. The instructions asking the court to construe these deeds as conveying only equitable interests must be refused.

TEXAS & P. RY. CO. v. LUDLAM.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 86.

CARRIERS—EJECTION OF PASSENGER—MEASURE OF DAMAGES.

In an action by a passenger against a railroad for being put off at K., nine miles from her destination, because, under the rules of the company, the train did not stop at the latter place, the court, without objection, gave an instruction which substantially declared the company's liability; and further stated that the measure of damages was the price of the ticket she purchased next morning from K. to her destination, and the increased damage suffered by reason of being left at K., instead of at some earlier place, provided that the conductor, by promptly informing her that the train did not stop at her destination, would have enabled her to stop at some other station, where she would have suffered less than she suffered at K. *Held*, that the rule as to the measure of damages was favorable to the company, as authorizing a lessening of the actual damages suffered, and the instruction was not objectionable as stating a conjectural or hypothetical case.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Affirmed.

W. W. Howe, (R. S. Lovett and F. H. Prendergast, on the brief,) for plaintiff in error.

J. A. Armistead, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This is a suit instituted in the circuit court by Emma Ludlam to recover damages from the Texas & Pacific Railway Company for violation of contract. From an adverse judgment the railway company prosecutes this writ of error.

The case is sufficiently stated in the following bill of exceptions, taken on the trial, to wit:

"Be it remembered, that on the trial of the above cause on February 9, 1892, the following facts were proven: Emma Ludlam, the plaintiff, an unmarried female, 21 years old, was traveling from Arkansas to Louisiana, her home, and desired to stop at Stalls, a station on the Texas & Pacific Railway, 53 miles south of Texarkana, to visit her brother. She had with her four small children under seven years old, and she had no other company or escort. On the evening of February 24, 1890, just after her arrival at Texarkana, a few minutes before the departure of the train to Stalls, she bought a ticket over the Texas & Pacific Railway from Texarkana to Stalls, and boarded the night train which leaves Texarkana at nine o'clock at night, and arrived at Stalls at eleven o'clock at night. Soon after leaving Texarkana, the conductor took up her ticket, and kept it. Just before the train arrived at Kildare, a station between Texarkana and Stalls, and nine miles from Stalls, the conductor informed her that his train did not stop at Stalls, and that she would have to get off at Kildare. She offered to pay the conductor to allow her to allow her to go on to Stalls. The conductor told her that he could not stop at Stalls; that, if he stopped there, somebody would be cutting up about it. She then asked him to take her to Lodi, a station between Kildare and Stalls. The conductor said he could not stop at Lodi either. The conductor put the plaintiff and children off at Kildare. She remained in the depot until next morning, and then took the next train, and went to Stalls, paying twenty-five cents for her ticket, and arrived at Stalls twelve hours later than she would if she had gone on the former train. Stalls is only a way station,—a side track. There is no depot or house there, the nearest house being one half mile, where plaintiff's brother lived; but her brother was to meet her at Stalls, and was there to receive her if she had come, and lived a half mile from the station at Stalls. There was a depot at Kildare, and an hotel within thirty or forty steps of the depot. Atlanta is a station between Kildare and Texarkana, and is a town of about 3,000 inhabitants, and has hotels and depot. Plaintiff was a stranger, and unacquainted in that part of the country. Plaintiff did not know that the night train did not stop at Stalls. She suffered from cold at Kildare. There was no fire in the depot, and it was a cold night. Plaintiff further proved that it was dark at Kildare. There was no light at the station at Kildare, and no one there at the depot to tell her where any hotel was; and, on account of the four small children being asleep, she could not leave them to hunt an hotel. Defendant proved that the night train that passed Stalls at eleven o'clock at night was a through fast train, and carried sleeping cars from St. Louis to El Paso; and by a rule and regulation of the company that train was not to stop at Stalls, but the day train did stop at Stalls. Plaintiff then proved that the night train did sometimes stop at Stalls to receive and put off passengers. Thereupon the court charged the jury as follows: 'The railway company had the right to run through trains that did not stop at Stalls, and it was the duty of plaintiff to inquire if the train on which she was about to take passage stopped at Stalls; but after she had boarded the train by mistake it was the duty of the conductor to act promptly, and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare. Now, it appears that the plaintiff was put off at Kildare. The measure of damages is the twenty-five cents she paid for the ticket at Kildare from there to Stalls, and also the damage she

suffered by reason of being left at Kildare, instead of being left at some other place between Kildare and Texarkana; that is, that if the conductor, by promptly informing plaintiff that his train did not stop at Stalls, would have enabled her to have stopped at some other station before reaching Kildare, where she would have suffered less than she suffered at Kildare, then she can recover the increased damage she suffered at Kildare over what she would have suffered at some other place." The defendant, at the time said charge was given, excepted to that part of the above charge which gives the plaintiff the right to recover for the additional suffering caused by her being left at Kildare, instead of some other station between Kildare and Texarkana, (1) because there is no pleading raising such an issue, or justifying a recovery on above ground; (2) and because there was no evidence that there was any place between Kildare and Texarkana where plaintiff would have suffered less than she suffered at Kildare; (3) and because there was no evidence that she would have stopped at any station before reaching Kildare if the conductor had promptly informed her that the train did not stop at Stalls. The court held the exceptions not well taken, and submitted the cause to the jury. The jury returned a verdict for plaintiff for \$200.25, and the court rendered judgment accordingly."

There are two grounds of complaint assigned as errors. The first is to part of the charge of the court to the jury in the following language:

"After she [plaintiff] had boarded the train by mistake, it was the duty of the conductor to act promptly and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare."

The record does not show that any exception was taken to the part of the charge quoted at the time it was delivered, nor to the charge as a whole; and it follows that, whether erroneous or not, it cannot be considered here. The only exception to the charge, or to a part thereof, taken in season, is the one referred to in the second assignment of errors, which relates entirely to the measure of damages, and is as follows:

"The measure of damages is the twenty-five cents (25c.) she paid for the ticket at Kildare from there to Stalls, and also the damage she suffered by reason of being left at Kildare, instead of being left at some other place between Kildare and Texarkana; that is, that if the conductor, by promptly informing plaintiff that his train did not stop at Stalls, would have enabled her to have stopped at some other station before reaching Kildare, where she would have suffered less, then she can recover the increased damage she suffered at Kildare over what she would have suffered at some other place."

It is urged that this was erroneous, because it is said there was no pleading in the case raising such an issue, or justifying a recovery on such grounds; that there was no evidence that there was any place between Kildare and Texarkana where plaintiff, if put off there, would have suffered less than she suffered at Kildare; and that there was no evidence that she would have stopped at any station before reaching Kildare, if the conductor had promptly informed her that the train did not stop at Stalls station; and it is said that the rule of damages thus given was on a supposed or conjectural state of facts in regard to which no evidence had been offered. In *U. S. v. Breitling*, 20 How. 252-255, it is declared:

"It is clearly error to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes

that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

An examination of the record shows that the plaintiff sued for violation of a contract of carriage as a passenger from Texarkana to Stalls, and the damages she claims are for not being carried through to her destination, and for being put off at Kildare, an intermediate station; all in violation of the contract. The defense was substantially that the plaintiff had taken a train of the defendant which, under the rules of the company, did not stop at Stalls; and that, as the conductor put the plaintiff off at the nearest stopping station to Stalls, there could be no recovery.

The facts recited in the bill of exceptions, as proven on the trial of the case, are not sufficiently full for this court to determine, even if the matter were open to inquiry, whether the plaintiff had made a case which would entitle her to go the jury upon the issues as made up in the pleadings. It does not appear that there were any public instructions posted at Texarkana as to whether the night train, or any other train of defendant, did or did not stop at Stalls station. It does not appear whether the plaintiff was or was not advised by any official of the company at Texarkana as to what train she should take to go to Stalls, other than the inference which can be drawn from the fact that a few minutes before the departure of the train the ticket agent of defendant sold the plaintiff a ticket from Texarkana to Stalls. Nor does the record show at what time—whether in first taking up her ticket or later—the conductor of the train informed the plaintiff she was on a through train, which would not stop at Stalls; and, finally, there is nothing in the record to show whether the defendant railway company operated any train from Texarkana which stopped at Stalls, although there is a statement that a train did stop at Stalls, but from where it started does not appear. We infer, from the absence of exception to the charge of the court as given, that there was no objection on either side to the law as given by the judge, "that the railway company had the right to run through trains that did not stop at Stalls; and it was the duty of plaintiff to inquire if the train on which she was about to take passage stopped at Stalls; but, after she had boarded the train by mistake, it was the duty of the conductor to act promptly, and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare." In other words, there seems to have been no objection on either side to the charge of the court substantially that the defendant was in fault, and for that fault plaintiff was entitled to recover; and this part of the charge, as we have said before, cannot be reviewed by this court.

As the plaintiff had sued for damages for being wrongfully put off at Kildare, and as, under the obligations of the defendant, as declared by the court without objection, she had the right to recover for such dam-

ages, it would seem that the charge complained of, which gives the rule of damages on account of plaintiff's being put off at Kildare, is not open to the charge of being hypothetical or conjectural. If the court was right in the proposition of law declared as to the liability of the defendant, and as to the right of the plaintiff to recover damages for being put off at Kildare, then it seems clear that the rule of damages given by the court was favorable to the defendant, as authorizing a lessening of the actual damages suffered by the plaintiff in being put off at Kildare, and gives plaintiff in error no ground for complaint in this court. On the record, as brought to this court, we see no other course than to affirm the judgment, and it is so ordered.

BANK OF EDGEFIELD v. FARMERS' CO-OPERATIVE MANUF'G CO.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1892.)

No. 27.

1. PLEADINGS—AMENDMENT—VERIFICATION.

In a suit in a federal court on certain notes, pleas filed alleging want of consideration, which are verified by an officer authorized under Code Ga. § 3450, to administer oaths, to wit, a justice of the peace, and afterwards sworn to at the trial before the clerk of the court and by the direction of the court, are sufficiently verified to make an issuable defense; and such verification before a clerk at the trial is allowable under Code Ga. § 3479 *et seq.*, as well as by Rev. St. U. S. § 954, providing that the court "may at any time permit either party to amend any defect in process or pleading" on certain conditions.

2. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTICE OF EQUITIES.

Where a bank takes three negotiable notes before maturity as collateral for money loaned, together with three other past-due protested notes by the same makers and indorsers, there being nothing on the face of the notes to indicate that they were given for the same consideration or formed part of one transaction, mere knowledge of the dishonor of the past-due notes will not operate as notice to the bank that the three notes not yet due were tainted by defective consideration, or of any equities existing between the original parties thereto, and the bank is entitled to recover the whole of the indebtedness of the borrower to it in a suit on such notes.

3. SAME—COMMERCIAL LAW—STATE DECISIONS.

When a bank advances money on certain negotiable notes, some of which are past due, the question of notice of any equities existing between the original parties, arising from knowledge on part of the bank of such overdue notes, is not a question of the construction of a contract, which is usually determined by the *locus contractus*, but is governed by the rule of commercial law which affects subsequent holders in the matter of notice of prior equities, and not by the statutes, rules, or decisions of the particular state where such notes were executed.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Action by the Bank of Edgefield against the Farmers' Co-operative Manufacturing Company on three promissory notes held as collateral security for a loan of \$1,239.77. Verdict and judgment for \$475.65 for plaintiff, who brings error. Reversed.

Statement by PARDEE, Circuit Judge:

The plaintiff in error filed a suit on the common-law side of the circuit court of the United States for the northern district of Georgia against the defendant in error, being an action upon three promissory notes, ag-

gregating \$5,270. Each of said notes was made at Griffin, Ga., on the 28th September, 1889, by the defendant in error, payable to the order of Smith & Vaile Company, a corporation organized under the laws, and being a citizen, of the state of Ohio. These three notes were afterwards, and before due, indorsed by Smith & Vaile Company to D. A. Tompkins, a citizen of, and residing in, the state of North Carolina, who then, before the notes became due, indorsed them for value to the plaintiff in error, a citizen of, and residing in, the state of South Carolina. The defendant in error filed certain pleas setting up the failure of consideration, which said pleas were sworn to by W. P. Walker, president of the defendant company, before a justice of the peace for Spalding county, in the state of Georgia.

When the case was called for trial in the court below, plaintiff in error moved for judgment, because there was no issuable defense filed under oath, as provided by the statutes of the state of Georgia and rules of court, plaintiff contending that the affidavit to the plea, made before a justice of the peace, constituted no sworn defense in the circuit court of the United States. The court ruled (a) that the affidavit was sufficient; and (b) that if it was not sufficient the plea could be sworn to then in open court; and the plea was thereupon sworn to by W. E. H. Searcy, president of the defendant company, before W. C. Carter, deputy clerk of the circuit court of the United States for the northern district of Georgia. Plaintiff then renewed the motion for judgment, because there could be no affidavit to a plea after the first term of the court. The court overruled this motion, and declined to permit the plaintiff to take judgment without a jury. The defendant then filed an additional plea, which was also sworn to before the deputy clerk, setting forth that, when the loan was made by the Bank of Edgefield to D. A. Tompkins, upon the three notes as collateral, certain of the notes which had been given by defendant to Smith & Vaile Company, and which were among those deposited as collateral security by Tompkins, were then due and unpaid; and that this was notice to the Bank of Edgefield; and that, if anything was due to plaintiff, it was only the amount first loaned to Tompkins, being \$500.

The other facts in the case sufficiently appear from the assignments of error, as follows:

"(1) That the court erred in not granting a judgment for plaintiff, as requested by its attorneys, upon the ground that there was no issuable defense filed under oath by defendant.

"(2) Because the court erred in not granting judgment for plaintiff, as requested by its attorneys, after defendant had been allowed to swear to its pleas in open court at the time of the trial.

"(3) Because the court erred in permitting the introduction of the depositions of M. H. Mims, cashier of plaintiff, which were offered by defendant at the trial, and objected to by plaintiff in open court and in presence of the jury.

"(4) Because the court erred in permitting W. E. H. Searcy, president of the defendant company, to testify in the cause over the objection of the plaintiff, made in open court in presence of the jury.

"(5) Because the court erred in not ruling out and excluding from the jury the depositions of said M. H. Mims and the testimony of W. E. H. Searcy, when the same was requested by attorney for plaintiff in open court and in presence of the jury.

"(6) Because the court erred in charging the jury as set forth in the transcript of the record.

"(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was. We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for \$500 each, which were the first three to mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes, as it is called in law, —the failure to pay them when they were due,—was notice to the bank of all the equities existing between the machinery company, Smith & Vaile Company, and the defendant corporation.'

"(8) Because the court erred in charging the jury as follows: 'So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Vaile Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter.'

"(9) Because the court erred in charging the jury as follows: 'About the date of that letter which you have in evidence, 28th February, 1890, I believe, there was an adjustment of this matter between Tompkins, agent or representative of the establishment that sold the machinery, and the president of the defendant corporation;' there having been no evidence adduced at the trial to authorize or justify such charge.

"(10) Because the court erred in charging the jury as follows: 'The proof shows that these notes were given for the purchase of certain machinery, and that that machinery was not delivered; that it was not to be delivered, however, until the three five hundred dollar notes were paid, and that these notes were not paid. The evidence is somewhat indefinite about that;' it appearing from the evidence that W. E. H. Searcy, a witness for defendant, positively and without dispute, that neither of the said three five hundred dollar notes were paid, the evidence not having in any wise been indefinite upon this point.

"(11) Because the court erred in charging the jury as follows: 'But Mr. Searcy stated they agreed he was to pay the interest on the entire transaction and the difference in freight. I do not believe that the bank is entitled to recover any more than that. I think, however, they are entitled to recover that;' there having no evidence to warrant such a charge, and the same being illegal and misleading.

"(12) Because the court erred in refusing to charge the jury, when so requested by counsel for plaintiff, as follows: 'If you find, as is admitted by the plaintiff, that the three notes for \$500 each were past due when they were transferred by Tompkins to the plaintiff bank, along with the three notes sued on, then this is not notice to the bank of all the equities existing between the defendant company and Smith & Vaile Company; nor was it evidence of a want or failure of consideration of the three notes not then due, and now sued upon. But you may consider the fact of the three \$500.00 notes being past due when the six notes were transferred to the plaintiff bank in determining from the evidence if that fact showed bad faith in the bank in

taking the notes not due, and, if it did, then the plaintiff cannot recover anything. But if you find from the evidence that, when the bank took the six notes, it took the three notes sued on before due, in good faith and for a valuable consideration, to wit, as collateral security for debt of D. A. Tompkins, then the plaintiff is entitled to recover the full amount called for by the three notes sued on.'

"(13) Because the court erred in taking a wholly erroneous view of the real issues and merits of the cause, and in permitting the defendant to introduce evidence of the equities existing between the defendant and Smith & Vaile Company, to whom the notes sued on were given, without there being any pleadings to justify the introduction of such evidence, and without there being any legal right on the part of the defendant to introduce testimony as to such equities; it not having been shown that the plaintiff took the three notes sued on without any knowledge of any failure of consideration or infirmity in the said notes, nor that plaintiff took said notes in bad faith."

Henry B. Tompkins, for plaintiff in error.

Hall & Hammond and *Disimukes & Mills*, (*John I. Hall* and *F. D. Disimukes*, of counsel,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The first and second assignments of error are not well taken. The plea in this case was sworn to originally before one of the officers mentioned in section 3450 of the Georgia Code, and in accordance with the Georgia practice, which we are inclined to think was sufficient verification to the plea filed in the circuit court; but, whether this be so or not, when the plea was afterwards sworn to in open court at the time of the trial, by the direction of the court, we have no doubt the plea was sufficiently verified. Code Ga. § 3479 *et seq.*, is very liberal with regard to the allowance of the amendments, and sufficiently broad, in our opinion, to cover this case. And section 954 of the Revised Statutes of the United States provides that the court "may, at any time, permit either of the parties to amend any defect in process or pleadings, and upon such conditions as it shall in its discretion and by its rules prescribe."

The seventh assignment of error seems to be well taken. It is as follows:

"(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was: We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for \$500 each, which were the first three to mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th of October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes—as it is called in law, the failure to pay them when they were due—was notice to the bank of all the equities existing between the machinery company, Smith & Vaile Company, and the defendant corporation.' "

There was nothing on the face of the notes to indicate that the three notes for \$500 each, which were past due when they, with the three

notes sued on, were deposited as collateral security with the plaintiff, were for the same consideration, or referred in any way to the same transaction, upon which the three notes sued upon were any of them issued. There is no proof in the case tending to show that the plaintiff had any knowledge whatever of the transaction or contract between the defendant and Smith & Vaile Company, or that the six notes constituted or formed part of one transaction. "Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is overdue and unpaid." Daniel, Neg. Inst. § 787.

The precise question was before the supreme court of the state of Wisconsin in the case of *Boss v. Hewitt*, 15 Wis. 260. In that case the court said:

"Upon the question whether the purchaser should be chargeable with notice of any defects in the consideration of the notes subsequently to become due by reason of the first being overdue at the time, no authority was cited by either counsel, and we have found none. The notes were all secured by one mortgage, and, if it had appeared on the face of the papers that they were all given for one consideration, upon one transaction, it might be urged, with considerable force, that, as the law charged the purchaser with notice of any defect in the consideration of the first note, it must also charge him with like notice that all were given for one consideration. But how that question should be decided, if it ever arises, can be then determined. But there was nothing on the face of the papers to show that the notes were all given for one consideration. It is true they bore the same date, and were secured by one mortgage. But it is frequently the case that parties, in giving securities, include debts arising out of many different transactions, as to some of which there might have been defenses not affecting the others; and we do not think that a purchaser of negotiable notes before maturity can be held chargeable with notice of any defect in their consideration from the mere fact that another note, secured by the same mortgage, was overdue, and had not been paid."

Boss v. Hewitt was affirmed in the supreme court of Wisconsin, 45 Wis. 110, citing *Bank v. Kirby*, 108 Mass. 497, and *Cromwell v. County of Sac*, 96 U. S. 51. In *Cromwell v. County of Sac*, affirmed in *Railway Co. v. Sprague*, 103 U. S. 756-762, and also in case of *Morgan v. U. S.*, 113 U. S. 476-502, 5 Sup. Ct. Rep. 588, it is held that the fact that installments of interest are overdue and unpaid is not sufficient to affect the position of one taking bonds and subsequent coupons before maturity for value, as a *bona fide* holder.

The defendant in error contends that the rule given in the judge's charge was correct, because section 2786 of the Code of Georgia provides as follows:

"If the holder receives it after it is due, its nonpayment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto; and if there be several notes constituting one transaction, but due at different times, the fact that the one is overdue and unpaid shall be notice to the purchaser of all, and put him on his guard."

And he cites the case of *Harrell v. Broxton*, 78 Ga. 129, 3 S. E. Rep. 5, to the same purport.

The plaintiff in error contends that the question of notice of equities existing between original parties in the case of commercial paper is regulated and determined by the commercial law, and not by the rule or decisions in any particular state; relying upon *Swift v. Tyson*, 16 Pet. 1; *Oates v. Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14; *Pana v. Bowler*, 107 U. S. 529-541, 2 Sup. Ct. Rep. 704; *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. Rep. 10; *King v. Doane*, 139 U. S. 173, 11 Sup. Ct. Rep. 465.

There is no doubt that the law of the place where the contract was made usually governs in the construction and enforcement thereof, and that the validity and effect of all writings or contracts are determined by the laws of the place where executed. The question presented here, however, is not with regard to the construction of the contract or its validity, but, rather, with regard to the rule of commercial law which affects subsequent holders in the matter of notice of prior equities. We are of the opinion that the general commercial law prevails, and not any particular rule or decision established in the state of Georgia either by the decisions of the supreme court of that state or by statute announcing a rule.

It has been settled in the courts of the United States since the leading case of *Goodman v. Simonds*, 20 How. 343, that one who acquires mercantile paper before maturity from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Swift v. Smith*, 102 U. S. 442; *King v. Doane*, 139 U. S. 166, 11 Sup. Ct. Rep. 465. It follows that, although the three notes of the same date as those acquired by the plaintiff were past due, and that the plaintiff was informed of that fact, still that would not be notice that the three notes not yet due were in any wise tainted by defective consideration, or for any other cause.

The eighth assignment of error seems also to be well taken. It is as follows:

"(8) Because the court erred in charging the jury as follows: 'So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Vaile Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter.'"

The proof in the case shows without dispute that the three promissory notes sued upon by plaintiff were held by it as collateral security to secure loans and discounts from time to time thereafter to D. A. Tompkins, whose total indebtedness to the plaintiff at the time suit was brought amounted to \$1,239.77. This evidence was produced by the defendant, and, as there is no evidence to the contrary, it is certainly

binding upon the defendant. "When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures if there be a valid defense against his transferor, being regarded as, at all events, a *bona fide* holder, and entitled to stand upon a better footing only *pro tanto*. Thus the holder could recover against an accommodation party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper." Daniel, Neg. Inst. § 832. To the same effect see *Stoddard v. Kimball*, 6 Cush. 469; *President, etc., v. Chapin*, 8 Metc. (Mass.) 40; *Fisher v. Fisher*, 98 Mass. 303; *Bank v. Roberts*, 45 Wis. 373; *Bank v. Werst*, 52 Iowa, 684, 3 N. W. Rep. 711; *Hatcher v. Bank*, 79 Ga. 547, 5 S. E. Rep. 111, and cases there cited.

The charge of the court, based on the theory that the plaintiff was not a *bona fide* holder, limiting plaintiff's right to recover to the amounts due by the defendant to Smith & Vaile Company, was probably correct, if the theory upon which it was based had been the correct theory of the case; but, as we have shown in considering the seventh assignment of error, that theory was wrong, and it follows that the charge of the court limiting the plaintiff's right to recover an amount less than the indebtedness of Tompkins to plaintiff was erroneous. A consideration of the other assignments of error is unnecessary. The judgment of the circuit court is reversed, with costs, and the cause is remanded, with instructions to order a new trial.

In re GREENE.

(Circuit Court, S. D. Ohio, W. D. August 4, 1892.)

1. HABEAS CORPUS—PRISONER HELD FOR REMOVAL TO ANOTHER DISTRICT—INDICTMENT.

On habeas corpus to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the right and duty of the circuit court to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending.

2. CRIMINAL LAW—OFFENSES AGAINST UNITED STATES—COMMON-LAW DEFINITIONS.

There are no common-law offenses against the United States, and the offenses cognizable in the federal courts are only such as the federal statutes define, provide a punishment for, and confer jurisdiction to try; but when congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it.

3. SAME—MONOPOLIES—INDICTMENT.

Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed.

4. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MONOPOLIES.

Congress has no authority, under the commerce clause or any other provision of the constitution, to limit the right of a corporation created by a state in the acqui-

sition, control, and disposition of property in the several states, and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce; and it is apparent that by the act of July 2, 1890, in relation to monopolies, congress did not intend to declare that the acquisition by a state corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several states, constituted a criminal offense.

5. **MONOPOLIES—RESTRAINT OF TRADE.**

To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the states, within the meaning of section 2 of said act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein.

6. **SAME—INDICTMENT.**

In an indictment under section 1 of the act of July 2, 1890, to protect trade and commerce against monopolies, one count alleged, in substance, that on a specified date defendants, under the guise of the Distilling & Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois, and that, by reason of the fact that said company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, defendants fixed the price at which the purchasers should and did sell such alcohol, and "did compel" said purchasers "to sell said alcohol at no less price than that fixed" by them, but there were no allegations as to the means of compulsion. *Held*, that it could not be assumed from these allegations that the means used was a contract with the purchasers, and the count was bad, as being too vague to charge any contract or restraint of trade between the states.

7. **SAME—RESTRAINT OF TRADE—WHAT CONSTITUTES.**

An arrangement whereby the said company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from such agents, and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not constitute a contract in restraint of trade, within the meaning of section 1 of said act, since the purchaser was not in any way bound to the performance of the conditions named; nor did such arrangement operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act.

8. **SAME.**

Nor was there any offense under the statute, even after the purchaser complied with the conditions of the promise, and thereby became entitled to the rebate, for such compliance had no retroactive effect to create a valid contract between the parties prior thereto.

9. **SAME.**

Even if the promise could be considered as a binding contract between the parties, the restraint thereby imposed was only partial and reasonable in the protection of defendant's business, and was not of the general character necessary to constitute an unlawful contract in restraint of trade. *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. pt. 1, p. 25, approved.

10. **SAME—INDICTMENT OF STOCKHOLDERS FOR ACTS OF CORPORATION.**

In indictments of individuals under the said statute, where all the acts alleged to constitute the offense are charged to have been done by a corporation, an omission to state what relation defendants bore to the corporation, other than that of stockholders, is fatal, since mere stockholders cannot be held criminally responsible for the acts of the corporation.

At Law. Petition by Louis H. Greene for a writ of *habeas corpus* to release him from the custody of the United States marshal, by whom he is held under a warrant of a United States commissioner, awaiting an order for his removal to the district of Massachusetts to answer an indictment for an alleged violation of the act of July 2, 1890, relating to monopolies. Prisoner discharged.

John W. Herron, for the United States.

Ramsey, Maxwell & Ramsey, for Greene.

JACKSON, Circuit Judge. The petitioner, a citizen and resident of Ohio, having been arrested and taken into the custody of the United

States marshal of this district upon a warrant of a United States commissioner, here to await an order of the judge of the district court, under section 1014 of the Revised Statutes, for his removal to the district of Massachusetts for trial upon an indictment found and pending therein against him and others for alleged violations of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," has applied to this court to be discharged from such custody, claiming that he is illegally restrained of his liberty; that said indictment against him in the district court of Massachusetts, on which his arrest and confinement is solely based, charges him with no offense against the United States under said act of July 2, 1890; and that said district court has no jurisdiction over either his person or the alleged offense on which it is sought to remove him there for trial.

It admits of no question that it is both the right and duty of this court, upon this application, to consider and determine whether the indictment pending against the petitioner in the district of Massachusetts charges either a criminal offense or one that comes within the jurisdiction of that court. It is well settled that upon application for an order of removal under section 1014, Rev. St., the district court or judge may properly look into the indictment to ascertain whether an offense against the United States is charged, and whether the court to which the accused is sought to be removed has jurisdiction of the same. In such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions. Such has been the uniform practice of the federal courts. *In re Buell*, 3 Dill. 116; *In re Doig*, 4 Fed. Rep. 193; *U. S. v. Brawner*, 7 Fed. Rep. 86; *U. S. v. Rogers*, 23 Fed. Rep. 658; *U. S. v. Fowkes*, 49 Fed. Rep. 50; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. These cases have recently been followed and approved by Judge RICKS in the case of *In re Corning*, (*U. S. v. Greenhut*), 51 Fed. Rep. 205, and by Judge LACOMBE in *Re Terrell*, (*U. S. v. Greenhut*), 51 Fed. Rep. 213, upon removal proceedings under the same, or substantially the same, indictment as that pending against petitioner. In the *Terrell Case*, Judge LACOMBE properly states that the same right and duty of looking into the indictment arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge, whose decision is thus reviewed, or under the warrant of the commissioner, to await the action of the district judge.

It is insisted by the district attorney, on behalf of the United States, that if the indictment is insufficient it must be met by a motion to quash, or some other appropriate proceeding in the court in which it is pending, and whose action would be subject to review; and the case of *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. Rep. 117, is relied on to support his contention that under *habeas corpus* proceedings the sufficiency of the indictment should not be inquired into. We do not understand that

decision as laying down any such general proposition as claimed for it in cases like the present. In that case the petitioners, being in the custody of the United States marshal under an indictment pending against them in the circuit court for the southern district of Georgia, applied to the supreme court for leave to file in said court their petition for a writ of *habeas corpus*, upon the grounds that the matters and things set forth and charged against them in the indictment did not constitute any offense under the laws of the United States, or cognizable in the circuit court. "In this posture of the case," say the supreme court, "we must decline to interfere." In this case it appears that the circuit court in which the indictment was pending had taken jurisdiction, and had the petitioners by its direction in the custody of its marshal, and no reason was shown for not invoking the judgment of said court upon the sufficiency of the indictment. The supreme court, in declining to interfere, acted in accordance with its well-settled rule not to issue or grant a writ of *habeas corpus* in the exercise of its original jurisdiction, except when the inferior court is acting without jurisdiction, or is exceeding its power to the prejudice of the party seeking relief. *In re Lane*, 135 U. S. 446, 10 Sup. Ct. Rep. 760; *Ex parte Mirzan*, 119 U. S. 584-586, 7 Sup. Ct. Rep. 341. It certainly did not intend to lay down the proposition that no other court than that in which an indictment was pending could look into the sufficiency of such indictment, or pass upon the question whether it charged an offense, or was within the proper jurisdiction of such court; for in the more recent case of *Horner v. U. S.*, 143 U. S. 214, 12 Sup. Ct. Rep. 410, it is said:

"The district judge, in exercising his jurisdiction under section 1014, Rev. St., to issue a warrant for the removal of Horner to the southern district of Illinois, had a right to determine whether or not the offense was within the jurisdiction of the district court of the United States for that district, and that determination was reviewable by *habeas corpus*."

In the second case of *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. Rep. 522, no question of removal to another district was involved, nor had any indictment been found; but the petitioner was simply held to await the action of the grand jury, and prematurely sought to raise, by *habeas corpus* proceedings, the question under examination, whether any offense had been committed. The present proceeding is essentially different, and comes within the rule stated above by Judge LACOMBE. If the indictment shows no offense committed against the United States in Massachusetts, the petitioner is unlawfully and illegally restrained of his liberty in being held in custody to await an order for his removal to that district for trial, and is entitled to the same measure of relief as though the removal had been ordered by the district judge. The right of the government to have the petitioner tried in the district of Massachusetts where the indictment is pending is not questioned if the case against him comes under section 731 of the Revised Statutes, providing that, "when any offense against the United States is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, deter-

mined, and punished in either district in the same manner as if it had been actually and wholly committed therein." There is, however, nothing in this provision of the law which deprives the court of the right and duty to look into the indictment to determine whether any offense against the United States is charged, and, if so, whether it was either begun or completed in the district of Massachusetts, so as to give the federal court there jurisdiction of the case. If, in cases like the present, the mere pendency of an indictment against a party in a state other than that of his domicile should be held to preclude all inquiry into the question whether he is charged with any offense against the United States, or whether the court wherein such indictment is pending has jurisdiction to try the accused, the rights of the citizen would be open to serious abuse. We are clearly of the opinion that the authorities establish a different rule, and we therefore proceed to the consideration of the indictment against the petitioner, to ascertain if any offense is charged against him, and, if so, whether the district court of Massachusetts has any jurisdiction in the premises.

The indictment is based upon alleged violations of sections 1 and 2 of the act of July 2, 1890, which read as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The indictment contains four counts. The 1st, 3d, and 4th allege violation of section 1, and the 2d count charges a violation of section 2. The 1st, 2d, and 3d counts recite, in the same general way, that on the 11th day of February, 1890, the petitioner and other associates, in the states of Ohio, Illinois, and New York, engaged with each other in a combination, in restraint of trade and commerce, in distillery products; that, for the purpose of restraining trade and commerce in said products among the several states of the United States, they, in the form and guise of a corporation known and designated as the Distilling & Cattle Feeding Company, which was on said 11th day of February, 1890, organized under the laws of Illinois, thereafter, and prior to August 1, 1890, obtained control, by purchase, renting, and leasing, 70 other distilleries within the United States used for the manufacture of said distilling products, which products were, on February 11, 1890, and continuously thereafter, up to the finding of the indictment, "a subject of trade and commerce among the several states of the said United States;" that each of said distilleries were, at the respective dates of their pur-

chase, renting, or leasing and running under said control, separate and distinct, and competing in the manufacture and sale of distilling products among the several states; that, in pursuance of said combination, they used, managed, and controlled all said distilleries, and by means thereof did, during the period last mentioned, manufacture and sell, and control the manufacture and sale, within the United States, of 77,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products made and sold within and among the United States during said period; that the condition of trade and commerce in said products among the several states during said period was such that, by controlling the manufacture and sale of 75 per cent. of said distillery products, they were able to control and fix the price at which they would sell such products to dealers therein in the several states, and to control and fix the price at which such dealers should sell the same to citizens of the several states during said period; that by said means they intended to control the amount of said distillery products manufactured and sold among the several states, and to control and fix the price at which said distillery products should be sold by all dealers therein among the several states, and in the state of Massachusetts, and to prevent and counteract the effect of free competition in the usual price at which said products were sold among and within the several states, and to increase and augment the usual price thereof, and thereby exact and procure great sums of money from the citizens of Massachusetts and other states purchasing distillery products, and to secure to themselves exclusively the trade and commerce in said distillery products, and by all the means aforesaid unlawfully to restrain the trade and commerce in such products among the several states of the United States.

The first count then alleges that, in pursuance of said purpose and intent, they, under the form and guise of said Distilling & Cattle Feeding Company, on October 3, 1890, did at Boston, within the district of Massachusetts, "negotiate a sale, and did sell," to the firm of D. T. Mills & Co., 5,642.82 proof gallons of alcohol, which was then in the state of Illinois; that by reason of said combination, and of their control of the large number of distilleries and the manufacture of 75 per cent. of all such products in the United States, they did fix the price at which said D. T. Mills & Co., who were dealers therein at Boston, should and did sell said alcohol within said district of Massachusetts, or for transportation into any other state, "and did compel said Mills & Co. to sell said alcohol within said district of Massachusetts for use in said district, or for transportation to other states of the United States, at no less price than that fixed" by the accused; that by this means they controlled the amount of distilled products sold within the state of Massachusetts, and did fix the price at which said products were sold by dealers in said state; that they thereby prevented and counteracted the effect of free competition on the usual price at which said products were sold within the state, and did increase and augment the usual price at which said distillery products were sold in the state of Massachusetts for use therein or transportation therefrom, and that they thereby, and by the means aforesaid, did "re-

strain the trade and commerce in said distilling products between the state of Massachusetts and the states of the said United States other than the state of Massachusetts," contrary to the form of the statutes in such case made and provided.

The second count, based upon the second section of the act, after the aforesaid general recital, charges an unlawful attempt to monopolize the trade and commerce in distillery products under the form and guise of said Distilling & Cattle Feeding Company; and the specific acts therein alleged are that on September 18, 1890, C. I. Hood, of Lowell, Mass., purchased from Webb & Harrison, as distributing agents of the accused, 526.52 proof gallons of alcohol; that the defendant, in the form and guise of the aforesaid company, promised said Hood a rebate of five cents per gallon on the purchase price of said alcohol, upon condition that for six months from the date of the promise he should have bought his supply or supplies of distillery products exclusively from said company's agents, and should not have sold any of the products so purchased at less than the company's distributing agents' list prices, and should furnish evidence of compliance with those conditions in the form of a certificate. This count alleges a similar arrangement with Kelly and Durkee on the sale to them, September 23, 1890, by the company's distributing agents, of 85.54 proof gallons of alcohol. It also sets out a list of the distributing agents from whom purchases could be made, and the agreement of the company as to the five cents per gallon rebate, and the condition on which it would be made. It is alleged that, by means of said premises and terms of rebate to said purchasers, the accused, under the form and guise aforesaid, did attempt to monopolize to themselves the trade and commerce in said distillery products among the several states, in violation of law.

The third count is based upon the first section of the act. It alleges an agreement made by the aforesaid company with C. I. Hood, at Lowell, Mass., on the sale to him of 518.88 gallons of said company's products, made October 2, 1890, for a rebate upon the same terms and conditions as set forth in the second count, by which arrangement and promise it is charged that the accused "did attempt to execute and carry out the purpose and intent aforesaid to restrain the trade and commerce in said distillery products among the several states of the said United States, and especially between the state of Massachusetts and other states of the United States, against the peace," etc.

The fourth count is also founded upon section 1 of the act. It sets out a contract or agreement of the Distilling & Cattle Feeding Company with Kelly and Durkee, bearing date at Peoria, Ill., September 23, 1891, promising to pay the latter \$4.27 as a rebate of 5 cents per gallon on 85.54 proof gallons of the company products purchased that day, upon the same terms and conditions as alleged in the second and third counts; and then sets forth the certificate of said Kelly and Durkee that they had since the date of the agreement purchased all their supply of such goods as are produced by the Distilling & Cattle Feeding Company, exclusively from one or more of the dealers or distributing agents of the company,

of which a list is attached. This certificate bears date May 7, 1892, and it is charged that the purchaser's compliance with the terms and conditions on which the company promised to make or pay the 5 cents per gallon on rebate was a contract in restraint of trade and commerce, within the provisions of the statute.

In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and that congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Britton*, 108 U. S. 199-206, 2 Sup. Ct. Rep. 531.

When congress, under and in the exercise of powers conferred by the constitution, adopts or creates common-law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198. The act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the states and foreign countries were not only illegal, but should constitute criminal offenses against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime, in making contracts in restraint of trade misdemeanors, and indictable as such. But the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmonds*, 96 U. S. 360; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512; *U. S. v. Trumbull*, 46 Fed. Rep. 755.

Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several

states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused "engaged in a combination," or "made contracts in restraint" of such trade or commerce, or "monopolized" or "attempted to monopolize" the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: "Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth." *U. S. v. Cruikshank*, 92 U. S. 542, 563.

Do the particular facts set forth in the indictment constitute violation of the statute? In construing and applying the provisions of the act to the specific offenses charged, it must be assumed that congress did not intend to make the enactment either retroactive or give it an *ex post facto* operation and effect. No criminality can therefore be ascribed to the acts of the accused in respect to their recited combination on February 11, 1890, in restraint of trade and commerce in distillery products by means of the Distilling & Cattle Feeding Company, a corporation organized by them on that day under the laws of Illinois, and its acquisition and control prior to the passage of the act of July 2, 1890, of 70 other distilleries, which enabled said company to manufacture and sell 70,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products manufactured and sold in the United States between the date or dates of acquiring said distilleries and the finding of the indictment. It is not alleged that this acquisition and control of the 70 other distilleries by the accused or by the Distilling & Cattle Feeding Company, by means of which this large production was secured, was in any respect unlawful; nor is it alleged, or even recited, that the parties from whom said 70 other distilleries were acquired, were by contract restrained from thereafter engaging in the distillery business, either generally or partially. From anything averred or recited to the contrary, it must be presumed, in this proceeding, that the defendants, or the Distilling & Cattle Feeding Company, in whose form and guise the accused is said to have acted, were in the rightful possession and control of the numerous distilleries employed by them in the manufacture of distilled products; and the quantity of such products, whether large or small, can in no way affect the right of disposition incident to lawful ownership. Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the states, or the citi-

zens of the states, in the acquisition, control, and disposition of property. Neither can congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several states or with foreign nations. Commerce among the states, within the exclusive regulating power of congress, "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826. In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or *situs* to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the states ceases, and that of congress attaches and continues, until it has reached another state, and become mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517-520, 6 Sup. Ct. Rep. 475; *Robbins v. 52 F. no. 1*—8

v. Taxing Dist., 120 U. S. 497, 7 Sup. Ct. Rep. 592; and *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6. In the latter case the supreme court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other states, was not commerce, falling within the regulating powers of congress.

Stripping the indictment of its verbiage,—its general recitals and conclusions of law,—does either count thereof charge any real offense against the United States over which the district court of Massachusetts has jurisdiction? The specific offense charged in the first count is that the defendants, under the form and guise of the Distilling & Cattle Feeding Company, sold on October 3, 1890, to Mills and Gaffield, copartners under the name of D. T. Mills & Co., a certain quantity of distilled products then in the state of Illinois; that, by reason of said Distilling & Cattle Feeding Company's controlling the manufacture and sale of 75 per cent. of all such products in the United States, they fixed the price at which said purchasers should and did sell said alcohol for use in Massachusetts, or for transportation into any other state, "and did compel said Mills and Gaffield, as copartners, to sell said alcohol at no less price than that fixed" by them. It is not alleged how said Boston purchasers were "compelled" to sell at the prices fixed by the defendants, nor how, or under what arrangement, the defendants fixed the price at which the alcohol should be sold in Massachusetts, or for transportation therefrom. Was it one of the provisions of the contract of sale and purchase, or was it by a combination or conspiracy between the defendants and the Boston purchasers? The means described by which the defendants were enabled to fix the price at which the purchasers should sell the alcohol was certainly not a "contract, combination, or conspiracy in restraint of trade and commerce among the states." If they, by force or duress, "compelled" the purchasers to sell at a price fixed by them, such compulsion would not constitute either a contract, combination, or conspiracy in restraint of trade. It cannot be assumed, under the language employed in this count, that there was any "contract" between the defendants and Mills and Gaffield which by its terms and provisions restrained the latter in respect to the price at which they should or did sell the alcohol. The count certainly charges no "combination or conspiracy," within the meaning of the act, between the defendants and the Boston purchasers. The charge is too vague and general to show a "contract" in restraint of trade; such as the first section of the act contemplates and declares illegal. It cannot be aided by presumption or intendment. It is bad upon its face, and charges no offense committed in the state of Massachusetts of which the United States courts in that state could take jurisdiction.

The second count charges an attempt on the part of defendants to monopolize to themselves, under the form and guise of said Distilling & Cattle Feeding Company, the trade and commerce in distillery products among the several states, and between the state of Massachusetts and other states; the special acts on which this charge is based being that,

on the purchase of certain quantities of alcohol by C. I. Hood, and Kelly & Durkee, (citizens and residents of Massachusetts,) in September, 1890, from certain distributing agents of the Distilling & Cattle Feeding Company, the defendants, under the form and guise of said company, agreed and promised that if said purchasers would, for a certain designated period, (six months,) buy all their supply or supplies of distillery products exclusively from said company's distributing agents, (two of whom, as appears in the count, were located at Boston, Mass.,) and would not sell the alcohol or other distillery products so purchased at any lower prices than the list prices of such distributing agents, and would make a proper certificate of such facts, then the said Distilling & Cattle Feeding Company would make and pay to said purchasers a rebate of five cents per gallon on each gallon purchased by them. The third and fourth counts set out substantially the same arrangement and agreement as to the payment of a rebate of five cents per gallon upon the purchasers' compliance, during the period stated, with the aforesaid terms and conditions, and charge the same to have been contracts in restraint of trade and commerce among the states, within the purview of the statute. We may therefore consider those three counts together. Do the facts therein set forth constitute either an "attempt to monopolize" trade and commerce in distillery products among the states, or contracts in restraint of such trade? It is not very clear what congress meant by the second section of the act of July 2, 1890, in declaring it a misdemeanor to "monopolize," or "attempt to monopolize," any part of the trade or commerce among the states or with foreign nations. It is very certain that congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.

A "monopoly," in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more

individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone, (4 Bl. Comm. 159,) and by Lord Coke, (3 Co. Inst. 181,) it is a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the act was under consideration in the senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term "monopoly" to mean; one of them saying: "It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." Another senator defined the term in the language of Webster's Dictionary: "To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade." It will be noticed that, in all the foregoing definitions of "monopoly," there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an "attempt to monopolize" any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a "monopoly," in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the 70 distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration.

Was the arrangement with the Boston purchasers, as to making them a rebate upon the conditions stated, an attempt to monopolize any part of the trade and commerce among the states in distillery products? It is not alleged, nor is it to be inferred from anything that is set forth, that said purchasers bound themselves, or entered into any contractual

obligations or understanding, to buy their distillery supplies exclusively from the distributing agents of said Distilling & Cattle Feeding Company. They were left at perfect liberty to purchase when, where, or from whom they pleased. No contractual or other restraint was placed upon them. Upon certain conditions, which it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said distilling company or its distributing agents. But, suppose it did, there was nothing in such an agreement unlawful or in contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an "attempt to monopolize," when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no "attempt to monopolize any part of the trade or commerce among the states." The rebate promised, upon condition of exclusive purchases and not underselling the vendor's distributing agents, was a legitimate method of inducing trade; but the means thus employed in no way operated to prevent or restrain others from offering the same, or greater, inducements. The condition as to not selling at lower prices than those of the distributing agents may have had a tendency to maintain prices, but that would not have been an attempt to monopolize trade. The inducements offered for the exclusive trade, and to sell at no lower prices than the price list of the distributing agents, was not prejudicial to the public. It was in no way contrary to public policy, or an unlawful restraint of trade, as will be seen from the authorities hereinafter referred to. But, aside from this, it is not shown that said arrangement necessarily involved or related to interstate traffic. It is not alleged that Webb & Harrison, the distributing agents, from whom Hood and Kelly and Durkee made their purchases of alcohol, were located or made such sales in some other state than Massachusetts; nor that the alcohol itself was beyond the limits of that state when purchased. Neither is it shown that the exclusive purchases thereafter to be made, as one of the conditions on which the rebate was to be paid, could not have been made in the state of Massachusetts, it appearing from the face of the count that two of such distributing agents were located at Boston, in said state. Without dwelling further upon its consideration, we are clearly of the opinion that this second count fails to charge any offense against the petitioner.

What has been already said applies largely to the third and fourth counts. The matter of the promised rebate upon the same conditions as set forth in the second count, which is charged to have been a con-

tract in restraint of trade and commerce among the states, and between the state of Massachusetts and other states, does not constitute any offense against the United States, or in any way contravene the first section of the act of July 2, 1890, because there was actually no contract which bound, or attempted to bind, the Massachusetts purchasers of alcohol, as to where or from whom they would make further purchases during the period stated, nor as to the price or prices at which they should sell. They were simply offered an inducement in respect to those matters, which they were at perfect liberty to comply with or decline. They were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions as alleged in the fourth count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties prior thereto, or during the period intervening between the date of the promise and the full compliance with the conditions on which the rebate was to be paid. During that period there was between the parties no contract in restraint of trade. But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. It is not deemed necessary to review the authorities upon the subject of contracts in restraint of trade, nor would it be at all profitable. It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful. The arrangement under consideration cannot possibly be considered as one in general restraint of trade. Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when, and under what circumstances, the restraint would be reasonable, and when it would be excessive. *Naviga-tion Co. v. Winsor*, 20 Wall. 64-68; *Beal v. Chase*, 31 Mich. 490; *Ward v. Byrne*, 5 Mees. & W. 549; *Horner v. Graves*, 7 Bing. 735; *Mallan v. May*, 11 Mees. & W. 667; *Whittaker v. Howe*, 3 Beav. 383; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335. In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business. It was not an unlawful contract in restraint of trade. The authorities fully support this conclusion. In addition to those referred to above, we cite the following: *Brown v. Rounsavell*, 78 Ill. 589; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Chicago, etc., R. Co. v. Pullman South. Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. pt. 1, p. 25, (decided by the house of lords in December, 1891.) In this latter case there was a combination or association of ship owners who, being engaged in the trade with China, with a view of obtaining a monopoly of the homeward tea trade and ex-

cluding the plaintiffs from competing with them for the same, and thereby keep up freight, offered to rebate or repay every sixth month, to such merchants and shippers in China as should have shipped their tea exclusively in vessels of the association, 5 per cent. on all freight paid by them. The plaintiffs, as rival and competing ship owners, were thereby excluded from this business, and sued for damages, and the question (almost identical with that under consideration) was presented whether the combination and arrangement adopted by the association to secure the exclusive transportation of tea trade was in any way unlawful. It was first passed upon, and held to be free from objection, by Lord COLERIDGE. 21 Q. B. Div. 554, 4 Ry. & Corp. Law J. 611. His decision was sustained on appeal, (23 Q. B. Div. 598, 7 Ry. & Corp. Law J. 223,) and was finally affirmed by the house of lords. It would be highly instructive to quote at length from the opinions delivered in the house of lords, if the limits of this opinion permitted. The reasoning and conclusions there reached fully sustain our conclusions in the present case.

But there is another and fatal objection to all the counts of this indictment. All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. By the eighth section of the statute, it is provided "that the word 'person' or 'persons' wherever used in that act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." If the acts charged constitute criminal offenses, the Distilling & Cattle Feeding Company is the "person" who has committed the same. It would be unheard of in criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law. without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation. We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the statute will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations, which the state courts have in most instances declared illegal. The conclusion of the court is that the petitioner, Lewis H. Greene, should be discharged, and it is accordingly so ordered and adjudged.

UNITED STATES *v.* STEVENS.

(District Court, W. D. Virginia. April 16, 1891.)

1. COUNTERFEITING—NOTES IN THE SIMILITUDE OF TREASURY OR NATIONAL BANK NOTES.

The fact that a note was originally issued by a duly-authorized state bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, under section 5430 of the Revised Statutes, if he has it in possession with intent to sell or otherwise use it, and pass it as a genuine note or obligation of the United States.

2. SAME—PROVINCE OF THE COURT AND JURY.

The question as to the similitude of such note to the treasury notes or other obligations of the United States is a question to be decided by the jury, as are also the facts as to whether the defendant had the note in question in his possession with intent to sell or otherwise use the same, and whether he knew at the time that said note was worthless.

At Law.

Harrison Stevens had been indicted under the provisions of section 5430 of the Revised Statutes of the United States for having in his possession or custody, without authority from the secretary of the treasury or other proper officer, an obligation or other security engraved and printed after the similitude of an obligation or other security, issued under the authority of the United States, with intent to sell or otherwise use the same. In the progress of the trial the evidence disclosed that the obligation or security in question was a genuine note of the Bank of Mecklenburg, N. C., a state bank which, during its existence, had issued its obligations as lawful currency, but which had become utterly insolvent, leaving its circulating notes unprovided for and worthless; upon which disclosure counsel for defendant moved the court to arrest the trial, and instruct the jury that the having of such a note or obligation as described by the evidence in this case in possession, without authority from the secretary of the treasury or other proper officer, as alleged in the indictment, with the intent alleged in the indictment, was not a violation of the section of the Revised Statutes of the United States cited in the indictment. Motion denied.

W. E. Craig, U. S. Atty.

E. B. Withers, for defendant.

PAUL, District Judge. The indictment in this case is under the following provision of section 5430 of the Revised Statutes of the United States:

"Every person * * * who has in his possession or custody, except under authority from the secretary of the treasury or other proper officer, any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, * * * shall be punished [in the manner prescribed in the statute.]"

The evidence before the court, at present, shows that the note or obligation which the defendant is charged with having had in his pos-

session, with intent to sell or otherwise use the same, was a note issued by a regularly chartered state bank, but which at the time defendant is alleged to have had in his possession the note in question was utterly insolvent and its notes worthless. The question presented to the court for its decision is, is the having in possession, without authority from the secretary of the treasury or other proper officer, with intent to sell or otherwise use, the notes of a broken bank, the said notes being worthless, but being engraved and printed after the similitude of a United States treasury or national bank note, a violation of the provision of the statute cited? The object of the provision of the statute under which this indictment is framed is manifestly to preserve the integrity of the national treasury and bank note currency, and to prevent the imposition on the public of worthless notes or obligations of any kind purporting to be the genuine obligations of the United States. It seems to the court that the fact that the note in question was originally issued by a duly-authorized bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, if he has it in possession with intent to sell or otherwise use and pass it as a genuine note or obligation of the United States. The possession of such a note or obligation, with intent to sell or otherwise use it, falls within the mischief intended to be prevented by the statute. "To constitute the offense, it is not essential that the fraudulent note or obligation should on its face purport to be an obligation of the United States." *U. S. v. Williams*, 14 Fed. Rep. 551. The question as to the similitude of the note alleged to have been passed by the defendant to the treasury or national bank notes or other obligations of the United States is a question to be determined by the jury, as are also the facts as to whether the defendant had the note in question in his possession with intent to sell or otherwise use the same, and as to whether he knew at the time that said note was worthless.

Verdict, "Not guilty."

In re H. B. CLAFLIN Co.

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

CUSTOMS DUTIES—CLASSIFICATION—HEMSTITCHED HANDKERCHIEFS.

Hemstitched cotton handkerchiefs, known as such in trade and commerce at the time the tariff act of 1883 was passed, are not "hemmed handkerchiefs," within Schedule I, par. 325, thereof, imposing a duty of 40 per cent. *ad valorem*, but are dutiable at 35 per cent. *ad valorem*, under paragraph 824 of the same schedule, as "manufactures of cotton not specially enumerated." *WALLACE, J.*, dissenting. 47 Fed. Rep. 876, affirmed.

Appeal from the circuit court of the United States for the Southern District of New York.

Application by H. B. Claflin Company for a review of a decision by the board of general appraisers, as to the classification of certain imported hemstitched cotton handkerchiefs. The collector had held that the goods were "hemmed handkerchiefs," within the meaning of the act of

March 3, 1883, Schedule I, par. 325, and accordingly assessed a duty of 40 per cent. *ad valorem*. The importers protested, claiming that the goods were dutiable at 35 per cent., under paragraph 324 of the same schedule, as "manufactures of cotton not specially enumerated," and the collector's action was sustained by the board of general appraisers. The circuit court reversed the decision of the board, and sustained the claim of the importers. 47 Fed. Rep. 875. The government appeals. Affirmed.

James T. Van Rensselaer, Asst. U. S. Atty., for appellant.
Albert Comstock, for respondent.

SHIPMAN, Circuit Judge. The question in this case is whether the hemstitched cotton handkerchiefs imported in August, 1890, and September, 1890, by the respondents, were properly classified by the collector under paragraph 325 of Schedule I (cotton and cotton goods) of the tariff act of March 3, 1883, or whether they should have been classified under paragraph 324 of that schedule. The paragraphs read as follows:

"324. Cotton cords, braids, gimps, galloons, webbing, cording, suspenders, braces, and all manufactures of cotton not specially enumerated or provided for in this act, and corsets of whatever material composed, 35 per centum *ad valorem*."

"325. Cotton laces, embroideries, insertings, trimmings, lace curtains, cotton damask, hemmed handkerchiefs, and cotton velvet, 40 per centum *ad valorem*."

It appears, by explicit and uncontradicted testimony,—the testimony of those conversant with the commercial designations of cotton goods and handkerchiefs,—that, at and prior to the time of the passage of the tariff act in question, there was a distinct nomenclature in the trade for hemmed handkerchiefs and hemstitched handkerchiefs, under which articles like the importations in controversy were known to and bought and sold in the trade exclusively as hemstitched handkerchiefs, while other articles, embracing a large variety, were known to and bought and sold in the trade exclusively as hemmed cotton handkerchiefs, the two classes being distinguished by the presence or absence of ornamentation at the edge of the hem. It was also proved that the trade name "hemmed handkerchiefs" excluded hemstitched handkerchiefs, although the latter were in fact hemmed, and that a hemstitched handkerchief was not, in commercial language and designation, a hemmed handkerchief. The two classes were distinct and separate. No testimony was offered by the collector to vary or weaken the force of those facts, and it is to be presumed that no such testimony was available. The contention for the appellant is that the handkerchiefs in controversy, being hemmed as well as ornamented, are specially enumerated or provided for by paragraph 325; that the term "hemmed handkerchiefs" is a descriptive term, meaning handkerchiefs, not in the piece, but hemmed, and was not used in the paragraph in question in a technical or commercial sense.

The tendency of the decisions of the supreme court has long been to hold with strictness that, when an article of commerce is designated in a tariff act by a specific name, or by general terms, the clearly estab-

lished commercial meaning of such name or designation, at the time when the tariff act was passed, determines the construction of the act with respect to that article, (*Arthur v. Morrison*, 96 U. S. 108; *Arthur v. Lahey*, Id. 112; *Worthington v. Abbott*, 124 U. S. 434, 8 Sup. Ct. Rep. 562,) until it was said by Mr. Justice BRADLEY in *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. Rep. 559, that commercial designation "is the first and most important designation to be ascertained in settling the meaning and application of tariff laws." Very likely, advantage will be attempted to be taken of the breadth of this declaration to endow mere subordinate fanciful commercial names with an undue importance, but such an attempt is not apparent in the present case. It must be evident that goods cannot be withdrawn from the operation of a general classification, according to material, by designating them by particular names, which merely indicate a subdivision of the general class named in the statute.

This being the general rule for the construction of terms or names in the tariff acts, if congress desires to classify articles by terms of general description, it can manifest such intent by the use of descriptive words which exclude any restricted meaning, and, if such language is not used, it is fair to presume that the intent of the legislature was in harmony with the rule of construction which the courts have declared, and which is:

"Where general terms are used, the terms are to be taken in their ordinary and comprehensive meaning, unless it is shown that they have, in their commercial sense, acquired a special and restricted meaning." *Arthur v. Morrison*, *supra*.

The sole question in this case is, were the words "hemmed handkerchiefs" used in their trade meaning, and are they denominative, or were they used in a more general sense, and are they descriptive? It is true that some of the terms used in paragraph 325 are apparently terms of general description, and have been held, in previous statutes, to be designations of quality and material. *Barber v. Schell*, 107 U. S. 617, 2 Sup. Ct. Rep. 301. It is therefore argued that the word "hemmed" is also to be considered descriptive, and not to be used in a commercial sense. Hemmed cotton handkerchiefs were not specifically named in the cotton schedule in the Revised Statutes, but it was thought best to specifically enumerate them in the act of 1883, and they were included by name in the paragraph which had long been in existence in the same general form. The fact that the article was put into this paragraph does not seem controlling, but in view of the decisions which have been quoted, and of the manifest importance that the rule of construction of tariff acts shall be, so far as is practicable, uniform and not easily disturbed by exceptions, I think that the term "hemmed handkerchiefs," which was introduced into the paragraph, should be construed in accordance with the principle which has been stated.

It is argued that it is unreasonable to suppose that congress intended to impose a higher duty upon cotton handkerchiefs having a plain, cheap hem than upon those which were prevented from raveling in a more ornamental and expensive manner. It is true that the construction makes

apparent a lack of symmetry in the rates of duty, but the court cannot attempt to adjust into symmetry the various provisions of a statute which must include many details, by creating exceptions to a well-settled, and, on the whole, satisfactory, rule of interpretation of the statute relating to the revenue from imports. In accordance with this rule, the term "hemmed handkerchief" is a commercial term, and does not mean a handkerchief which has been cut from the piece, and has been in fact hemmed, but it means the article commercially known as a "hemmed handkerchief," which definition excludes the hemstitched article. Indeed, if the distinctions made in common speech are looked at, it is probable that the word "hemmed" would generally be regarded as indicating a different article from the one known as "hemstitched." The term appropriately describes a class of articles in which, by the commercial nomenclature, hemstitched handkerchiefs are not included, and resort must therefore be had to other statutory provisions to ascertain the proper duty upon the excluded articles. We agree with the opinion of the circuit court that the importation in suit should have been classified under section 324. The judgment is affirmed.

WALLACE, Circuit Judge, (*dissenting*.) I cannot agree with my Brother SHIPMAN in this case. I think that the handkerchiefs in controversy, being hemmed as well as ornamented, are "especially enumerated or provided for" by paragraph 325. It is unreasonable to suppose that congress intended to impose a higher duty upon cotton handkerchiefs having a plain, cheap hem than upon those having an ornamented and more expensive hem. I think that the term "hemmed handkerchiefs" is descriptive rather than denominative. It means the same thing as though it read "handkerchiefs hemmed," or "handkerchiefs having a hem." The case is somewhat analogous to *Binns v. Lawrence*, 12 How. 9. The importations are none the less hemmed handkerchiefs because they are also ornamented ones.

INDURATED FIBRE INDUSTRIES Co. *et al.* v. GRACE *et al.*

(Circuit Court, D. Massachusetts. July 28, 1892.)

No. 2,982.

1. PATENTS FOR INVENTIONS—JOINT INFRINGEMENT—PLEADING.

In a suit against two or more persons for infringing a patent, a general averment of infringement by defendants is a sufficient allegation of common infringement, without in terms averring a joint infringement.

2. SAME—PROPERT OF PATENT—DEMURRER.

In a bill for infringement, the propret by complainants of the letters patent does not make the recitals in the specifications as to the prior state of the art a part of the bill, in any technical or proper sense, so that the prior state of the art can be considered on demurrer.

3. SAME—DEMURRER—JUDICIAL NOTICE OF PRIOR ART.

On demurrer to a bill for infringement of letters patent No. 273,869, issued March 13, 1883, to the Underground Electric Cable Company, for an insulating underground cable conductor, consisting of a tube of compressed paper, the court cannot take judicial notice of the prior state of the art.

In Equity. Bill by the Indurated Fibre Industries Company and the Builders' Insulating Tube Company against James J. Grace, Charles S. Pinkham, and Eugene W. Godfrey, for infringement of let-

ters patent No. 273,869, issued March 13, 1883, to the Underground Electric Cable Company, as assignee by mesne assignments of William and Timothy G. McMahon, for certain improvements in underground cables. Heard on demurrer to the bill. Demurrer overruled.

The specifications thus describe the invention:

"Our invention relates to insulated conductors for conveying electrical currents for any of the purposes for which such currents are ordinarily used, and more especially to insulated underground conductors, although the improvements are of utility in, and applicable to, any relations or positions in which insulated conductors of electricity are desirable. In order to be commercially practicable, underground insulated conductors must be furnished with an insulating and protecting medium, economical in first cost, of high insulation, durable, and easy of application, to which ends many materials, combinations, and forms have been devised, the most common of which have been compositions, solid or presumably solid at ordinary temperatures, but plastic at high temperatures, so that they could be applied to the conductors in a plastic condition. Some of these possessed the merit of economy in first cost, but were found to lack durability, being affected by thermal and hygro-metric changes, and hence proved in the end to be lacking in actual economy. Others proved comparatively durable, and not subject to any great change under such influences; but their prime cost, due to expensiveness of the materials used, especially where rubber and such materials entered into the composition, rendered them economically undesirable. In other instances the conductors are placed and kept separated from each other in tubes which are filled with an insulating liquid; but in such cases constant attention was required in order that the tubes be kept constantly full of the liquid under pressure, and leakage and evaporation prevented; hence such systems, so far as we know, have failed of general adoption. Moreover, where in compositions hydrocarbons—such as paraffine, asphalt, etc.—were used, the insulation itself was highly combustible, and proved in some instances a source of great danger.

"In view of these things, the object of our invention is to produce an insulated conductor wherein the insulating material shall be cheap in prime cost, durable, of high insulative capacity, easy of application, and, under ordinary circumstances, practically incombustible. To accomplish this we make the insulation of the conductors as an already-formed tube of paper completely encircling, protecting, and insulating the conductor.

"The insulating properties of paper were of course known before our invention. For instance, in some positions, for small spaces or for temporary uses, sheet paper has been wrapped around the conductor, and it has been suggested that paper pulp be coated upon the conductor; but, so far as we know, no means were suggested or shown of carrying this mere suggestion into practice. Paper has also been used incidentally, alternative with cloth or any other fabric, as a base upon which an asphalt composition was applied, and a tube then formed thereof, which served as a mandrel, upon which a cement pipe was cast. Beyond this, so far as we have been able to ascertain, no way has been devised or disclosed for utilizing the insulating properties of paper.

"In our invention tubes are formed, preferably from the pulp, and, when they are to be used in any peculiar situations, with any desired exterior configuration best fitting them for use in the peculiar situation. They are formed under great pressure, so as to render them hard in substance, firm, and homogeneous, and so formed they are practically incombustible, or at least not liable to combustion from any influence of the current.

"By these means we are enabled to utilize the high insulating properties of

paper, and to furnish an insulated conductor, cheap, durable, easy of manipulation and use, and of high insulative capacity. What we claim is—

"An insulated conductor for conveying electric currents, consisting of the combination of a metallic conductor and a formed pipe of paper only, substantially as set forth."

The bill makes profert of the patent as follows: "And your orators bring here into court a duly-authenticated copy of said letters patent, and pray that the same may be taken as a part of this bill." After setting out the various matters showing complainants' right to maintain an action for infringement, the bill alleges that there is a large and growing demand for the apparatus claimed by said patent, which demand complainants have ample facilities for supplying,—

"Yet that the said defendants, well knowing the premises and the rights and privileges secured to your orators as aforesaid, by the said letters patent, but contriving to injure your orators, and to deprive them of the profits, benefits, and advantages which might, and otherwise would, have accrued to them from the said letters patent, have been, in said district of Massachusetts, and in the city of Boston, and elsewhere in these United States, and still are, unlawfully, wrongfully, and without permission of your orators, making, using, and vending to others to be used, wiring systems for electric installations in which paper tubes are used for the protection and insulation of the metallic conductors in the manner set forth and claimed in the aforesaid letters patent, and in violation and infringement of the aforesaid rights and privileges of your orators; and, although notified of said infringement, and requested to desist therefrom, they still continue so to do; and your orators further show that the defendants have derived and are still deriving from such construction, use, or sale large gains and profits, but to what amount your orators are ignorant, and cannot set forth; and they pray that the defendants may be required to make a disclosure of all such gains and profits, and of the amount of such infringing apparatus which they have thus wrongfully made, used, or sold.

"And your orators further pray that the said defendants may be compelled by a decree of this court to account for and pay over to your orators all such gains and profits as have accrued to or been received by them, or either of them, and all such gains and profits as your orators would have received but for the said unlawful acts of the said defendants, and the damages by said unlawful acts of the said defendants.

"And that the defendants, their clerks, attorneys, agents, servants, and workmen, may be perpetually enjoined and restrained by the decree and injunction of this court from directly or indirectly making, constructing, using, or vending to others to be used, any tubes formed of paper in combination with metallic conductors contained therein, or any apparatus containing or embodying the invention described and patented in said letters patent, and that they may be decreed to pay the costs of this suit, and that they may be also enjoined and restrained, as aforesaid, during the pendency of this suit, and that your orators may have such other and further relief as the equity of the case may require, and to this court may seem meet."

Bentley & Blodgett, for complainants.

Dyer & Seeley, for defendants.

PUTNAM, Circuit Judge. One ground of demurrer assigned is that the bill is defective because it does not, in terms, allege a joint infringement, or at least set out sufficient facts from which a joint infringement can be gathered. Neither party has furnished me any decision of any

court, or any observation of any text writer, or referred me to approved forms, directly touching this proposition, unless Rob. Pat. § 1104, and *Shickle v. Foundry Co.*, 22 Fed. Rep. 105. What is said in Robinson on Patents rests entirely on *Shickle v. Foundry Co.*; and this case was an oral ruling, made apparently conversationally, without any citation of authorities or expression of well-considered reasons, and under such circumstances that the court may very likely have gathered from other parts of the bill that, *prima facie*, the defendants were in fact several infringers. This case is not sufficient to satisfy me that for this matter there is any special rule applicable to bills for infringement of patents not found elsewhere. The cases and text-books are full of expressions that, in bills of this nature, a general allegation of infringement is sufficient, thus conforming to the common practice in other suits, and giving the impression that there is no special rule to be observed by patentees in framing pleadings at law or in equity.

In actions at common law, whether on torts or in contract, in bills in equity for waste or nuisance, and even in pleadings of so high a character as indictments for murder and piracy, a general allegation charging those named as defendants, or those indicted, without the interpolation of the word "jointly" or its equivalent, is sufficient; and I can see no reason why it is not sufficient in bills like this, in which the common act does not in law necessarily involve a conspiracy, but, as with ordinary torts, is proven by showing common wrongdoing, without alleging or especially proving a common intent. The rules of the supreme court have stricken from bills in equity the common confederacy clause, but for all ordinary bills this was long since recognized as of no intrinsic value, and its omission can hardly require the interposition of new allegations. I know of no more approved forms than those given in Curtis' "Equity Precedents," where I find the frame of a bill in behalf of the owners of a patent against two defendants. This nowhere alleges that defendants jointly infringed, nor does it contain an equivalent therefor. It is true that the form uses the common confederacy clause, in the following words, namely, "that the said defendants have confederated to use the said improvement;" but the portions which properly constitute the statement of the infringement conform literally to the bill in the case at bar. In the absence of any sufficient authority shown to me to the contrary, I shall apply the rule of pleading usual everywhere else, and hold that the bill sufficiently alleges a common infringement.

The principal ground of the defendants' demurrer is that the patent sued on appears on its face void for want of invention. This proposition was stated at the oral argument to have reference to the state of the art; but it was not claimed that, independently of what is set out in the specifications, the court could take judicial knowledge thereof. Reference was made especially to those portions which state that, prior to the alleged invention sought to be covered by the patent, the insulating properties of paper were known, and also that, in some positions for small spaces or for temporary uses, sheet paper had been wrapped about the conductor, and that it had been suggested that paper pulp be coated

upon the latter. It may be that other portions of the specifications, more or less relevant, were referred to on this point.

It was also claimed that, by making profert of the letters patent, these specifications were made a part of the bill. This is undoubtedly correct. Nevertheless, they were not thus made a part of it more effectually, or for any different purpose, than if set out in the bill at length. A bill in equity does not necessarily make all the statements of fact contained in a contract or letters patent, or other instrument, proper parts of its pleadings, either by referring to them, or by annexing as an exhibit, or by making profert, or by reciting the tenor at length. With reference to letters patent, the claim or claims become, of course, a fundamental portion of the allegations of the bill, so far as any of them—in case there are more than one—are relied on by the complainant. So everything in the specifications which must be resorted to by the court in construing the claims might be considered as part of the complainants' pleadings. But all portions which merely set out the state of the art are, like recitals of facts in contracts or other instruments, more or less conclusive on the party who sets them up, yet in the eyes of the law explainable, and not absolutely presumed to have been so alleged as to become the subject of demurrer. Especially must this be so with specifications in patents, in which many statements are necessarily complex, relate to unfamiliar topics, and are not easily understood without extrinsic evidence. It is true that, so far as the specifications contain any representations which, if erroneous, may be presumed to have misled the patent office to the detriment of the public, the patentee may be estopped. On the other hand, I do not understand the law has gone so far as to forfeit a valuable patent because the patentee has inaptly, or somewhat inaccurately, described the state of the art, or that it conclusively prohibits him from showing such inaptitude or inaccuracy, if it also appears that the public has not been prejudiced thereby; and in the case at bar, where the state of the art has been set out, not so positively or categorically as the respondents seem to assume, but somewhat confusedly and with qualifications, I should be unwilling to hold on a demurrer that there was no possibility that the complainants might introduce evidence placing their alleged invention in a more favorable position than the respondents assign for it.

I am not aware that in this circuit the practice of demurring on the ground of the want of invention has obtained a footing. The mischief of permitting it unnecessarily is well pointed out by the reference of Judge BLODGETT to the crop of demurrers which one of his decisions occasioned in the northern district of Illinois. *Manufacturing Co. v. Adkins*, 36 Fed. Rep. 554. I am not able to ascertain that the practice of this character which exists in some of the districts has ever had the direct approval of the supreme court. The expressions in *Brown v. Piper*, 91 U. S. 37, frequently referred to, do not seem to go to that extent; as in that case there were a bill, answer and proofs, so that the complainant had had full opportunity, and all possible facts were before the court. On such a record the court might with safety say that there was nothing on the face of the patent itself which could require its attention. In *New*

York Belting Co. v. New Jersey Rubber Co., 137 U. S. 445, 11 Sup. Ct. Rep. 193, where the subject-matter was that of a design, the court overruled the demurrer on the merits, without either expressly condemning or approving the practice on this point. It is true, nevertheless, that in several districts this practice is sustained; and it is also approved by Rob. Pat. § 1110, and by Mr. Gould's notes to Story, Eq. Pl. (10th Ed.) § 452. In *Blessing v. Steam Copper Works*, 34 Fed. Rep. 753, Judge SHIPMAN uses the following language: "To decide, in advance of an opportunity to give evidence, that no evidence can possibly be given upon the question of invention which would permit the case to be submitted to the jury, seems to me to be ill-advised, except in an unusual case." This would seem especially so if the questions, not only of value and usefulness, but of novelty, are to be in any degree determined by what transpires subsequent to the issue of the patent, as was suggested in *Magowan v. Belting Co.*, 141 U. S. 332-343, 12 Sup. Ct. Rep. 71, and *The Barbed Wire Patent*, (*Washburn & M. Manuf'g Co. v. Beat 'Em All Barbed Wire Co.*) 143 U. S. 275, 12 Sup. Ct. Rep. 443; even with such qualifications as appear in *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, and *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. Rep. 66.

However, without undertaking to settle whether in any case a demurrer can be allowed for want of invention appearing on the face of the patent, or whether, in this particular case, the state of the art would be, with the aid of the recitals in the specifications, a matter of judicial knowledge, I hold that the recitals relied on by the respondents are not made by the proffert a part of the complainants' allegations, in any technical or proper sense, so that they can be considered on demurrer, and that, aside from such recitals, the court cannot take cognizance of the state of the art to which this particular patent relates. I am aware that in *Fougeres v. Murbarger*, 44 Fed. Rep. 292, and in *Studebaker Bros. Manuf'g Co. v. Illinois Iron & Bolt Co.*, 42 Fed. Rep. 52, in each of which cases the demurrer was sustained, the court read into the bill statements of facts found in the specifications; but I do not perceive that the propriety of doing so was considered, and the practice seems so clearly violative of fundamental principles of correct pleading that I am compelled to follow my own conclusions. I believe that of all the cases properly in point which have been cited in the briefs, or otherwise found, the demurrer was sustained in only three.

Demurrer overruled, with costs for complainants to the time of filing respondents' answer; respondents to answer on or before rule day in October next.

ELECTRICAL ACCUMULATOR Co. *et al.* v. BRUSH ELECTRIC Co.

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—CONSTRUCTION OF CLAIMS—SECONDARY BATTERIES.

Claims 1, 2, and 3 of letters patent No. 337,299, issued March 2, 1886, to Charles F. Brush, for an improvement in secondary batteries consisting in a plate or element having active or absorptive material primarily and mechanically applied thereto or combined therewith, cannot be invalidated on the theory that the term "secondary battery" was used therein in its older and looser sense, and included batteries which were sometimes primary and sometimes secondary according to the method of their use, for the distinction between primary and secondary batteries is definitely marked and recognized, and the Brush invention was professedly an improvement over the Plante battery, which was of the purely secondary class.

2. SAME—DEFINITIONS—"PRIMARY" AND "SECONDARY" BATTERIES.

A "secondary battery" is one which has no original power of developing a current, and is active only when rendered so by sending a current through it from an independent source of electrical energy, while a "primary battery" is one which is active in virtue of the materials of which it is made.

3. SAME—PRIORITY OF INVENTION—FOREIGN PATENTS.

The invention described in letters patent No. 252,002, issued January 3, 1882, to C. A. Faure, a citizen of France, for an improvement in secondary batteries, having been conceived by the patentee in France, and being covered by a French patent issued October 20, 1880, he cannot claim the invention in this country prior to the latter date, as against a citizen of the United States who, being an original inventor, subsequently received an American patent.

4. SAME—LIMITATION OF CLAIM—DISCLAIMER.

The owner of the Faure patent in this country having, as the result of certain litigation, filed a disclaimer limiting his invention to an electrode coated with a mechanically applied layer of lead, or like insoluble substance, placed upon the supporting plate in the form of a paste, paint, or cement, prior to immersion in the battery fluid, any further discussion of the question of priority of invention between Faure and Brush is now useless.

5. SAME—ANTICIPATION.

Brush's patent 337,299 was not anticipated by the patent of April 3, 1866, to George G. Fercival for secondary battery electrodes consisting of cells filled with coarse conducting powder, and divided by a porous partition; or by the patent of April 23, 1867, to Georges L. Leclanche, for a "polarization apparatus or electrical accumulator," consisting of two plates of graphite or unoxidizable metal buried in two flasks of powdered graphite moistened with a liquid which is a good conductor, such as potash water.

6. SAME—TWO PATENTS FOR SAME INVENTION.

The Brush patents Nos. 337,298 and 337,299 were issued on the same date, (March 2, 1886;) the difference between them was the difference between "an absorptive substance, or an absorptive substance adapted to be transformed into active material," on the one hand, and "active material, or material adapted to become active," on the other. *Held* that, in view of the admitted fact that all distinction between the two disappears the moment a battery so constructed is charged or discharged, there was no substantial difference, and the two patents were for the same invention.

7. SAME—PRIORITY—PRESUMPTIONS FROM PATENT NUMBERS.

These patents were issued on the same day to the same person, and the evidence showed that it would be impossible ever to ascertain which first received the official signature that rendered it a valid deed. *Held*, that the mere fact that one had an earlier number was no proof of priority, for it merely signified that the patent office followed the alphabetical order of Brush's contemporaneous applications, and hence that one could not be held an anticipation of the other.

8. SAME—ELECTION BY PATENTEE.

Under these circumstances the owner of both patents was entitled to elect upon which one he would rest his monopoly; but having elected to rely upon No. 337,299, it became improper that No. 337,298 should be left in a condition in which it could be assigned and sold, and a final decree should be framed, which, in connection with its finding of the validity of No. 337,299, should declare 337,298 inoperative, and prohibit its assignment or sale.

9. SAME—ANTICIPATION.

The Brush patent No. 337,299 was not invalidated by patents 260,653 and 276,155, issued to him prior to 1886, for improvements subsidiary to the main invention, for their subsidiary character appears on the face of such patents, although, owing to delays in the patent office, they were issued before the patent for the main invention. 47 Fed. Rep. 48, affirmed.

10. SAME—FOREIGN PATENT—EFFECT OF EXPIRATION ON AMERICAN PATENT.

The Brush patents No. 337,299, and No. 266,090 did not expire with the Italian patent issued to him August 8, 1882; for division D of the Italian patent was designed to cover, not the main invention, but Brush's invention made in 1882 of plates specially prepared for the purpose of more rapidly forming active material thereon by the Plante method of electrical disintegration. 47 Fed. Rep. 48, affirmed.

11. SAME—LIMITATION OF CLAIM.

The Brush patent No. 266,090 must be limited to electrodes on which the active material is made by applying the Plante method of electrical disintegration, or other "forming" process, to plates which are ribbed, honeycombed, studded, or equivalently prepared. 47 Fed. Rep. 48, modified.

12. SAME—ENLARGEMENT OF CLAIMS—OVERLAPPING PATENTS.

Where an inventor makes a generic invention and also subordinate specific inventions, and presents the whole series in a set of contemporaneous applications, he cannot be allowed, by subsequent amendments couched in general terms, to enlarge the boundaries of each invention so as to extend each into the borders of another, and thus obtain a series of overlapping patents.

Appeal from the Circuit Court of the United States for the Southern District of New York. Modified and affirmed.

Frederick H. Betts and Edmund Wetmore, for appellants.

W. C. Witter, W. H. Kenyon, and Charles E. Mitchell, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the southern district of New York, which enjoined the defendants against the infringement of the 7th and 14th claims of letters patent No. 266,090, dated October 17, 1882, and of the 1st, 2d, 3d, 6th, 7th, and 12th claims of letters patent No. 337,299, dated March 2, 1886, each of said patents having been granted to Charles F. Brush for improvements in secondary batteries for the current storing of electrical energy. The applications were filed as follows: that of No. 266,090 on June 9, 1881, and that of No. 337,299 on June 13, 1881.

The subject-matter of this litigation has been three times examined by Judge COXE, in the cases of the present defendant against the Julien Electric Company, (38 Fed. Rep. 126,) of the present complainant against the Julien Electric Company, (41 Fed. Rep. 679,) and in this suit, (47 Fed. Rep. 48.) This repeated scrutiny has caused some of the questions which were presented in the pleadings to disappear from the case, while the vigor of other defenses, which have been successively supported and resisted, has become impaired. The questions which still remain for investigation are important, and, mainly by reason of the numerous patents which Mr. Brush has taken, are entangled; but the three opinions which have been written have freed the subject from much of its perplexity.

Patent No. 337,299 is the most important, and will be first considered. It solely relates to secondary batteries. A secondary battery was well defined by Judge COXE to be "a battery which has no original power of developing a current of electricity, and is active only when rendered so by sending a current, elsewhere generated, through it." Sir William

Thomson, in his deposition in the first *Julien Case*, had stated the distinction between a primary and a secondary battery, as follows: "A secondary battery is a battery which is active only when rendered so by sending a current through it from an independent source of electric energy. A primary battery is one which is active in virtue of the materials of which it is made." Electricity is chemically generated by virtue of these materials. The electrodes are unlike and inherently differ from each other electro-motively. The positive plate is dissolved in the battery fluid in which it is placed, and which is ordinarily dilute sulphuric acid. "The other electrode collects the electric energy from the liquid, and by this chemical union a current of electricity is developed." The two electrodes of a purely secondary battery are of the same kind, are not separated electro-motively, and are insoluble in the battery fluid, but, "by subjecting these elements to the action of an electric current, the two elements are differentiated and rendered electro-positive and electro-negative with respect to each other, depending entirely on which is connected with the positive pole of the charging generator and which with the negative pole thereof." The electrodes absorb either the hydrogen or oxygen which is set free from the liquid by the charging current, which in popular, though not in scientific, language, is called absorbing electricity; hence the significance of the name "storage battery," which suggests the idea of continuance or duration of use. The capacity of a primary battery to give a current is limited; it is soon exhausted; "while in the secondary battery the amount of current which may be obtained depends entirely upon the resistance of the conducting wires discharging it," and the battery may be charged and discharged for an indefinite number of times. The commercial importance of a secondary battery is easily recognized from this statement of its points of unlikeness to a primary battery.

Prior to the invention of the Brush and the Faure batteries, the only secondary battery in use was that of Plante, which was invented about the year 1860. The following statement of the chemical effect of the successive charges of the electric current upon the two plain plates of rolled or pressed lead, of which this battery was composed, is condensed from the more elaborate statement in the appellee's printed argument: The plates having been immersed in an electrolyte of dilute sulphuric acid, and having been respectively connected to the two poles of any suitable source of electricity, by means of which a current was passed through the plates, oxygen was developed on one plate and hydrogen on the other. The hydrogen passed off in bubbles, leaving its lead plate practically unaffected, but the oxygen combined chemically with the lead of the other plate until it had formed a film or skin of peroxide of lead, of a finely-divided, granular character, like rust. The skin of peroxide, operating to protect the underlying lead, soon stopped the action of the oxygen on the lead. A small current or discharge was produced, but too small to be of value. Plante ascertained that there must be correspondingly thick films on each plate. He therefore reversed the direction of his current, developed oxygen on the hydrogen plate and

hydrogen on the oxygen plate, which took away the oxygen from the oxide film and left the surface granular or spongy metallic lead. These reversed charges were repeated for days and sometimes for weeks. The result was to disintegrate, through the action of electricity, the surface of the plain lead plates, and to form spongy layers of lead thereon. This granular layer is what is called the active material of the battery; that is, material which becomes practically and actively capable of receiving and discharging electricity by the passage of an electric current. The core of the original plate mechanically supported the active material and conducted the current through it. This operation of the breaking up of the surface of solid lead plates so as to create porous coatings, in other words, of the "formation" of the active material of a battery by electrical disintegration, was the distinguishing feature of the Plante secondary battery. It occupied a long and therefore expensive amount of time, and was incumbered by other mechanical difficulties, one of which was the thinness of the layers, and another, the tendency of the layer to peel off from the plate. These minor defects were partially avoided by increasing the number and diminishing the surface of the plain plates.

The improvement described in No. 337,299 was confessedly an improvement upon the Plante battery and upon no other, and, in the language of the specification, consisted "broadly in a secondary battery plate or element having active or absorptive material primarily and mechanically applied thereto or combined therewith, as contradistinguished from a plate or element having the active material produced by the disintegrating action of electricity, as in the well-known Plante process." The mechanical application of a layer of lead oxide to each one of two lead plates, before the plates are placed in the battery fluid,—these coatings being at once active material, and ready for the charging current when immersed in the battery fluid,—was, speaking in general terms, the distinguishing feature of the Brush invention. The drawings of the patent show a plain plate, and also corrugated, ribbed, slotted, honey-combed, and studded plates of various forms. The first conception of Brush was a plain plate of lead coated with lead oxide, which was retained in position by a sheet of paper or felt, which was secured to the plate by strips of wood. The more perfected method of construction consisted in changing the plate into a ribbed or corrugated or slotted plate, and in filling the ribs and corrugations with the lead oxide, which was retained in position by being rammed or pressed into the open receptacles. The patentee deemed peroxide to be the best oxide of lead to be used, but, as it is expensive, directed that red lead might be used, and suggested that protoxide of lead or litharge might also be used.

The specification says:

"When a pair of plates such as I have described are associated together to form a secondary battery, and immersed in dilute sulphuric acid, and charged by the passage of an electric current in the usual manner, one of the plates has its coating peroxidized, if a lower oxide of lead was employed for the coating and forms the oxygen element of the battery, while the other plate has

its coating of oxide reduced to the metallic state and then absorbs hydrogen, thus constituting the hydrogen element of the battery."

The claims which are to be considered upon the present appeal are as follows:

"(1) A secondary-battery element or electrode, consisting of a plate or suitable support primarily coated or combined with mechanically-applied active material, or material adapted to become active, substantially as set forth.

"(2) In a secondary battery, an electrode consisting of a plate or support provided with a coating or surface layer of an absorptive substance, such as metallic oxide, applied thereto, substantially as set forth.

"(3) A plate or suitable support primarily coated or combined with mechanically-applied oxide of lead or equivalent lead compound, substantially as set forth."

"(6) A plate or suitable support provided with grooves, perforations, or receptacles, and primarily coated, combined, or filled with mechanically-applied active material, or material adapted to become active, substantially as set forth.

"(7) A plate or suitable support provided with grooves, perforations, or receptacles, and primarily coated, combined, or filled with mechanically-applied oxide of lead or equivalent lead compound, substantially as set forth."

"(12) The method of making plates or electrodes for secondary batteries, consisting in primarily combining active material with suitable plates or supports mechanically, in contradistinction to forming the active material by an electrical disintegration of the plate or support, substantially as set forth."

These claims describe and necessarily refer to a secondary battery as heretofore defined, a plate or support which is insoluble in the liquid, mechanically supports the active material and electrically conducts the current of electricity through it, the specified active or absorptive materials being oxides of lead which are primarily mechanically applied to the plates, and in such state of minute division as to be at once capable of being charged without previous process of "formation" by electrical disintegration.

The first question, that of novelty, brings directly into view the much discussed subject of priority of invention as between Mr. Brush and Camille A. Faure, who, in France, of which country he was a citizen, invented, in 1878, the same improvement upon the Plante battery, by the use of lead oxide, which he applied to the plates in the form of a paste or cement. His French patent was dated October 20, 1880, and, inasmuch as he was a citizen of France, he is not permitted to claim his invention before that date, as against a citizen of the United States, who, being also an original inventor, subsequently received a patent for his own invention in this country. Faure's application for a patent in this country was filed April 20, 1881, and the patent thereon, No. 252,002, was issued on January 3, 1882. Brush's application and the Faure patent were put into interference in March, 1882, in the patent office. The subject-matter involved in the interference was the fundamental principle of each invention,—that of "a plate of a secondary battery provided with a surface layer of an absorptive substance, such as metallic oxide, applied thereto." After a long delay in the office, priority was adjudged to Brush, and his patent was issued in 1886. The defend-

ant in this suit, as owner of the Faure patent, then brought suit for its infringement against the Julien Electric Company. In that suit the question of priority as between Brush and Faure was thoroughly tried. The circuit court decided that Faure was the inventor of a secondary battery electrode coated with a mechanically-applied layer of lead, or like insoluble substance, placed upon the supporting plate in the form of a paste, paint, or cement, prior to immersion in the battery fluid; that he was not the inventor of an electrode otherwise coated; and that upon filing his disclaimer, thus limiting the first claim of the patent, the accumulator company was entitled to a decree. The complainant in that case, being the defendant here, filed such a disclaimer. Faure had filed a bill in equity in the United States circuit court in one of the districts of Ohio, for the repeal of the Brush patent, upon the ground that he (Faure) was the prior inventor of the broad invention described in the first claim of 252,002. After the disclaimer, this bill was dismissed upon Faure's motion. Inasmuch as the defendant, being the owner of the Faure patent, has, as the result of a direct issue on the subject of priority, disclaimed the right of Faure in this country to the invention, except as limited, a renewal of a discussion of the question of priority is useless.

We next come to other devices which are alleged to anticipate especially the first three claims of the patent, in the event of a liberal and broad construction of those claims. This question was most extensively discussed in the record of the first *Julien Case*, with respect to the Faure patent, and has been less elaborately considered by the experts in this case, and turns upon the proper construction of the term "secondary battery." It is admitted that the definition of a secondary battery, which has been already given, is a correct one; but it is said that, at the date of the Brush and Faure inventions, the term "secondary battery" was often used by writers and scientists in a larger and looser sense, and included a battery in which electrodes of different materials are employed, and capable of yielding a current without being previously charged from an external source; that such a battery, although also a primary battery, is a secondary battery when it is used as such, and it is so used when it has become exhausted and "is regenerated or brought back to its former condition by the direct action upon itself of an independent source of electric energy." Hence it is claimed that if Brush used the term in this larger sense, and if the language of his claims is liberally construed, then, in some of the pre-existing descriptions of batteries, there are described structures which possessed the elements of a plate primarily combined with mechanically-applied active material of some sort. It is perhaps sufficient to say that such a construction of the Brush patent requires one to assume that Brush did not mean what the history of the invention and of the patent and its manifest intent make it apparent that he did mean. He is describing an improvement upon a Plante secondary battery, and upon his method of producing active material by the disintegrating action of electricity upon two lead electrodes insoluble in the battery fluid. Brush's secondary battery is Plante's sec-

ondary battery improved, and his language is to be read in the light of that fact and the fact that he was speaking only of a current-storing device. It therefore serves no useful purpose to strive to show that the Brush patent was anticipated because some pre-existing scientist had described a battery which corresponds with the general phraseology of the claims, provided their language should be so construed as to include the class of batteries which has been mentioned, a construction which is forbidden by the history of the invention and by a disinterested examination of the patent.

Passing by, therefore, batteries of the primary type, the structures of another character, which are in this case deemed by the defendant to bear adversely upon the Brush claims to novelty, are those described in the patents to George G. Percival, dated April 3, 1866, and to Georges L. Leclanche, dated April 23, 1867. Percival's invention, he says in his patent, consisted "in substituting layers of pulverized gas carbon, or some other conducting powder, (coarse lead powder,) separated by a layer or plate of some porous substance, for the metallic plates of which the electrodes of the pole are ordinarily formed." The layers constitute the electrodes, are wet by a proper solution, and, for convenience in establishing connection with these layers, there is on each end of the box a screw cup, fastened to a slip of copper. This invention, as described, resided solely in the substitution of separate layers of coarse powder for the two metallic plates of a Plante battery. The copper slips, which when exposed to dilute sulphuric acid would be dissolved, are not plates or supports, but are mere connecting devices; the layers are not coatings of plates, and probably are to be "formed" by the Plante process of electrical disintegration. Leclanche's "polarization apparatus or electrical accumulator" is composed of two flasks, in which are placed two plates of graphite, or two plates of unoxidizable metal. These two plates are buried in powdered graphite,—a good conductor of electricity, —and moistened with a liquid which is an equally good conductor, such as "potash water." There is no similarity between Leclanche's plates and his powdered graphite, which is practically unoxidizable, though it may be minutely oxidized, and the lead plates and the absorptive oxide of lead of Brush or Faure. The Leclanche device was furthermore intended to be constantly associated with the primary battery, when in use. These structures do not affect Brush's patent 337,299. Not only the invention, as described in the 1st, 2d, and 3d claims, belongs to him, but he was the first who rammed or pressed the dry powder—the form in which his absorptive substance was used—into grooves or receptacles in the plates, as described in the 6th and 7th claims.

There being no question as to infringement, the next point relates to the validity of the various claims which are solely the subject of this appeal, in view of other patents to Mr. Brush of a prior or of the same date. On July 9, 1881, Mr. Brush filed in the patent office eight divisional applications for patents, marked from "A" to "H," inclusive, and on June 13, 1881, he filed two more applications respectively marked "Case I" and "Case J." He drew the ten original specifications himself. The

first eight were designed to subdivide his improvements upon the Plante battery into as many separate patents as practicable, and to state the subdivisions in a progressive order and system. Cases I and J were intended to describe and claim the important and generic departure from Plante. In process of time some of these applications were subdivided. Cases I and J came into interference with Faure's patent, and patents thereon were not issued until March 2, 1886. Meanwhile the other applications had become patents, and in some of the cases the specifications had been amended and rewritten, with a view to cover as large a field as was attainable. The result of this subdivision of the main invention, the alteration of specifications, and the grant of divisional patents at different dates, was to make an entangled mass of patents, which are to some extent intertwined with each other,—a confusion which has caused perplexity to experts, counsel, and judges, and which has endangered the strength and the validity of the patents themselves. As Cases I and J were originally presented to the patent office, distinction between them seemed to rest upon the difference between porous or spongy lead and oxide of lead as active materials. When the patents 337,298 and 337,299 were issued, the difference between them is that between "an absorptive substance, or an absorptive substance adapted to be transformed into active material," on the one hand, and "active material, or material adapted to become active," on the other. There is a theoretical and scientific difference between the articles which may be called "absorptive" and "active." Spongy lead has no oxygen, but will absorb oxygen, and thus become active; the oxides of lead have absorbed oxygen, and are therefore active, but "it is admitted that the moment a battery constructed with plates having either coating is charged or discharged, all distinction vanishes." As the terms are used in the electrical art, they are synonymous, and it is especially certain that, as these two patents are phrased, there is no substantial difference in the character of the inventions which are described and claimed. The attempt to draw a line of demarkation between them is ineffectual. The bill of complaint in this case originally included 337,298, but upon motion of the complainants was dismissed as to that patent. This was done after Judge Coxe's analysis and criticism of the two patents in the second *Julien Case*.

The defendants insist that, as 337,298 is the earlier patent, and is for the same invention as 337,299, the latter patent is void. This conclusion would be true if the premises were true. The applications were filed on the same day, the patents were issued on the same day, and are owned by the same person. The testimony shows that it can never be ascertained which patent actually first received the final signature which rendered it a complete and legal deed; the mere fact that one has an earlier number signifies merely that the patent office followed Brush's alphabetical order; so that a judicial ascertainment of the fact of priority is impossible, and there are no known presumptions which can be resorted to upon which to base a finding. The owner of both patents has elected

to regard No. 337,299 as the one upon which it will vest its title to a monopoly, and we are of opinion that it had such power of choice. What would be the condition of separate owners of two separate and contemporaneous patents for the same invention? is a question which has not yet arisen, but it is obviously improper that No. 337,298 should be left in a condition where it can be assigned or be made the subject of sale. It has been suggested that a disclaimer should be filed, but the sections of the statutes in regard to disclaimer were not intended for, and do not seem applicable to, a case of this sort, in which the patentee was the actual and first inventor of the whole of the described and patentable thing which is specified in the patent. It therefore seems proper that a final decree should be framed in accordance with the circumstances of the case, and should, in connection with the finding of the validity of the specified claims of 337,299, adjudge 337,298 to be inoperative, and prohibit its assignment for sale.

The next defense is that the Brush patents Nos. 260,653 and 276,155 cover and include everything properly claimed and described in the first seven claims of No. 337,299. No. 260,653 was a division of the application designated as Case I, was applied for June 15, 1882, and was patented July 4, 1882. The remainder of that application was patented as No. 337,298. The single claim is as follows:

"In a secondary battery, an element consisting of a structure of *etagere* like form, containing, in the spaces between its shelves, lead in a finely-divided state, substantially as set forth."

This claim was inserted in Case I in September, 1881, at the suggestion of the patent office, and was put in interference with an application of August de Meritens, which was decided in Brush's favor on December 5, 1881. On June 15, 1882, he filed an application which contained only the claim which was the subject of this interference. No. 260,653 states on its face that it is a division of Case I in which other features of the invention were claimed, so that the public was not misled into the idea that unpatented portions of the invention had been abandoned. The specification, although the broad invention is described, and the claim show that the patent is for the *etagere* like form or series of shelves in which the finely-divided lead of Case I was held. If letters patent were to be treated by courts in the critical and hostile spirit which a plea in abatement formerly encountered, the contention of the defendant would have technical importance; but courts do not construe letters patent for the purpose of their destruction. The history of No. 260,653 entirely contradicts the theory of its breadth. The broad invention was the subject of Case I. Pending its consideration in the patent office, a subordinate claim became the subject of interference upon which a patent was issued, which proclaimed its divisional character. Subsequently the patents were issued upon the broad claims which had lingered in interference in the patent office, and it is now contended that the main invention had been in fact included in the claim for a series of shelves which held finely-divided lead. Such a construction is not demanded

by decided cases, or by known principles of law, and a limited construction, in accordance with its apparent scope, will therefore be placed upon No. 260,653.

No. 276,155 was originally Case B, and is apparently for a corrugated plate, which has an active coating electrically produced thereon, or which is provided with an active or absorbing coating. The same suggestions which have already been made apply to this patent, which was intended to include only a limited part of the improvements of Brush. Whether it anticipates the fourth and fifth claims of 337,299, which are not in issue in this litigation, is not important in this case.

The effect of Brush's Italian patent upon No. 337,299 remains to be considered. Brush applied for an Italian patent on July 28, 1882. It was sealed August 8, 1882, was issued for the term of three years from September 30, 1882, and was not prolonged. It had expired when 337,299 was issued. It was in force when No. 266,090 was issued. Under section 4887, an existing foreign patent is not a bar to a subsequent United States patent for the same invention to the same inventor, unless the invention has been in public use in this country for two years prior to the application. Existing foreign patents for a claimed invention limit the duration of subsequent United States patents for the same essential invention to the same inventor. The defendant claims that an expired foreign patent for a specified and described invention is so substantial a limitation that it is in fact a bar to a subsequent United States patent for the same invention to the same inventor, and that an expired foreign patent for a subordinate feature of a described but unclaimed invention is a bar to a subsequent United States patent to the same inventor for the generic invention, because, by not taking out his foreign patent for the generic invention, and by permitting the short-term patent to expire, he had abandoned the generic invention to the world. The interesting questions of law which are involved in these two propositions will become practically important if the facts of the case require their decision. In our opinion, the Italian patent is not the same in its essential particulars with any one of the inventions which are claimed in 337,299, and the home "patent would not be infringed by a structure made in accordance with the provisions of the foreign patent." The question in regard to No. 337,299 turns upon the character of the invention disclosed or claimed in divisions C and D of the Italian patent, particularly in division D. The alleged destructive effect of this division was the question upon which the experts most strenuously contended, the question being whether division D is the Brush battery of 1880, in which active material in the form of powder is primarily pressed into receptacles, whereby the process of electrical disintegration is superseded, or is for a different invention, made in 1882, of a secondary plate prepared by compressing partially oxidized powdered lead into a core of roughened or perforated sheet lead, so as to create a solid plate coherent and malleable, having minute seams of oxide of lead, upon which plate the active material is to be produced by electrical disintegration, the alleged improvement being to facilitate the Plante process. Another

form of the described invention was to have the solidified mass of particles constitute the entire body of the battery plate. The witnesses differed, both upon the intent and meaning of the language of this division, and also upon the result which would be attained by the process as described, the defendant insisting that, whatever pressure was brought to bear upon the partially oxidized particles of lead, the result would not be a compact plate, but a "porous mass of mingled particles of lead, and lead oxide," which would be substantially the same thing as the dry powder pressed into the receptacles of the plate of 337,299.

The language of the Italian patent, its history, and that of the United States patents Nos. 275,986, 266,762, 266,089, 262,533, which were applied for May 27, 1882, being Cases K, M, N, and O, and which are for the general characteristics of division D, as distinguished from Cases I or J, cause us to believe that there is a clearly-marked separation between Cases I or J and division D, and satisfy us of the weakness of this part of the defense. The electrodes of the respective patents are different things, and one does not interfere with the other. The discussion of this question, and of the reasons which lead to our conclusion, could be greatly prolonged, but we prefer to summarize the important considerations, and as the principal reasons which led Judge Coxe to adopt the same view have also controlled us, we restate them in substantially his language:

(1) The language of the Italian patent is entirely different from that of the patent in suit. The drawings are different. (2) The inventor's statement of his intent and purpose in taking the foreign patent and his reasons for not attempting to patent the invention of No. 337,299 abroad is corroborated by his notes made at the time he was perfecting the inventions patented abroad. When these notes are placed side by side with corresponding portions of the Italian patent it will be seen that they are substantially similar. (3) The fact that a sharp distinction is drawn in No. 337,299 between the inventor's and Plante's method. There is nothing of this in the Italian patent. On the other hand, the inventor clearly intimates that the plates of division D are to be formed by the Plante process. (4) The Italian patent is capable of a narrow construction which differentiates it from the patents in suit. (5) The fact that the element of the Italian patent is produced by heavy pressure, hydraulic or otherwise, whereby the particles of lead and lead oxide are compacted into a firmly coherent mass having minute veins of oxide of lead everywhere ramifying through it, unlike the plate of the United States patents in suit. (6) The "mass" described in the Italian patent is malleable, and capable of being made into strips or wires, and manipulated so as to form any style of element. Neither the active material of No. 337,299 nor the completed plate of that patent is capable of such treatment. (7) No. 337,299 is designed to cover Mr. Brush's inventions made in the summer of 1879 and in the summer and autumn of 1880. The Italian patent is designed to cover the inventions of 1882.

Division C was for the same invention which is described in United States patent No. 261,512, originally Case F. It describes a method of providing a coating of porous metal upon the plate of a secondary battery, which metal is reduced from the oxide "through the agency of a hot atmosphere of any suitable reducing gas, and at a temperature insufficient to fuse the reduced metal." Plain or corrugated or perforated

plates may be used. Knowledge in regard to this invention must be derived from the patent alone, for apparently it has never been subjected to a crucial test by practice. It is a particular process for coating lead plates, and the coating possesses properties differing from, but intermediate between, those of spongy lead and electrically deposited coherent lead. The patent also says that these properties are similar to those of the electrically deposited metal described in division B, which are also described in United States patent No. 274,082, originally known as Case D. The peculiarities of this coating can be easily understood, for it is deposited by electrical action in the manner customary in any process of electro plating, and before the process of "forming" the plate. The coating, though porous in an electrical sense, is firmly attached to the plate, and is firm in its structure. The active layer is formed by the Plante process. The coating of division C is between this solid coating and the spongy lead, and batteries made according to this process demand a "forming" process analogous to that required by the Plante battery, for the coating must require disintegration. We do not perceive that either the principle or a subordinate feature of 337,299 is contained in division C, and it is quite manifest that any one who should make batteries in accordance with it would never be asked to defend himself against infringement of 337,299.

The question respecting 266,090 remains to be considered. The first form of Brush's broad invention of the primary mechanical application of active material to the lead core or plate was a plain plate covered with lead oxide, which was retained in position by blotting paper, which was secured to the plate by strings or strips of wood. This was obviously a clumsy and insufficient method of combining or coating the plate with active material, and the ribbed or corrugated plate was substituted, in which the oxide was easily retained in position. This more perfect form of the invention is described in the sixth and seventh claims of 337,299. The battery of these claims is the one distinctly known as the storage battery of Brush, and is the one with which the battery of the defendants, which is filled with the paste or cement of Faure, corresponds. But it is also obvious that the ribbed or grooved plate possessed advantages in a secondary battery in which the Plante process of electrical disintegration or some kindred process of "forming" was used. A larger surface of metal was exposed, the expansion or contraction of the active coating was confined to many small areas, and the peeling, which was unavoidable upon a large plain surface, was diminished, if not prevented. Accordingly, Mr. Brush applied in Case C, which subsequently became No. 266,090, for a patent upon a secondary-battery plate, ribbed, honeycombed, studded, "or equivalently prepared." The descriptive part of this specification manifestly referred only to the method of producing active material by formation from the substance of the plate and ribs, whether by the Plante process of electrical disintegration, or by the improved forming process of division A. The scratched, perforated, thin platina foiled plates of Kirchoff were no anticipation of the plate as described in the specification. The distinction between Cases I or J and

C were in the mind of the draughtsman, who meant that I and J should refer to the generic invention and that Case C should be limited to a narrow improvement upon Plante. But the desire for enlargement of territory grew, and by an amendment of June 20, 1882, wherein the specification was rewritten, the draughtsman said: "This form of element is also well adapted to receive and retain any active coating which may be applied thereto." This sentence the patent office promptly required should be omitted, upon the ground that it was "new matter," and it was thereafter canceled. The following sentence had, however, been permitted to remain: "Figures 8 and 9 are * * * plates arranged ready for charging, after having been 'formed,' or in any manner provided with active coating." The corresponding part of the sentence in the original application was, "after having been previously 'formed' according to the process described in Case A, or otherwise." The new specification also made cast lead instead of rolled or pressed lead a patentable improvement, but Judge Cox directed a disclaimer of the purely cast lead claims, upon the ground that they contained nothing patentable; and they were disclaimed accordingly.

Upon the strength of the clause "in any manner provided with active coating," which slipped by the scrutiny of the patent office, it is now insisted that the general language of the various claims covers a plate in a secondary battery provided with any kind of active coating either electrically formed or mechanically applied. The literal language of the claims is broad enough for such a construction, but it would be obtained by an undue enlargement of the meaning of an amendment, the effect of which was not appreciated by the examiner. Mr. Brush has obtained all to which he was entitled by construing his patents for improved form of plates in the order and system in which they were originally presented to the patent office. What the construction ought to be had different inventors taken the progressive steps, it is not necessary to inquire, but when one inventor makes a generic invention and also subordinate specific inventions, and presents the whole series in a set of contemporaneous applications, the patentee must not be enabled, by an ingenious use of general terms, to enlarge the boundaries of each invention, to extend each into the borders of another, and obtain a series of overlapping patents. This construction is narrower than that permitted by Judge Cox, who found an infringement by the defendants of two claims only. As construed by this court there is no infringement of No. 266,090. The decree of the circuit court will be modified in accordance with the directions herein contained, with costs of this court to the appellant. In other respects the decree will be affirmed.

IRONCLAD MANUF'G CO. v. JACOB J. VOLLRATH MANUF'G CO., Limited,
et al.

(Circuit Court, E. D. Wisconsin. June 27, 1892.)

1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—WHEN ISSUED.

In a suit for infringement, when the case is not free from doubt, and the experts are at variance, and there are no prior adjudications, a preliminary injunction will be denied, especially if defendants are amply able to respond to any damages that may be adjudged against them on final hearing.

2. SAME—PROVINCE OF PATENT OFFICE—INTERFERENCES.

Upon an interference in the patent office the question is as to priority of invention, and anything said by the patent officials as to the construction of the claims is not binding upon the courts in a suit for infringement.

In Equity. Bill by the Ironclad Manufacturing Company against the Jacob J. Vollrath Manufacturing Company, Limited, and others, for infringement of a patent. On motion for a preliminary injunction. Denied.

L. L. Bond, Marcellus Bailey, and Ernest C. Webb, for complainant.
Dyrenforth & Dyrenforth, for defendants.

JENKINS, District Judge, (*orally*.) The bill is filed for an infringement of a patent for peppered enameled ironware, issued to Chester Comstock, the letters patent being numbered 415,161, dated November 12, 1889, and a motion is made for a preliminary injunction to restrain the defendants from the alleged infringement pending this litigation. The specification, after stating the process for obtaining the "foundation coating," as it may be called, of the vessel that is to be enameled, proceeds:

"When the metallic surface to be enameled has been properly pickled and cleansed in the usual way, and a paste of suitable material has been prepared in any one of the usual ways for the production of either the 'mottled' ware, 'white' ware, or 'plain' ware, I incorporate in such paste, preferably, comminuted or granular oxide of iron, and, after coating the surface of the iron with such paste, having so commingled with it the comminuted oxide of iron, it is subjected in the muffle to the usual fusing process, which produces the glazed appearance, but which also leaves the comminuted or granular oxide, in its natural or substantially natural condition, in practically mechanical suspension within the body of the glaze, and producing an appearance in the finished article which I here denominate as 'peppered' enameled ironware, in contradistinction to the æsthetic appearance of the severally and previously described well-known articles in the trade. While, as I have said, I prefer to use granular or comminuted oxide of iron to produce this effect, it will be understood that I may employ any other suitable contrasting body which will not fuse at the ordinary temperature employed for fusing the paste which subsequently constitutes the coating, and I therefore do not wish to be limited in any degree to the character or quality of the material employed for this purpose, so long as it results in the production of what I have termed 'peppered' enameled ironware, by which term I intend and mean enameled ironware having mechanically suspended or held in and throughout the glaze a granular or comminuted material in color contrasting with that of the body of the enameled coating, and comparatively infusible as compared with the glaze, so that when the latter is fused on the ware the granular or comminuted

contrasting colored material, although mixed with and held in the glaze, will preserve unimpaired its original form, and thereby give the enamel a peppered appearance."

The first claim of the patent is for the process described.

The second claim is stated to be—

"As a new article of manufacture, peppered enameled ironware having the properties and characteristics substantially as hereinbefore set forth."

On the 19th of November, 1889, just a week following the issuance of the patent to Comstock, a patent was issued to Vollrath, which is the foundation of the defendants' claim, and his process differs from the other as stated in the specification. After the foundation coating he makes a mixture which he calls "A." Then, according to the color desired, he takes the necessary ingredients, and adds to them a separately prepared mixture in substantially the same proportions as the mixture A, the amount of the coloring ingredient added being more or less, as a light or dark result is desired, and this mixture is melted, cooled, and ground dry into a condition like sand, forming a mixture B, and is ground to a different degree of fineness from the mixture A. He mixes A and B in the necessary proportions to produce the desired effect, according as the finished product is to have more or less of the color prominent. This mixed mass, composed of A and B, is of a paste-like consistency, and is applied by pouring it upon or dipping into it the articles having the first-described foundation coating, and then they are put into a muffle and subjected to a temperature of about 1,000° Fahrenheit, and there is produced what is called in the patent "a speckled appearance," consequent upon the different degrees of fineness of the mixture.

The question in this litigation is upon the construction of the second claim in the Comstock patent, whether the words "having the properties and characteristics substantially as hereinbefore set forth," are to be limited to the process described in the specification, or whether it is a claim for peppered enamel ware, however produced. Some months after these patents Vollrath filed a claim for another patent, his claim being for an article of manufacture, namely:

"Ironware having incorporated in the enamel throughout the entire coating specks contrasting in color with the remainder of the enamel."

There was an interference declared upon that claim, and it was held by the patent office that the second claim of the complainant's patent was in anticipation of this alleged discovery, and it is asserted by the complainant that that decision substantially forecloses this claim of the defendants, and substantially holds that the second claim of the complainant's patent is to be construed as a claim for articles of enameled ironware having this peppered appearance, however produced. The court cannot agree with that conclusion. The issue before the patent office was whether this claim for the article of peppered ware, or speckled ware, as claimed by Vollrath, was anticipated by the second claim of Comstock, and the controversy there was which was the first inven-

tion. The sole controversy was whether Vollrath or Comstock had first invented peppered ware. The patent office held that Comstock was the first inventor; but it was not within the province of the patent office to construe this second claim of the patent, nor was it essential to the determination of the question there involved.

There were some things said in the opinions by the different officers of the patent office which have been supposed to bear upon this question, and, so far as the court is advised by reading their decisions, there would seem to be some comfort to be gained from them by both parties. The decision of the examiners in chief asserts:

"The appearance may be given in various ways, amounting to but little beyond the ordinary resources of the craft in manipulating their enameling processes; but it appears from the record that each party to the interference has secured a patent to his peculiar method of producing the effect, and each has also been allowed a claim for his specific product resulting from his specific process. * * * Each of these claims is supposed to correspond to the product resulting from the pursuance of the method set out in the patent of the respective parties. The issue in interference is deemed to be somewhat generic, thus covering the species made by either party. Hence this interference. The title to the generic claim must turn upon the evidence as to what each party did in arriving at the general result of speckled or peppered ware, and the dates of such experiments. In any case, each party's species, as defined by its mode of production, is secured to him beyond cavil. This is an instructive instance, moreover, of the utility, if avoidance of litigation be an object, of defining and limiting the novel product of a process by the terms of that process in setting forth the true and patentable substance, contrary to usual practice, but correctly set out and distinguished by the commissioner in *Ex parte Painter*, 57 O. G. 999. The existing allowed claims to both parties we regard as specific, being based on their respective processes."

Now, upon the other side, the acting commissioner of patents, in his decision, said:

"Without setting forth the various facts upon which a conclusion is based as to just what will meet the terms of the issue, it is sufficient to state that such subject-matter is held to be enameled ironware having incorporated in the enamel specks, fusible or infusible in their inherent characteristics, scattered throughout the enamel, and giving it a speckled or peppered appearance."

It would thus seem that the acting commissioner of patents, so far as his attention was called to the subject, took a different view of this second claim from that taken by the examiner; but, as before observed, it was not a question for the officers of the patent office to construe. That is within the province of the court.

Upon this motion there have been presented the *ex parte* affidavits of two experts on each side construing this claim differently, so that it may be said, at the least, that the proper construction of this second claim of the Comstock patent is not altogether free from doubt. The court need not go further than to say that, without expressing any opinion whatever upon the construction which should be given to that second claim, for, upon a motion for an injunction in advance of any adjudication by the courts, it is well settled that a preliminary injunction will not be allowed unless the case is entirely clear and unless irrevocable injury is to result

from withholding the injunction. Here there is no sort of dispute that the defendants are responsible for any damages which the complainants may sustain if there should be a final adjudication in their favor upon the construction contended for their claim. As the question is not free from doubt, and is one respecting which the experts are not in accord, it would seem to be improper for the court, as a preliminary step in the litigation, to do that which might work great injury to the defendants, when, if the complainants shall finally be adjudged entitled to relief, the defendants are amply able to compensate them for the injury.

The motion for an injunction will therefore be overruled.

PASTEUR CHAMBERLAND FILTER CO. *et al.* v. FUNK *et al.*

(Circuit Court, N. D. Illinois, N. D. May 16, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—FILTERING COMPOUND.

Letters patent No. 336,385, issued February 16, 1886, to Charles Edward Chamberland, is for a filtering compound composed of pipe clay, or other suitable clay, diluted with water, and then mixed with porcelain earth or its equivalent, the latter being first baked and then reduced to a fine powder; the proportions being about 20 to 40 per cent. of the clay to 60 to 80 of the earth. *Held*, on motion for a preliminary injunction, that it was an infringement to use a compound of kaolin clay, or porcelain earth, and finely ground silic, in about the proportions of 80 to 45 per cent. of the kaolin and the rest silic.

2. SAME—PRELIMINARY INJUNCTION—BOND—BAD FAITH OF DEFENDANT.

On the granting of a preliminary injunction against infringement, complainant will not be required to give a bond for the protection of defendants, when the latter have been guilty of bad faith towards him.

In Equity. Bill for infringement of a patent. On motion for preliminary injunction. Granted.

Kerr & Curtis, L. Hill, and Staley & Shephard, for complainants.

H. A. Toulmin, L. L. Bond, and Poole & Brown, for defendants.

BLODGETT, District Judge. This case is now before the court on a motion for a preliminary injunction to restrain the alleged infringement of patent No. 336,385, granted February 16, 1886, to Charles Edward Chamberland, for a filtering compound. The scope and characteristics of the patent are perhaps best disclosed by the patentee himself, in his specification, where he says:

"The means hitherto employed for filtering water ordinarily consist in the use of burned brick, powdered substances, and various other materials, but which, either from the character of the materials themselves, or from the manner in which they are used or compounded, are not fully satisfactory, where great thoroughness in filtering is requisite. However efficient the named substances may be for filtering purposes, yet they do not, however, retain all germs or microbes, or extremely fine organisms, which are in suspension in the water or other liquid. * * * My invention is designed more completely to hold back and retain such germs. The compound is formed substantially of pipe clay, or any other suitable clay, and porcelain

earth, or its equivalents, hereinafter named. The clay is diluted in water, and then mixed with the porcelain earth or its equivalents. The porcelain earth is ground or reduced to fine powder in any suitable mill, after having been previously baked in any suitable kiln. The proportions are from twenty to forty per cent. of clay to sixty to eighty per cent. of porcelain earth or its equivalents. They may, however, vary, more or less. I wish it, however, to be understood that I do not limit myself to the above-named substances, for the same, or very much the same, result may be attained by using, for instance, silex, magnesia, or its equivalent, instead of porcelain earth.

* * * A filtering body produced from the above compound is homogeneous, and fulfils the required conditions for filtering. I do not wish to be understood as laying claim, broadly, to the materials hereinabove mentioned as a filtering compound, but only when they are treated as above specified."

The proof is, I think, quite convincing that defendants use a filtering compound made by combining kaolin clay or porcelain earth and finely-ground silex in about the proportions of 30 to 45 per cent. of kaolin and the balance ground silex. This, I think, is an infringement of the patent, as the patentee expressly says:

"I do not limit myself to the above-named substances, [pipe-clay and porcelain earth,] for the same, or very much the same, result may be attained by using, for instance, silex, magnesia, or its equivalent, instead of porcelain earth."

The utility of this compound for filtering purposes is, I think, abundantly established by the proof, as it now stands, for the purposes of this motion. The infringement being established, as I think it is by the proof, an injunction will be ordered, as prayed.

A bond would be required as a condition of granting this injunction, but for the proof in the record showing that the defendants in this suit have been guilty of bad faith towards the complainants, to such an extent that they are not equitably, as I think, entitled to the protection of the bond from complainants.

CUTCHEON *et al.* v. HERRICK *et al.*

(Circuit Court, D. Massachusetts. September 9, 1892.)

No. 2,882.

1. PATENTS FOR INVENTIONS—NOVELTY—PRIOR ART—BEATING-OUT MACHINES.

Letters patent No. 384,893, issued June 19, 1892, to the assignees of James C. Cutcheon, covers, in claim 1, "a machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means substantially as described, having provision for automatically moving one jack in one direction, while the other is being moved in the opposite direction, whereby the sole of the shoe upon one jack will be under pressure, while the other jack will be in a convenient position for the removal of the shoe therefrom." *Held*, on a review of the prior state of the art, that the essence of the invention is that it was the first machine in which both the motions of compressing the last and of clearing the last from the die were performed automatically, and the claim is valid.

2. SAME—INFRINGEMENT—EQUIVALENTS.

The fact that defendants in their machine use lasts instead of jacks does not prevent infringement, since the two are well-known equivalents.

B. SAME—ANTICIPATION—PRIOR USE.

The third claim of the patent, relating to certain details of construction, seems to have been anticipated by the old style Knox molder, but, in the absence of proof that the Knox machine was used prior to the date of the patent, this claim must be held valid, and infringement declared.

In Equity. Bill by James C. Cutcheon and others against George W. Herrick and others for infringement of patent. Decree for complainants.
Alexander P. Browne and George W. Moulton, for complainants.
Charles A. Taber, for defendants.

COLT, Circuit Judge. The present suit is for the infringement of letters patent No. 384,893, issued June 19, 1888, to the complainants, as assignees of James C. Cutcheon. The patent is for an improvement in beating-out machines. These machines are used to give the sole of a shoe the requisite curve or contour. Originally this was done by the cobbler holding the shoe between his knees, and beating the sole with a flat-faced hammer. In the operation of these beating-out machines three motions are necessary,—the motion of pressure, the motion of clearance, and the motion of removal. The first machine of this character was constructed under the Johnson patent of November 26, 1867. This apparatus consisted of a hand-operated screw press, in which the sole of the shoe was forced against a mold or base plate having the proper curvature to give the sole the desired shape. This was followed by the Johnson patent of March 10, 1868. In this device the shoe was supported upon an iron last, mounted upon a bar moving vertically between the guide to and from a fixed mold. The last was connected with a toggle lever, and a foot lever, and the operator, by placing his foot upon the foot lever, forced up the last against the mold. The next Johnson patent is dated July 22, 1873, in which the machine was operated by a power driving shaft, so that when the operator had pressed the treadle down part way the power of the shaft would force the sole against the mold. In his patent of June 30, 1874, the same inventor substitutes a jack for the iron last or shoe carrier. This jack was adapted to carry several sizes of wooden lasts, whereas, in the case of the iron last, a separate last must be provided for each size of shoe. The next improvement of Johnson was patented July 20, 1880. In place of a single pressing mechanism, this machine contains a number of such mechanisms arranged side by side, and for this reason it became known in the art as a "gang" machine. The next patent referred to in the record was granted to Maurice V. Bresnahan, June 10, 1884. This was also a "gang" machine. In this device the motions are horizontal, instead of vertical, as in previous machines. It is unnecessary to enter into the specific improvements embraced in this machine.

The result of this brief review of the prior art shows that, previous to the Cutcheon patent, the operation of clearing the last from the die had never been done automatically. The essence of the Cutcheon invention is that it was the first machine in which both the motions of compressing the last and of clearing the last from the die were performed automatically. The first claim of the patent is as follows:

"A machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means, substantially as described, having provision for automatically moving one jack in one direction while the other is being moved in the opposite direction, whereby the sole of the shoe upon one jack will be under pressure, while the other jack will be in a convenient position for the removal of the shoe therefrom."

There is no doubt that the defendants' machine contains all the mechanical elements embraced in the above claim. The fact that the defendants use lasts instead of jacks in their machines is unimportant, because they are well-known equivalents. Upon the question of alleged prior use of the Cutcheon invention several years before the date of the patent, in a single machine constructed mainly in accordance with the Bresnahan patent of June 10, 1884, I am satisfied that this defense has not been made out upon the present record.

The defendants are also charged with infringing the third claim of the patent in suit, which relates to certain details of construction. This claim seems to have been anticipated by the old style Knox molder, but the defendants have not proved the use of the old Knox machine prior to the date of the Cutcheon patent. Upon the evidence, therefore, I must hold that this claim is also infringed. Decree for complainants.

SMITH & DAVIS MANUF'G Co. v. MELLON.

(Circuit Court, E. D. Missouri, E. D. June 1, 1892.)

PATENTS FOR INVENTIONS—PUBLIC USE—BED BOTTOMS.

Letters patent No. 269,242, issued December 19, 1882, to J. G. Smith for an improvement in bed bottoms, are void because bed bottoms having all the material elements of the invention were in public use and on sale for more than two years prior to the application.

In Equity. Bill by the Smith & Davis Manufacturing Company against Mellon for infringement of letters patent No. 269,242, issued December 19, 1882, to John G. Smith for an improvement in bed bottoms. Bill dismissed.

William M. Eccles, for complainant.

George H. Knight, for defendant.

THAYER, District Judge, (orally.) In view of the testimony the court is of the opinion that the invention covered by letters patent No. 269,242 was in public use and on sale for more than two years prior to the date of the application for the patent, and that the patent is for that reason void. *Smith Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122; *Egbert v. Lippmann*, 104 U. S. 333; *Manning v. Glue Co.*, 108 U. S. 462, 2 Sup. Ct. Rep. 860; *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. Rep. 101. It hardly admits of a doubt that complainant made and sold wire bed bottoms which embodied all of the material features or elements of the

invention for a period of more than two years prior to October 14, 1882, and that it did so not as an experiment, but for the purpose of realizing a profit.

The closing of the head of the spiral springs by passing the top wire around the second before extending it to form a hook cannot be regarded, under the specifications, as a material feature of the invention. That is merely a preferable mode of construction. The patentee would be entitled to claim (and no doubt would claim if there was occasion to do so) that the use of a spring with an open head was an infringement of his patent as well as the use of a spring with a closed head. Bed bottoms embracing all of the material elements of the invention having been in public use and on sale for more than two years prior to the application, the patent is void, and the bill must be dismissed.

LORING v. BOOTH *et al.*

(Circuit Court, N. D. New York. October 11, 1892.)

No. 6,001.

1. PATENTS FOR INVENTIONS—ASSIGNMENT—INFRINGEMENT BY PATENTEE.

A patentee assigned all his interest in a patent, agreeing not to manufacture or sell the patented machine or make any improvement thereon which would adapt it to any other kind of work. Subsequently the assignee sued him for infringement in making an improvement on the machine. *Held*, on motion for preliminary injunction, that in the light of the above contract, although the suit was not based thereon, the patentee was not in so favorable a position before a court of equity as one who infringes ignorantly or inadvertently, and that the patent should be construed liberally as against him.

2. SAME—INFRINGEMENT—NOTICE TO DESIST—LACHES.

The defendants were notified to desist from infringement about eight months after knowledge thereof came to the plaintiff, and suit was begun within four months thereafter. *Held*, that under the circumstances the delay did not constitute laches.

In Equity. Bill by Charles M. Loring against Quentin W. Booth and Irving E. Booth for infringement of patent. On motion for preliminary injunction. Order for injunction unless defendants give bond.

George B. Selden, for complainant.

Howard L. Osgood, for defendants.

COXE, District Judge. The bill is in the usual form, alleging infringement of two letters patent, numbered respectively 318,731 and 344,485, for improvements in shoe-upper machines. The validity of both patents is undisputed. The defendants oppose the motion upon two principal grounds—noninfringement and laches. The question of infringement of the third claim of the patent granted to Charles B. Hatfield, No. 318,731, was decided at the argument. The device which the complainant produces as a sample of the defendants' manufacture certainly infringes when the irons are stationary, but it is thought this condi-

tion was produced rather by accident than design. The device which the defendants produce as a sample of their present manufacture does not infringe; and, when operated as defendants insist it always should be operated, cannot be made to infringe. The defendants should not be permitted to sell devices like the former or prevented from selling devices like the latter.

The other patent, No. 344,435, was granted to Quentin W. Booth, one of the defendants, on the 29th of June, 1886. The patent was duly assigned to the complainant. It is intended to cover improvements upon the machine described in No. 318,731, the other patent in suit. The only claim in issue is as follows:

"In a machine for beading shoe uppers, the combination of the arm, the stationary jaw secured to the end of the arm, the movable jaw, the rod connected with the movable jaw, and the eccentric for giving motion to the rod, as set forth."

The machine made by the defendants has all these elements in combination substantially like the combination of the claim, but it is said that an examination of the prior art renders a narrow construction necessary, and, if so construed, the defendants do not infringe the claim.

At the time the patents were assigned the defendants also transferred by a written agreement—

"All of their right, title and interest in the automatic shoe beader, *i. e.*, patent, beader mdse. on hand and beader special tools belonging thereto, as shown in inventory and ledger of the company. The parties of the first part further agree not to manufacture, sell or handle or cause to be manufactured, sold or handled any of said shoe beadings or make any improvement on the same that would adapt it to any other kind of work than that for which it is now intended, without the consent of the party of the second part."

It is true that this action is not based on the contract, but the language quoted, if it has no other signification, certainly throws some light upon the interpretation and scope of the claim as understood by the defendants at the time they sold the patents, the machines and the tools for making them, to the complainant's predecessors. They appear to have thought at that time that the purchasers of the patents were invested with a broad monopoly of the business in question. If their present contention is correct the complainant obtained nothing of real value. Parties situated as the defendants are do not occupy as favorable a position in a court of equity as those who infringe ignorantly or inadvertently. As against the defendants the patents must be liberally construed. Further discussion of this question should be reserved until the final hearing, when it can be determined more satisfactorily than upon the comparatively crude presentation of a motion of this character. At present it is sufficient to say that I am inclined to think the claim in question has been infringed.

The bill was filed July 15, 1892. Several affidavits tending to show that the existence of the defendants' machine was known to Charles B. Hatfield during the summer of 1891 have been read. Assuming these statements to be true, and assuming also that the knowledge

of Hatfield, who assigned his patent in May, 1885, can be imputed to the complainant, still the proof is insufficient. The time which elapsed before the defendants were notified to desist from infringing was only about eight months, and the suit was commenced within four months thereafter. In the circumstances of this cause the delay was too short to constitute laches. *Collignon v. Hayes*, 8 Fed. Rep. 912, 916; *Kilbourn v. Sunderland*, 130 U. S. 505, 518, 9 Sup. Ct. Rep. 594. The testimony seeking to fasten knowledge upon the complainant himself as early as the autumn of 1889 is too vague and uncertain to prevail against his positive denial. For the reasons stated at the argument the defendants should have an opportunity to give a bond if they so desire.

An injunction may issue, unless within 10 days from the date of the service of a copy of the order entered upon this decision, the defendants shall give a bond in the sum of \$6,000, conditioned, substantially, as in *Swift v. Jenks*, 19 Fed. Rep. 641. If a bond is given the complainant can at any time move to increase the amount upon sufficient proof that it is inadequate.

UNION INS. CO. OF SAN FRANCISCO v. DEXTER.

(District Court, S. D. New York. July 13, 1892.)

SHIPPING—MASTER—NEGLIGENCE—APPROACHING DANGEROUS COAST.

When a vessel is approaching a dangerous coast at night, amid uncertain currents and in a deceptive atmosphere, it is the master's duty to make use at the first opportunity of all his available means provided for correcting by observation the errors of dead reckoning; and for losses either to ship or cargo, resulting from his neglect to do so, the master is directly responsible to the persons injured. In this case the master was held negligent (1) for not making such change of course as the chart showed was necessary upon his own estimate of his position; (2) not using the alidade in order to correct his erroneous estimate of position.

In Admiralty. Libel against the master of the City of Para for damages caused by the stranding of the vessel. Decree for libellant.

George A. Black, for libellant.

Hoadley, Lauterbach & Johnson, for respondent.

BROWN, District Judge. The above libel was filed by the insurers of a part of the cargo on board the steamship City of Para, which stranded on a reef about 1½ miles off the southwesterly point of Old Providence island, at 10:24 p. m. of May 17, 1888, while on a voyage from Aspinwall to New York. Having paid the loss, the libellant sued the respondent, as master of the steamship, on the ground that the stranding was caused by the master's neglect to take proper precautions to keep away from that dangerous coast. The question of negligence in navigation was among the issues presented to this court upon the trial of the petition of the Pacific Mail Steamship Company, as owners of the steamer, for a limitation of their liability to cargo owners in respect to this stranding. On that trial the present defendant was a witness for the petitioners to

disprove negligence; but the court found that there was negligence in the navigation of the ship in not bearing away sufficiently to port when the island was made a half point on the steamer's port bow; and in not verifying, by simple and easy methods of observation and calculation, the actual distance of the island, which was much less than the master supposed; and because the master relied upon his mere estimate and judgment of his position instead of verifying it by such calculations and observations as would quickly have shown him the truth. *The City of Para*, 44 Fed. Rep. 689.

Upon the hearing of the present case the facts proved are substantially the same as before; except that it does not appear that at 5 P. M., before the stranding, the position of the steamer was accurately ascertained. The master now testifies, on the contrary, that he had not obtained any accurate observation since the previous noon. The additional testimony taken in behalf of the respondent shows in general the dangerous nature of the coast; that a prudent navigator, in going on the westward side of Old Providence island in the night-time, would intend to give it a berth of about six miles, which the respondent testifies he also intended; that the haziness of the atmosphere at that time made the estimate of the distance of land deceptive; that the currents of that region, depending upon the strength of the wind, usually run about north or northwest, varying from half a knot to two knots, or sometimes even more; and that up to the line of the coral reefs the water is so deep as to make soundings for the most part impracticable.

Upon the additional testimony, I cannot find that the aspect of the case is substantially changed from that presented on the former hearing. The master is not, indeed, to be held for error or mistake in the exercise of his best judgment in the midst of uncertainties which there are no means of correcting by observation. But when approaching a dangerous coast at night, in uncertain currents and in a deceptive atmosphere, it is the master's duty to make use at the first opportunity of all the means provided for correcting by observation the errors of dead reckoning. It is for the omission to make use of these means, and for this alone, that I am constrained to hold the master answerable.

At 9:45 P. M. the southwestern point of the island was made half a point on the steamer's port bow, and was seen to stretch away like a black mass across to starboard. Reckoning according to the supposed speed of his ship from the position made by observation the previous noon, the master estimated his distance to be 12 miles from the island. He went to his cabin to prick out his position on the chart, and at 10 o'clock changed his course $1\frac{1}{2}$ points to port, namely, from N. by W. $\frac{1}{4}$ W. to N. W. by N. $\frac{1}{4}$ N. The captain stated that he estimated his speed at about 9 knots; but in order to reach his supposed position 12 miles distant from the island from his position of the previous noon, (deducting a stop of three fourths of an hour,) he must, in fact, have counted upon a speed of about $9\frac{1}{2}$ knots, including, as he says, one half knot for his estimate of the current, all sails being also set. Ten minutes afterwards a further change of three fourths of a point was

made to port, i. e., to N. W. $\frac{1}{2}$ N. In 10 minutes afterwards the bows of the vessel struck on a coral reef in less than four fathoms of water, at a point $1\frac{1}{2}$ miles W. S. W. from shore. During the 39 minutes after the land was reported one half of a point off the port bow, no observation was made with the alidade to determine the distance, and the speed of the ship was kept unchanged.

1. I do not ascribe any fault or neglect to the master in estimating his distance from the island to be 12 miles at the time when the land was reported one half a point on his port bow. But if there was any call to prick his position upon the chart, as he testifies he immediately did, it was certainly his duty also to observe the course which, upon his own assumption of a distance of 12 miles, would be necessary in order to carry him at a reasonably safe distance, namely, 6 miles from the coast, as he says he intended; and that would have required, at the supposed distance of 12 miles, that his course should have been changed to N. W. $\frac{1}{2}$ N.; that is, $3\frac{1}{2}$ points to port, instead of $1\frac{1}{2}$ points. Had he made such a change at that time, he would in fact, although but half the distance from the land that he supposed, have just cleared the reefs. Had the change of $1\frac{1}{2}$ points been made when the land was reported, instead of 15 minutes afterwards, and had he been 12 miles distant, that change even at that distance, according to my plotting of the navigation, would have carried him only $2\frac{1}{2}$ miles from land, instead of 6 miles; and the subsequent additional change of three fourths of a point would not have been sufficient to carry him even 3 miles away from the land. Upon the master's own estimate of his position, therefore, the courses which he took were not sufficient, even had they been taken at once, to carry him half the distance from the shore that he now says he intended. This mistake could only have arisen from great inattention to the chart, or entire neglect to ascertain from it his proper course.

2. I think there was an equal neglect of duty in not making observations by the alidade to verify his actual position. The ship was provided with this instrument, and by the use of it the bearings of the point of the island on the port or starboard bow at different times could have been quickly taken, and with all the accuracy necessary for practical purposes. It is stated in general terms for the defense, that the western end of the island did not afford a sufficiently precise object for such observations. I cannot give any weight to this excuse. The western end was sufficiently marked to enable its bearing on the port bow to be determined, namely, half a point. Observations with the alidade would have shown the rapid change in its bearing at short intervals. The tables prepared for giving the distance upon any two of such observations enabled the approximate distance to be obtained very quickly. Even at the supposed distance of 12 miles, when the land was reported a half point on the port bow, it was the master's duty to port at least two points, for a glance at the chart would show that that was necessary to clear the reefs. Observations with the alidade made five minutes apart would have shown such a change in the angle of the bearing of the head of land seen, as to indicate that its distance

was only about one half what was supposed. There was time for several such observations. All would have repeated the same warning, and shown the necessity of a much greater change of course to port.

I must hold the master remiss in his duty, both for not taking a course more to port, which a proper consultation of his chart would have shown to be necessary on his own estimate of his position, and also for not correcting his erroneous estimate of position by observations with the alidade. For losses resulting from such neglect, either to ship or cargo, the master is directly responsible to the persons injured; and to the libellant by subrogation, on its payment of the insurance. Story, Ag. §§ 314, 315.

Decree for the libellant, with costs.

THE EXE.

WILLIAMS v. THE EXE.

(District Court, S. D. New York. July 11, 1892.)

SHIPPING—DAMAGE TO CARGO—INSUFFICIENT FITTINGS—NEGLIGENCE.

A cargo of tea was delivered damaged by water which had been admitted to the hold of a vessel through an open bolt hole in the water ballast tank. The court found that the damage proceeded either from the original insufficiency of a stanchion, which the bolt had served to fasten, or its bad condition or bad fastening at the commencement of the voyage. *Held*, that the ship, not the cargo, took the risk of such defect.

In Admiralty. Libel for damage to cargo. Decree for libellant.

Sidney Chubb, for libellant.

Convers & Kirkin, for claimants.

BROWN, District Judge. On the delivery of a consignment of tea in New York in November, 1891, by the steamship Exe, 217 packages were found damaged. They had been stowed in compartment No. 2 and the damaged packages were in the lower tier, where they had been more or less wet by water, which, upon subsequent examination, proved to have come through an open bolt hole in the water ballast tank. The bolt had served to fasten the smaller stanchion some five or six inches from the principal stanchion over the keelson. This stanchion of iron, two inches in diameter, was found bent in the middle and loose at the bottom, the bolt having been drawn out of the hole where it had been fastened.

The claimants contend that the bending of the stanchion, and the consequent drawing of the bolt were caused through the surging of the ship in heavy weather, that is, by a peril of the sea, and by the weight of the cargo pressing against the stanchion in the rolling of the ship on the voyage. I am not satisfied of the sufficiency of this expla-

nation. The cargo of tea was a comparatively light cargo; it was not calculated to damage and to break down into an unseaworthy condition a vessel properly constructed, and in proper condition at the commencement of the voyage. The weather was not so extraordinary that damages arising from mere insufficiency of the interior structure of the vessel to keep the cargo from water damage, should fall on the cargo. The bolt when loose was found to be much rusted. The master in his testimony speaks of it as so loose and rusted that water might come around it.

Packages of tea are, or ought to be, so tightly packed as not to admit of any shifting. In this case there was no proper shifting; only evidences of slight movement of the cargo. Some boxes in the neighborhood of the stanchion were broken; and some damaged on top. But the risks of the bending of a stanchion like this, and of pulling out rusty bolts, do not belong to the cargo, but to the ship. Had they been of proper strength and in proper condition, no such accident could have happened, or such damage arisen. In my judgment the damage proceeded from either the original insufficient strength of the stanchion, or from its bad condition, or bad fastening at the commencement of the voyage. For such defects, either of condition, or of original structure, the ship, and not the cargo, takes the risk; and to such damages none of the exceptions of the bill of lading apply. *The Hadji*, 16 Fed. Rep. 861, affirmed 20 Fed. Rep. 876; *The Rover*, 33 Fed. Rep. 515, 516, affirmed 41 Fed. Rep. 58; *The Caledonia*, 43 Fed. Rep. 681; *Steel v. State Line, etc.*, 3 App. Cas. 72, 86; *Tattersall v. Steamship Co.*, 12 Q. B. Div. 297.

Decree for the libellant, with costs, with an order of reference to compute the damages, if not agreed upon.

THE COVENTINA.

MUSICA v. THE COVENTINA.

(District Court, S. D. New York. July 14, 1892.)

1. SHIPPING—DELAY IN SAILING—CONTROVERSY BETWEEN OWNER AND CHARTERER—LIABILITY TO CARGO OWNER.

The owners of a vessel chartered her for the purpose of procuring freight, and the master issued the usual bills of lading to a shipper, importing a delivery of the goods within a reasonable time. Thereafter a controversy arose between the owners and charterers, by reason of which the sailing of the vessel was unduly delayed. *Held*, that the vessel was liable to the shipper for the excessive delay caused by such controversy.

2. SAME—DELAY DUE TO ATTACHMENT OF VESSEL—DUTY OF OWNER TO SHIPPER.

When a vessel was attached after cargo had been put aboard, and could not be released until the end of an uncertain litigation, *held*, that the shipper's goods should have been transferred to another vessel, or notice given the shipper of the liability to delay, with the privilege of reshipping. In default of this, the ship took on herself the risk of loss by delay, with right of recourse for indemnity over to the person causing it.

In Admiralty. Libel for damage caused by delay in shipping cargo.
Decree for libellant.

Hobbs & Gifford, for libellant.

Convers & Kirlin, for claimants.

BROWN, District Judge. On the 9th of January, 1892, a quantity of wine was shipped at Leghorn, Italy, on board the steamship *Coventina*, bound for New York. The vessel did not arrive till the 18th of April, 1892, a period of 100 days. Forty-three days was the outside limit of the usual time of delivery. The wine had been sold by the consignee "to arrive," and in consequence of the great delay in arrival, the purchaser revoked the contract and refused to accept the wine. Meantime the market price declined; and this libel was filed to recover the loss.

The vessel had been chartered by the owners. After the wine was shipped, a controversy arose between the owners and the charterers upon the terms of the charter, whether the ship was bound to touch at certain ports in Spain. The master refusing to proceed to the ports desired, the charterers caused the vessel to be attached in Italy on the 27th of January, on a claim of damages for breach of charter, and she remained in custody 40 days, until a reversal on appeal. The owners were unable to procure her release at first, the practice there not entitling them to this right. There is no proof of negligence in the endeavor to procure the release of the ship, or to dispatch her upon the voyage. The court of first instance at Civita Vecchia decided the suit in favor of the charterers. The owners might then have obtained a release of the vessel by the payment of the judgment; but the charterers having become insolvent, the owners could not safely pay the decree and expect to get back the money in case of reversal. The vessel was, therefore, left in custody and an appeal taken to Rome, on which the judgment below was reversed, at the end of 40 days from the original arrest, with damages to the amount of the charter, pursuant to its stipulation, in favor of the owners.

For the ship it is contended that, in the absence of any negligence, she is not liable; 1 Pars. Shipp. & Adm. 311; *The Success*, 7 Blatchf. 551; *The Onrust*, 6 Blatchf. 533; for the libellant, that she is answerable for damages to the cargo owner for nondelivery within a reasonable time.

The exception in the bill of lading, "Restraint of Princes," etc., does not, I think, include a detention under a suit like that above stated. *Finlay v. Steamship Co.*, 33 Law T. (N. S.) 251. The charter was a charter of affreightment, voluntarily entered into for the mutual interest of the owners and the charterers. As respects the shipper of goods, they both represented a single interest; and the vessel was bound for the delivery of the goods according to the legal import of the bill of lading, which the owners in legal effect, by the master, had issued. This obligation was to deliver within a reasonable time. The charter was but a means of procuring freight; and if, for securing freight, the owners incumbered themselves by a charter contract, I do not perceive how any controversy

between them and the charterers could change their obligation to the shipper to deliver within a reasonable time under the bill of lading they had issued. The shipper was a stranger to that controversy. Its consequences were not at the shipper's risk, but at the risk of the owners, who had voluntarily dealt with the charterers and had chosen to obtain cargo in that way. If the charterers were in the wrong, the owners were entitled to indemnity from them; and the court of appeal, as above stated, seems to have awarded that indemnity.

Nor is a detention of the vessel by an attachment in such a litigation such a circumstance as is to be taken into account in considering what is a usual or reasonable time. Upon this point the case of *Broadwell v. Butler*, 6 McLean, 296, is analogous. It is there said, (page 300:)

"The subsidence of the water in the Ohio river, which prevented the boat from passing over the falls, was not a cause of delay, which, within any of the principles, would excuse the carrier from the obligation imposed by law to deliver the property within a reasonable time. It was practicable to have delivered the cargo at Cincinnati by draying the molasses and sugar around the falls, and reshipping on other boats."

The waiting for the rise of water was there justified solely on the ground of long usage. So in this case, had not the owners wished to rely on indemnity to be obtained from the charterers, they might have reshipped the goods by another vessel.

In the case of *Stiles v. Davis*, 1 Black, 101, it was held in the supreme court that a seizure of the goods by the sheriff under an attachment as the property of a third party, was a good defense by the carrier to an action of trover for nondelivery. But in such cases the carrier is a stranger to the controversy. He performs his whole duty by prompt notice to the owner and proper care and defense of the goods meantime. In the case at bar the controversy was the ship's own controversy, founded on her own contract by charter to which the shipper was a stranger, no reference to the charter being made in the bill of lading. The relations of the cargo owner to the controversy in the two cases are reversed. But even in the former class of cases, prompt notice to the owner, and due care in the meantime, are obligatory on the carrier. For nonperformance of these duties the ship in the case of *The M. M. Chase* and *The G. P. Trigg*, 37 Fed. Rep. 708, in this court, was held liable; and this ruling was affirmed on appeal.¹ So here, when it was found that this ship had been seized and could not be released, except at great risk to the owners, until the end of an uncertain litigation, reasonable consideration of the shipper's interests required either that the goods should be transhipped to their destination by some other vessel, or else that the shipper should be notified of the liability to delay, and the privilege given him to reship at his option. In default of this, the ship took on herself the risk of loss by delay, with the right of recourse to the charterers for indemnity.

On both grounds I think the libelant is entitled to a decree, with costs.

¹ No opinion.

THE DANIEL BURNS.

STARIN'S CITY, RIVER & HARBOR TRANSP. CO. v. THE DANIEL BURNS.

(District Court, S. D. New York. June 28, 1892.)

SHIPPING—HIRED VESSEL—BAILMENT—SHORTAGE—OWNER PRO HAC VICE.

A canal boat was hired by libelant at a specified daily rate for an indefinite time, to be used by libelant for storing or carrying its own grain. A man was attached to the boat, who, however, had nothing to do with the manipulation of cargo or the navigation of the boat, which was done exclusively by the libelant. A shortage in a cargo of grain having occurred, this suit was brought to recover its value. *Held*, that the boat was not a common carrier, and that the libelant, in putting its grain aboard, did not part with its possession, or deliver it to the boat owner. Therefore, apart from the unsatisfactory nature of libelant's proof as to the actual shortage, *held*, that the libel should be dismissed.

In Admiralty. Libel for shortage in cargo. Libel dismissed.

Goodrich, Deady & Goodrich, for libelant.

Hyland & Zabriskie, for claimant.

BROWN, District Judge. The libel was filed to recover the value of 1,348 bushels of oats, which, it is alleged, were not delivered out of a quantity of 8,989 bushels, alleged to have been loaded upon the canal boat Daniel Burns on December 8, 1891. The libel states that the quantity missing "was sold and delivered by the master without orders from the libelant," and that the canal boat was "under charter to the libelant for transportation of the oats from Hoboken, N. J., to such point or points in the harbor of New York as might thereafter be ordered."

The proof is scarcely satisfactory as to the actual quantity loaded upon the canal boat. What was put upon the boat was put in from cars, which had been weighed and measured upon different days previous to the loading. The weigher could give no testimony as to the amount on either of the cars. The weight he testified to was obtained, as he said, by the addition of the weights on the several cars together. He testified positively to this aggregate; but he could give no items; he did not remember them without his memoranda; and his memoranda though called for, were not produced. There was no proof as respects the custody of the cars, or of the grain, between the time when they were measured and the time when they were unloaded upon the boat; and hence no proof that all of it went upon the boat. There was no proof of any abstraction of grain from the boat, nor of any improper delivery without orders of the libelant. 7,641 bushels were admitted to have been delivered in three different deliveries; but there was no proof of the actual measurement of the quantity delivered, or that the amount taken by the libelant's vendee did not exceed that quantity. I should hardly be satisfied to render any decree for the libelant upon such evidence, if in other respects the libel could be sustained.

But upon the proof as to the hiring of the boat, I do not think the facts show that either the Burns or her owner was liable for a mere deficiency of grain found on unloading. There was no charter of the

boat in the ordinary sense. The boat was merely hired by the libelant, in accordance with a very common practice, for an indefinite time, at the rate of two dollars a day, for use by libelant in storing or carrying its grain about the harbor; that price to be paid for each day that any cargo was aboard. The boat, so far as respects loading and unloading, her navigation, and the delivery of cargo, was to be subject wholly to the orders and control of the libelant. The price of two dollars per day included a man, who was called a captain, who stayed upon the boat, and whose business it was to attend to her and keep her pumped out as necessary. But this man had nothing to do with the loading, trimming, or unloading of the cargo, nor with the navigation of the boat; and the canal boat had no motive power of her own. Whatever navigation there was, was to be done exclusively by the libelant. When any cargo was to be delivered, the libelant would cause it to be towed; and the cargo, or so much of it as might be sold, would be transported by the libelant to the place where the buyer wished to remove it. The boat was loaded by the libelant on the 8th of December. The first delivery was of about one third of the oats on the following 27th of December; the next, on January 25th; and the last, on February 25th. Upon the evidence in the case the most that can be said, even if there was sufficient proof of the loading of 8,989 bushels and of the delivery by libelant's orders of only 7,639, that there is a discrepancy of 1,315 bushels between the intake and the outgo, without any explanation of how the discrepancy occurred. But the proof does not show that the loss, if any, occurred by any fault of the boat, or of her owner.

It is plain that the boat was not a common carrier. She had none of the duties of a carrier to perform. It is equally plain that the owner, in letting her out in the way above stated, did not take on himself any of the duties of carrier, or of a warehouseman. The contract amounted simply to a bailment of the boat by the owner to the libelant for its use in receiving the grain, with the privilege to the company, either to use the boat simply for storage, or to move her about the harbor as the company pleased, from place to place, for the sale and delivery of such grain as the libelant might choose to put on board, the claimant simply supplying a man to take care of the boat, without any duties as regards the cargo or navigation.

In all the cases cited by the libelant, the boat receiving the cargo has received it under some contract to transport it, and has had the rights, and has owed to the libelant the duties, of a carrier. *The E. M. McChesney*, 8 Ben, 150; *Coal & Iron Co. v. Huntley*, 2 C. P. Div. 464; *Leary v. U. S.*, 14 Wall. 607; *Richardson v. Winsor*, 3 Cliff. 395. In the present case no such duties rested upon the claimant or upon the canal boat. The only duty of the claimant to the libelant was to furnish a proper man to look after the care of the boat itself, and there is no evidence that the man failed in this duty. The claimant was neither carrier nor warehouseman. He never took on himself the duties of either, and never assumed or contracted to assume any responsibility as respects the cargo.

The boat was in legal effect delivered to the libelant. The libelant, in putting its grain on the boat, did not part with the possession of the grain, nor deliver it to the boat owner. On the contrary, the boat was delivered to the libelant, and was legally in its possession, custody, and control. The libelant was owner *pro hac vice*. The claimant was not liable for the boatman's willful torts or crimes, if any had been proved. *Scarff v. Metcalf*, 107 N. Y. 217, 13 N. E. Rep. 796.

The libel is dismissed, with costs.

THE EURIPIDES.

AMERICAN SUGAR REFINING CO. v. THE EURIPIDES.

(District Court, S. D. New York. June 11, 1892.)

1. SHIPPING—DAMAGE TO CARGO—INSUFFICIENT PUMP—NEGLIGENCE.

Where a vessel arrived with her cargo of sugar damaged both above and below by water in the hold, and the evidence indicated that the damage above had been caused by water taken in through deck openings in heavy weather, but that the damage below was caused by a bad condition of the ship's pump and valve, which condition existed at the commencement of the voyage, and also that reasonable care had not been taken to remove the water when it was found that the pumps were choked, it was held that the ship was liable for the latter damage; not for the former.

2. SAME—CHARTERED VESSEL—LIABILITY OF SHIP.

The vessel was demised to charterers, who had subchartered her at the time of the damage by a charter of affreightment. Held, that the original charterers having undertaken to transport the goods under authority and consent of the shipowners, under a bill of lading signed by a duly-authorized agent, or without any bill of lading whatever, on her implied contract to transport safely, the ship would be liable.

In Admiralty. Libel for damages to cargo. Decree for libelants.

Wing, Shoudy & Putnam, for libelants.

Convers & Kirlin, for claimants.

BROWN, District Judge. On the discharge of a cargo of sugar in New York in March, 1892, brought by the Euripides from Havana, some two feet of water were found in her hold, causing considerable damage to the sugar, some of the bags being entirely empty, and some 2,500 partly empty or damaged. The above libel was filed to recover for this loss and damage.

The claimants contend that the loss occurred through a peril of the seas, in consequence of an unusually long and tempestuous voyage, during which a great deal of water was taken over her bows, which worked more or less down through the deck about the mast and ventilators into the two compartments below. The four-inch pipe from the water closet, leading to the ship's side, was also found to have a hole in it of about an inch and a half in diameter, claimed to have been gnawed by rats, about 12 or 18 inches inside of the valve, which was a little inside of

the ship's side, and through which additional water worked its way. The ship's pumps ceased to bring any water some five or six days after the vessel sailed, and no considerable amount of water was suspected to be aboard until her arrival in New York. Subsequent examination showed that the pumps had got filled up solid at the bottom by candied treacle and greasy matter from the bilges. The vessel sailed on February 17th. No heavy weather was experienced till the 19th; and from the 22d to the 28th was continuous heavy weather. She arrived in New York on March 3d.

I have considerable doubt whether the hole shown in the pipe was gnawed by rats. Although one rat was seen, there are no other indications of rat damage, nor of any considerable number of rats aboard. The amount of water taken in from the deck is shown to have been comparatively small. Three hundred bags is the highest estimate given at the trial of the number of bags damaged from this cause on the upper part of the cargo. This number, or whatever number may be found to have been injured from water taken in from above, should be excluded, as caused by sea perils.

But the evidence does not indicate any such amount of water taken in in this way as to injure the cargo at the bottom, where most of the damage and loss arose. This must have come through the pipe, and should have been prevented by the valve; but the valve, also, was proved by Reilly to have been so battered as to afford insufficient protection.

Water in the hold ought to have been removed also by the pumps, before it had accumulated to such an extent as to touch the bags protected by proper dunnage and flooring; but the pumps would not work after the vessel was five or six days out.

It is not credible that the pumps could have got stopped up solid in so short a time, if they were properly cleared before the vessel sailed. After arrival the water was removed without difficulty by hand pumps. Nor am I satisfied that on so short a trip the water-pipe valve, if in proper order at the beginning of the voyage, could have become so much battered as to account for the amount of water found at the close of the voyage. The unavoidable inference from all the circumstances, it seems to me, is that both the pumps and the valves were in bad condition at the commencement of the voyage; and that when it was found that the pumps did not work, reasonable care was not exercised to ascertain the amount of water in the hold, or to remove it by other means, if the pumps were stopped. On both grounds the ship is liable to make good so much of the damages as did not arise from water coming in from above.

The original charter was a demise of the ship, and the charterers were in the position of owners *pro hac vice*. *The India*, 14 Fed. Rep. 476, affirmed, 16 Fed. Rep. 262; *The Bombay*, 38 Fed. Rep. 512. The subcharter was not a demise of the ship, but a charter of affreightment only. For goods shipped under the subcharter the master, or the original charterers, or their authorized agent, the supercargo, had authority to sign any proper bill of lading, and that would bind the ship. This

was a common form of bill of lading and proper for the goods in question.

But the liability of the ship would be the same without any bill of lading. The original charterers undertook to transport these goods; this was done by the authority and consent of the ship owners, for such was the very object of the charter. The ship is, therefore, answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee, upon the implied contract to transfer safely, whether a bill of lading is issued or not. *The Water Witch*, 19 How. Pr. 241, affirmed 1 Black, 494; *The Peytona*, 2 Curt. 21, 27; *The T. A. Goddard*, 12 Fed. Rep. 184, and cases there cited.

Decree for the libelants, with costs, and an order of reference to compute the damages, if not agreed upon.

SORENSEN *et al.* v. KEYSER.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 28.

1. DEMURRAGE—LAY DAYS—DROUGHT—CONSTRUCTION OF CHARTER.

Where a ship is chartered in Liverpool to carry a cargo of lumber from Ship Island, and the charter party provides that "in the computation of days allowed for delivery should be excluded any time lost by reason of droughts, floods, and storms, or any other extraordinary occurrence, beyond the control of the charterer," such exception does not apply to a drought existing at the time of the charter in the region of the Pascagoula river, and which prevented the charterer from obtaining the timber, but which did not interfere with its delivery from Moss point, the usual place of preparing cargoes, and between which place and Ship Island no drought could affect the delivery. 48 Fed. Rep. 117, reversed.

2. SAME—STORMS.

Under the terms of the charter, demurrage was to be paid for each "working day beyond the days allowed for loading." Held, that time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage.

3. SAME—"WORKING DAYS" DEFINED.

The term "working days" in maritime affairs means a calendar day on which the law permits work to be done. It excludes Sundays and legal holidays, but not stormy days.

Appeal from the District Court of the United States for the Southern Division of the Southern District of Mississippi.

In Admiralty. Libel by Jacob E. Sorensen and others, owners of the bark *Urania*, against W. S. Keyser, for demurrage. The libel was dismissed, (see 48 Fed. Rep. 117,) and the libelants appealed. The case was then heard on motion of appellee to be allowed to take testimony as to the meaning of certain words in the charter party, which motion was overruled. 51 Fed. Rep. 30. The case is now on final hearing. Reversed.

John D. Rouse and *Wm. Grant*, for appellants.

E. Howard McCaleb and *John C. Avery*, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. On the 11th day of October, 1889, the Norwegian bark *Urania*, then lying in the port of Liverpool, was chartered by W. S. Keyser to take a cargo of pitch pine timber from Ship island, or Pensacola, as ordered, to some port in the United Kingdom of Great Britain, or the Continent. The charter contained the usual general stipulations, and, in addition, the following special clauses, which are the subject of dispute in this cause:

"Twenty-seven (27) working days are to be allowed the said merchant in which to deliver the cargo at the port of loading, which is understood to mean actual delivery of cargo alongside, and not to complete loading. In the computation of the lay days allowed for delivering the cargo shall be excluded any time lost by reason of drought, floods, storms, or any extraordinary occurrence beyond the control of the charterer. Demurrage to be paid for each working day, beyond the days allowed for loading, at £20 per day; and the charterer may keep the ship on demurrage 10 days."

The ship arrived December 30, 1889, and was ordered to take cargo at Ship island, and was ready to load January 7, 1890, of which fact Keyser received due notice. Libelants claim that the 27 lay days expired February 12, 1890, at which date no cargo had been furnished. Delivery did not begin until the 17th of the month, and was not completed until April 1, 1890. For these 47 days of wrongful detention the master demanded demurrage, which the charterer refused to pay, claiming that, owing to the prevalence of a drought which delayed him in procuring cargo, the lay days had not expired when the loading was completed. As the master refused to issue a bill of lading without noting thereon his claim for demurrage, and Keyser threatened to libel the vessel for damages on account of such refusal, it was mutually agreed, as a compromise, that the master should issue a clear bill, but without prejudice to his right to file a libel *in personam* against Keyser for the amount claimed. This suit was accordingly brought by the owners of the *Urania*, in which they claim the sum of \$4,574.04.

It is admitted by defendant in his answer that the ship was ready to receive cargo January 7, 1890, but that none was furnished until February 11th, and that the delivery was not finished until March 30th. As excuse for this delay he alleges—

"That, at the time said vessel reported for cargo under the terms of said charter, there was an unusual drought, general and extensive, prevailing throughout the whole country from which timber is obtained for the loading of ships at Ship island, Moss point, and other points in that vicinity, which drought continued for a long while, and prevented this respondent from obtaining cargo for the loading of said vessel, notwithstanding he had made arrangements for procuring cargo for her, and would have procured same in ample time to have loaded her within the period of twenty-seven working days, but for said drought. And he further alleges that on the 10th, 11th, 13th, and 14th of January, the 8th, 24th, 25th, and 27th of February, and on the 4th, 5th, 6th, 8th, 10th, 11th, 12th, 13th, 18th, 19th, 22d, and 31st days of March, 1890, (being in all twenty days,) storms prevailed which rendered it impos-

sible for timber to be delivered to said vessel, excepting at great risk and hazard. And that, excluding the time lost by reason of said drought and storms, he delivered the cargo to said vessel within the period required by the terms of said charter."

The judge of the district court being of the opinion that the existence of the drought had been established, and that it excused defendant's delay in delivering cargo, dismissed the libel. While defendant claims in his answer that drought prevented him from obtaining timber for cargo, he does not allege, nor does it appear in proof, that on any of the days specified storms in any manner interfered with the delivery of timber to the vessel, nor that any time was actually lost from that cause. The only proof as to storms is found in the deposition of William Rudolph, who names January 10th, 11th, 13th, and 14th, February 8th, and March 4th, 5th, 6th, 8th, 10th, 11th, 12th, 13th, 17th, 19th, 21st, 22d, 24th, 26th, and 27th, in all 20 days, as too stormy to permit timber being towed. His observations were made at Moss point, some 6 miles inland, and on cross-examination he admits he did not know the velocity of the wind nor its direction on any of the days enumerated, nor the character of the weather, except that it was stormy. Notwithstanding this alleged state of the elements during this period, he testifies that timber was actually sent to the *Urania* and other vessels at Ship island on the following of the above days: January 14th, March 4th, 8th, 11th, 12th, 13th, 19th, 21st, 22d, 24th, and 26th, in all 11 days out of the 20 claimed to have been stormy. It does not appear that defendant was ready to deliver cargo on any of the other 9 days.

The charter gave the defendant 27 working days only, within which to deliver his cargo. The term "working day" means, in maritime affairs, running or calendar days on which the law permits work to be done. It excludes Sundays and legal holidays, but not stormy days. *Pedersen v. Eugster*, 14 Fed. Rep. 422; *The Cyprus*, 20 Fed. Rep. 144; *The Ohuf*, 19 Fed. Rep. 459.

It is to be observed also in this connection that, under the terms of the charter, only time lost by drought and storms during the lay days is required to be excluded in the computation. That time lost after the expiration of the lay days was to be paid for, without regard to the happening of any unforeseen event, is evidenced from the express stipulation written in the charter immediately after the drought and storm clause, which provides that demurrage shall be paid for each working day beyond the days allowed for loading. Time lost from these causes before the beginning of the lay days, or after their expiration, is not to be deducted in computing the demurrage, even if the term "working days" does not exclude all such time. During the lay days proper, January 10th, 11th, 13th, and 14th, and February 8th were stormy, according to the evidence above referred to, which, while not as satisfactory as could be wished, is not contradicted. The evidence does show that on January 14th some timber was delivered by Keyser to another ship, but that may have been at a great risk,—a risk the appellee was not compelled to take in the case of the *Urania*. On the whole, we are inclined

to the opinion that, in computing the lay days under the charter in this case, January 10th, 11th, 13th, and 14th, and February 8th should be excluded.

The case shows that defendant lost the time which caused the delay in delivering cargo by a drought which occurred prior to the beginning of the lay days, and even antedated that charter, and which affected his ability to obtain the required amount of timber to load all the ships he had chartered, either in the market at Moss point, or in the interior country. He does not claim in his answer that the drought prevented the delivery of the timber from Moss point, or any other port, to the vessel at Ship island; but says that it prevented him from obtaining timber within the stipulated lay days. He was engaged in the business of buying and exporting timber, having an office at Pensacola and Moss point. Having no stock of timber of his own stored anywhere, arrangements were made during the summer and fall of 1889 to procure timber from mill and log men, to meet the requirements of his trade. Contracts were made as early as September for a large amount of timber, with parties whose business it was to get out logs in the interior country along the upper tributaries of the Pascagoula river. These contracts were in form executory agreements in which the contractors agreed to cut and deliver into the booms of defendant at Moss point certain round and hewn pitch pine logs as soon as water will permit, not later than July 1, 1890; the timber to be paid for when inspected and measured. But such contracts vested no present title in Keyser to any particular timber, and the contractors were under no obligation to deliver in sufficient time to load the libelants' vessel. Defendant himself knew at the very time he chartered the *Urania* that his supply of timber from these sources was necessarily uncertain, as he was then aware that a drought had prevailed throughout that whole country since the July previous. After the contract for timber had been made, Rudolph, his agent, went into the interior about the 1st of October, to look after defendant's interests, and he then found the water in the tributaries of the Pascagoula so low that the logs were stranded, and could not be floated out. Knowing all these facts, defendant chartered the *Urania* and a number of other vessels, and undertook to load them. The master of the *Urania*, for all that appears, was in ignorance of the situation, and cannot be supposed to have contracted with reference to a cargo of timber to be procured in the particular manner and from the special source intended by Keyser. The charter is silent on this point, as it does not provide from what source and in what manner cargo was to be obtained for the vessel. Presumably the execution of the charter in contemplation of the parties was to be governed by the custom of the port of loading. But the answer of the defendant does not aver what that custom is. From anything that appears in the pleadings, cargo was to be delivered from any port in the Gulf of Mexico. The evidence on this point simply shows that Keyser intended to load with logs out of his booms at Moss point after they had been delivered to him there.

The contracts above referred to called for about 6,000 pieces of hewn timber and 5,000 round logs, to be cut and delivered out of the upper tributaries of the Pascagoula. In addition to this, the Wolf River Manufacturing Company agreed to sell 4,500 pieces of sawed timber; and the L. N. Danzler Lumber Company and Howe & Griffin, who had mills at Moss point, contracted to sell 14,000 pieces. The Wolf River Manufacturing Company never delivered any logs, and the other parties only a part of those contracted for. No doubt, the drought was a cause of their failure. All these logs were to have been delivered in defendant's boom, where they were to be sorted, put up in rafts, and towed to the vessel at Ship island. We take it, therefore, for the purposes of this case, that cargo for vessels loading at Ship island is customarily gathered together and stored at Moss point. Testifying on this point, F. H. Wilson, a witness for defendant, says that vessels at Ship island draw their cargoes from Moss point, and that Moss point is dependent on the Pascagoula river for its supply of timber. If defendant had had sufficient timber at Moss point, there would have been no difficulty in delivering it to the vessel at Ship island, so far as droughts were concerned.

These facts make a case similar to that of *The India*, decided at the first session of this court, reported in 2 U. S. App. 83, 1 C. C. A. 174, 49 Fed. Rep. 76. In that case, as in this, the charterers contracted to supply a cargo of timber at Ship island under a charter party containing a clause excluding from the computation of lay days at port of loading "any time lost by reason of quarantine, drought, flood, storms, strikes, fire, or any extraordinary occurrence beyond the control of the shippers," and the charterers contended in that case that they were prevented from obtaining a supply of timber, under contracts similar to this involved here, by the same drought. But this court decided, in a carefully prepared opinion delivered by Judge Locke, reviewing the case on principle and on authority, that the exclusion claimed could not apply to time lost by the charterers in failing to procure and have ready at the usual place of storage a cargo of timber on account of a drought which was prevailing before the charter of the ship, and which affected the rivers flowing through the country from which cargoes are ordinarily procured, but did not affect in any way the delivery of cargoes from the place of storage to the ship. After reargument and re-examination, we adhere to the principles declared in the case of *The India*. It follows that the libelants in this case are entitled to recover demurrage at the rate stipulated in the charter for 42 days. It is therefore ordered that the decree of the district court appealed from be and the same is hereby reversed; that this cause be remanded to the said district court, with instructions to enter a decree in favor of libelants for the sum of \$4,087.44, and costs, together with the costs of this appeal.

SKANTZE *et al.* v. KEYSER.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 87.

Appeal from the United States District Court for the Southern Division of the Southern District of Mississippi.

In Admiralty. Libel by Carl Alfred Skantze and others, owners of the Norwegian bark Arab Steed, against W. S. Keyser, for demurrage. Libel dismissed. Libelants appeal. Reversed.

J. D. Rouse and Wm. Grant, for appellants.

E. H. McCaleb and John C. Avery, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. On the 25th day of October, 1889, the Norwegian bark Arab Steed, then lying at Buenos Ayres, was chartered by W. S. Keyser, of Pensacola, to take a cargo of sawn pitch pine timber or boards or plank to any port in the United Kingdom of Great Britain. The charter contained the usual general clauses, and, in addition, the following special stipulations, which are the subject of dispute in this case: "Seventeen working days are to be allowed the said merchants in which to deliver the cargo at port of loading, which is understood to mean 'actual delivery of cargo alongside,' and not to complete loading. In the computation of the days allowed for delivering the cargo shall be excluded any time lost by reason of drought, floods, storms, or any extraordinary occurrence beyond the control of the charterers. Demurrage to be paid for each working day beyond the days allowed for loading at £9 per day, and the charterers may keep the ship on demurrage ten days." The libel avers that the vessel arrived at Ship island January 6, 1890, and was ready to receive cargo on the 10th, and that the lay days expired February 1st, which is admitted by the answer. It is also averred in the libel and admitted by the answer that delivery of cargo did not commence until March 3, 1890, and was not completed until the 27th. As excuse for this delay, defendant alleges "that it is expressly stipulated and agreed in the charter that in the computation of the days allowed for delivering cargo shall be excluded any time lost by reason of drought, storms, floods, or any extraordinary occurrence beyond the control of the charterers. And respondent alleges that, at the time said vessel reported for cargo under the terms of said charter party, there was an unusual drought, general and extensive, prevailing throughout the whole section of the country from which timber is obtained for the loading of ships at Ship island, Moss point, and other points in that vicinity, which drought continued a long while, and prevented this respondent from obtaining cargo for the loading of said vessel, notwithstanding he had made arrangements for procuring cargo for her, and would have procured same for her in ample time to have delivered it to her within the period of seventeen working days, but for said drought. And this defendant further alleges that, on various days during the time the said vessel remained at Ship island in readiness for cargo, storms prevailed, which rendered it impossible for timber to be delivered to her except at great risk and hazard. And * * * that, excluding the time lost by reason of said drought and storms, he delivered the cargo to said vessel within the period required by the terms of said charter."

It will be seen that the case is very similar to that of *Sorensen v. Keyser*, 52 Fed. Rep. 163, (just decided.) The differences are that a lesser number of

working days were allowed within which to load the vessel, a lesser rate of demurrage, and that the cargo to be furnished was sawn pitch pine timber, in which last respect the case is still stronger than that of *Sorensen v. Keyser*, as it is clear that the charterers had not only to procure the timber, and have the same floated to the place for storage, but the timber was additionally to be passed through the mills prior to shipment. From the demurrage days claimed, and ordinarily expiring on February 1st, we deduct January 10th, 11th, 13th, and 14th as stormy days, leaving 36 days for which demurrage is due, at £9 per day.

For the reasons given in *Sorensen v. Keyser*, it is ordered that the decree of the district court appealed from be and the same is hereby reversed; that this cause be remanded to the district court, with instructions to enter a decree in favor of libelants for the sum of \$1,576.58, and costs, together with the costs of this appeal.

WOLD *et al.* v. KEYSER.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 33.

Appeal from the United States District Court for the Southern Division of the Southern District of Mississippi.

In Admiralty. Libel by Hermann Wold and others, owners of the bark Foldin, against W. S. Keyser, for demurrage. Libel dismissed. Libelants appeal. Reversed.

J. D. Rouse and Wm. Grant, for appellants.

E. H. McCaleb and J. C. Avery, for appellee.

Before PARDEE and MCCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. On the 14th of November, 1889, the Norwegian bark Foldin, then lying at Stettin, was chartered to W. S. Keyser to take a cargo of hewn or sawn pitch pine timber from Ship island to the port of Liverpool. The charter contained the usual general clauses, together with the following special clause, which is the subject of dispute in this case, viz.: "Twenty-two running days, Sundays and holidays excepted, are to be allowed * * * in which to load the ship at port of loading. * * * In the computation of the days allowed for delivering the cargo shall be excluded any time lost by reason of floods, droughts, storms, or any extraordinary occurrence beyond the control of the charterers. Demurrage to be paid for each working day beyond the days allowed for loading at £12 per day, and the charterers may keep the ship on demurrage ten days." The libel alleges, and the answer admits, that the vessel arrived and was ready to receive cargo on the 21st day of January, 1890, and that the lay days in due course expired February 15, 1890, at which date no cargo had been furnished. Delivery of cargo did not begin until February 20th, and the loading was not completed until March 27, 1890. As an excuse for this delay the defendant alleges in his answer "that, at the time the said bark reported for cargo under the terms of said charter, there was an unusual, general, and extensive drought prevailing throughout the whole section of country from which timber is obtained for the loading of ships at Ship island, Moss point, and other points in

the vicinity, which drought continued for a long time, and prevented this respondent from obtaining cargo for the loading of said vessel, notwithstanding he had made arrangements for procuring same in ample time to have loaded her within the period of twenty-two running days, but for said drought and storms."

This case also is similar to that of *Sorensen v. Keyser*, 52 Fed. Rep. 163, (just decided.) The differences are that the lay days for loading cargo are described as "running days, Sundays and legal holidays excepted," instead of working days, a lesser rate of demurrage, and that the cargo to be furnished was to be hewn or sawn pitch pine timber. From the demurrage days claimed, and ordinarily expiring on February 1st, we deduct February 8th, as a stormy day, leaving 35 days for which demurrage is due at £12 per day.

For the reason given in *Sorensen v. Keyser*, it is ordered that the decree of the district court appealed from be and the same is hereby reversed; and that this cause be remanded to the district court, with instructions to enter a decree in favor of libelants in the sum of \$2,043.72, and costs, together with the costs of this appeal.

MARK *et al.* v. HOME INS. CO. OF NEW YORK. SAME v. ORIENT INS. CO. OF HARTFORD, CONN. SAME v. BRITISH-AMERICA INS. CO. OF TORONTO, CANADA.

(District Court, S. D. New York. July 28, 1892.)

MARINE INSURANCE—FIRE—RIDER—CONSTRUCTION—EXCEPTION OF PARTICULAR TRIP.

An insurance policy insured a vessel against fire on "all inland waters as far south as Norfolk, Va." Afterwards a rider was attached to the policy, giving permission to the tug to go as far south as Charleston, "but not to cover on trips either way between Norfolk and Charleston." On her way from Norfolk to Charleston, and while north of Norfolk, the tug caught fire and was burned. Held that, being at the time on a trip between Norfolk and Charleston, the wording of the rider prevented any recovery on the policy, even if the loss occurred on "inland waters."

In Admiralty. Libel on policies of marine insurance. Libel dismissed.

Benedict & Benedict, for libelant.

Carpenter & Mosher, for respondents.

BROWN, District Judge. In or about January, 1890, the respondents issued policies of marine insurance by which they insured the libelant for one year against loss by fire, etc., on the tug D. L. Flanagan, in the "bays and harbor of New York, East and North or Hudson rivers, waters of New Jersey, Long Island sound and shores, and as far as New Bedford, and all inland waters as far south as Norfolk, Virginia, and all waters adjacent, connecting, or tributary to any of the above waters." The description of the waters and places privileged to be used was in print, except the above clause in italics, which was in writing.

On June 12, 1890, a rider was attached to the policy as follows:

"Permission is hereby given the tug D. L. Flanagan to use port and harbor of Charleston, and to go as far as the jetties at Charleston, but not to cover on trips either way between Norfolk and Charleston."

On June 16, 1890, at 1:15 A. M., the steam tug left Norfolk, Va., on a trip to Charleston. At about 3:30 A. M. fire was discovered by the second engineer in the boiler room, and in a few moments the fire burst up through the hull, to the serious damage of the tug.

There is a serious conflict in the evidence as to the position of the tug, whether she was inside or outside of Cape Henry, at the time when the fire was discovered. I do not, however, find it necessary to determine this point, for the reason that there is no doubt that when the fire broke out the tug was not at Norfolk, nor within the port of Norfolk, but was upon a trip between Norfolk and Charleston; and I am of the opinion that the language of the rider is so explicit and unambiguous, that it cannot properly be narrowed by legal construction so as to make the policy cover any part of the trip to Charleston, even while within the inland waters of Chesapeake bay.

It is urged that the rider was intended as an additional privilege, and not to narrow the extent of the previous insurance which would at least cover the inland waters of Chesapeake bay, and the "waters adjacent thereto." This argument at first impressed me with considerable force. It seems to me wrong, however, to yield to it. The rider does, in some respects, undoubtedly, extend the scope of the insurance, by giving the privilege of the use of the port and harbor of Charleston, and the waters as far as the jetties. But in granting this additional privilege, which appears to have been without any additional consideration, it was surely competent to the insurers to annex to it such a condition, or exception, as they saw fit. And when they explicitly say, "not to cover on trips either way between Norfolk and Charleston," it seems to me that the court has no right to hold that the exclusion means anything less than what the words themselves import, namely, the whole trip from port to port.

If it were necessary, or proper even, to inquire what reason there might be for such an exception, it is quite plain that the conditions involved in the preparation the equipment of the tug for the prosecution of a trip between Norfolk and Charleston, would necessarily be quite different from her equipment and preparation for river, or harbor or inland business. The liability of the tug to accidents within the policy while prosecuting such a trip might be greater, not merely when on the high seas, but at all stages of the voyage. Without regard, however, to the increased risks, it is sufficient to say that the express exception of the rider is so clear and unambiguous as not to admit, as it seems to me, of any restriction under the rules of legal construction. On this ground the libels must be dismissed, with costs.

THE VIOLA.

MURRAY v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. July 1, 1892)

1. SALVAGE—WHAT CONSTITUTES—TOWAGE.

Towing into port a lightship which had broken adrift during a severe storm, and been carried out to sea, is not a salvage service, when the lightship was not in peril when she was taken into tow, and could, with a little delay, have reached a place of safety without assistance.

2. TOWAGE SERVICES—COMPENSATION.

In determining the compensation for a towage service, the value of the towing vessel and cargo, the risk incurred, the fact that the vessel was not intended or adapted for towage service, the chance of endangering the towing vessel's insurance, the time spent in and the danger incurred by lying by the vessel towed before the towing could commence, and the time spent in deviating from her course, may be considered, although the service rendered does not amount to a salvage service.

Suit under Act March 3, 1887, (24 St. at Large, p. 505,) by Lawrence Murray, master of the British steamship *Viola*, to recover for services rendered in towing the United States lightship No. 45 into port. Decree for libellant.

John F. Lewis, (Curtis Tilton, of counsel,) for libellant, cited, as to what constituted a salvage service: *The Saragossa*, 1 Ben. 551; *The Charles Adolphe*, Swab. 155; *The Reward*, 1 W. Rob. 177; *The Charlotte*, 3 W. Rob. 71.

Robert Ralston, Asst. U. S. Atty., and *Ellery P. Ingham*, U. S. Atty.

The service rendered was not salvage, but towage, which has been described to be "the employment of one vessel to expedite the voyage of another, where nothing more is required than the accelerating her progress." Dr. LUSHINGTON, in *The Princess Alice*, 3 W. Rob. 138, at page 140; Carver, *Carriage by Sea*, § 340, p. 343.

BUTLER, District Judge. On the night of April 8th, during a very severe storm, the government lightship No. 45, worth about \$50,000, (anchored off the coast of Delaware,) broke adrift, and was carried out to sea. She was well equipped for keeping afloat, and sufficiently provisioned for a three months' voyage. Her crew consisted of a mate and five men,—the master being on shore. While the storm lasted she was kept before the wind, and until it passed she could not get back, without aid. She raised a signal indicating her desire for towage, and, after passing two vessels unable to render this service, she met and came into communication with the steamship *Viola*, a large vessel loaded with sugar and bound for New York. This vessel, deeming it unsafe to attempt the service until the storm should abate or moderate, remained by until the next day when she took the lightship in tow, under the circumstances described by the witnesses, and brought her to Cape Henry, a distance of about 125 miles. In doing this the *Viola* was compelled

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

to deviate slightly from her proper course to New York; and her crew in passing back and forth between the vessels, incurred the risk usual to such services performed in a rough sea. When taken in tow the lightship had not sustained any injury, nor had her crew as the several members of it say, seen any cause for alarm. They had declined to be taken off by the passing vessels referred to. The signal for towage was raised, as they testify, because it was considered important to get the ship back to her station without delay which could only be done with the aid of such help.

The view I entertain of the case renders a more minute statement of facts unnecessary. The libelant's claim is for salvage services. To sustain it I must find that the lightship was in peril when the *Viola* came to her aid. This the evidence does not permit. She was drifting before the wind in a severe storm, but was riding safely, had suffered no injury or loss, was thoroughly provisioned, with everything in good condition. She had safely passed through the violence of the tempest, and in a little while, with the improved weather which followed, could have returned to the station, or have gone into port elsewhere, without assistance. The libelant's witnesses admit that the situation involved no peril if her crew was competent for its duty. They infer however that it was not—that it was deficient in knowledge and experience—from what they saw of the vessel's movements. This inference is sought to be supported by the cross-examination of the crew on the general subject of navigation. Some answers of Kambaren, a Norwegian, whom the respondent put forward as possessing accurate knowledge on the subject, would certainly show extraordinary ignorance if he made them understandingly. They are so extraordinary, however, as to justify belief that he did not understand the questions. It is incredible that a man who answered other questions on the subject so intelligently, and who seems to have had considerable experience in navigating vessels, should have knowingly made such answers. He understands our language very imperfectly and it may well be inferred that he misunderstood the questions. It is clear that the management of the vessel carried her safely through the violence of the storm; and although she was not kept from drifting as the witnesses describe, it is at least open to question whether another crew could have done better under the circumstances. In my judgment, it is not shown that the men were incompetent for the service, and that the vessel was consequently in danger. I believe as before stated, that with the improved weather which followed they could have safely brought her back, or have taken her in port elsewhere. She signaled for assistance, as the mate says, not because she was in distress but because she was needed at her station earlier than she could get there without it. There was no alarm on board, as is shown not only by what the members of the crew say, but also by the fact that they refused to be taken off by passing vessels. I regard the testimony of Commander Reed, a navigator, of large experience, respecting the ship's situation, her management by the crew, and her probable danger, as entitled to considerable weight.

Notwithstanding, however, the services were not such as command salvage compensation, they were highly meritorious, and should be compensated accordingly. The *Viola* was a large and valuable vessel and was carrying a valuable cargo. She was not designed for towing, nor adapted to the service. In lying by the lightship and going out of her course to do so in the storm, and afterwards taking her in tow under the circumstances, she incurred serious responsibility—some risk to herself, her cargo and crew, as well as the possibility of endangering her insurance. These things should all be considered in determining the amount due for her services. She behaved well and generously and should be liberally compensated. The services were extraordinary, and there is no rule by which their value can be measured with exactness. While they are not salvage services they partake somewhat of the nature of such services. They were voluntarily and ungrudgingly rendered, under circumstances that made them very valuable to the government and should be ungrudgingly paid for. In view of all the considerations involved, I think the libelant should have \$2,500; and this sum is accordingly awarded. A decree may be entered for this amount with costs.

THE CHALMETTE.

LAVERTY *et al.* v. THE CHALMETTE.

(District Court, S. D. New York. June 28, 1892.)

1. COLLISION—VESSELS AT WHARVES—IMPINGING BOAT TAKES RISK OF CONSTRUCTION.
A boat which is allowed to swing against a steamer at rest takes all the risks of the steamer's construction, and of any damage to herself caused by such contact.
2. SAME—PROPELLER BLADE—ALLEGED INJURY FROM—WEIGHT OF EVIDENCE.
Where a lighter swung under the stern of a steamship laying at a wharf, and received injuries from which she sank, and the weight of evidence indicated that the injuries were not caused by a blow from the steamer's propeller, but probably by the surging of the lighter against the yoke of the rudder, it was held that the lighter could not recover.

In Admiralty. Libel for injury caused by steamer's propeller. Dismissed.

Hyland & Zabriskie, for libelants.

Charles H. Tweed and *R. D. Benedict*, for claimants.

BROWN, District Judge. The libel charges that between 3 and 4 o'clock in the afternoon of December 26, 1891, while the libelant's lighter *Alfred Collins* was being moved stern first towards the bulkhead from alongside the steamer *Chalmette*, which lay on the southerly side of pier 25, North river, the steamer's propeller was suddenly set in motion and came in contact with the starboard quarter of the lighter, breaking some planks and causing her afterwards to sink. The libel was filed to recover the damages.

The evidence shows an oval-shaped wound a little beneath the water line from four to seven feet distant from the stern post of the lighter, extending across the third, fourth, and fifth plank streaks from the top. The planks were from six to seven and a half inches wide, one or two of which were cracked and broken. The marks of the wound consisted of two somewhat sharp and narrow surface cuts, and beyond them three very rough and ragged abrasions, or scourings beneath the grain, varying from five to six inches broad, and running somewhat diagonally across the plank streaks.

The lighter had come alongside the Chalmette with a cargo of iron, which she had expected to deliver to the steamer; but as it could not be taken aboard, the lighter, after several hours, was ordered away. The steamer sailed at quarter before 5, and from 1 o'clock till 4 she had been, as usual, working her propeller occasionally, sometimes forwards, sometimes backwards. The master of the lighter testifies that before proceeding to haul his lighter astern for the purpose of mooring her near the bulkhead behind the steamer, he looked to see whether the propeller was in motion, and that it was not in motion when he began to haul the lighter astern; but that it started up as the lighter came under the quarter of the steamer, the wind and tide setting the lighter that way towards the bulkhead.

It is not denied that when the lighter got under the steamer's quarter, the propeller was in motion. The witnesses for the steamer testify that the propeller was in motion when the lighter started; that a suitable and proper watch was kept astern, and that as soon as the lighter was seen to be coming under her quarter, the engine was stopped; and that the lighter hung for a considerable time across the stern of the steamer; and it is contended that the wounds shown, and the damage done, were not caused, and could not have been caused, by contact with the propeller, but only by contact with the iron yoke of the rudder, a projection about 20 inches in length by 5 or 6 inches across on the top, used for fastening chains to the rudder in case of accident to the steam gear for steering. The libelants contend that the damage was done by the propeller alone.

There is considerable conflict in the evidence; and as the damage was done beneath the water line, and no one saw just what did it, the question whether it was done by the propeller, or by the yoke of the rudder, must be determined by inference from the circumstantial evidence and the probabilities of the case, since direct observation was not possible.

Upon the best consideration I have been able to give the case, my judgment is that the wounds were not probably caused by the propeller blades; but by the yoke of the rudder, which at the time was held firmly fast. The two sharp and thin surface cuts just beyond the three broad and ragged abrasions above referred to, could not have been caused by the blades of the propeller, since the shape and the direction of the rotations of the blade edges were not such as could produce straight thin cuts like those shown, and in the direction shown, in the plank produced upon the trial. They might have been produced by the surging of the

lighter up and down, against the corners of the yoke, through the waves in the slip, and the yoke is of a breadth corresponding with the three broad abrasions. The extreme roughness of these abrasions also, and the ragged and broomy ends of the grain of the wood still left at the sides of these three abrasions, could not have been made, it seems to me, by an object in *rapid* motion, like the blades of a propeller; but only by a comparatively slow motion such as the surging of boats, and the rubbing against such a projection would produce. In other cases before me of wounds produced by propellers, the appearance of the wound has been wholly different, (see *The El Dorado*, 27 Fed. Rep. 762, and *The City of Pueblo*, Mar. Reg., April 14, 1886, there cited; affirmed on appeal;) and the testimony of Mr. Reed is very strong to the effect that wounds like these could not have been produced by a propeller; and that the construction of the steamer and of the stern of the lighter, as illustrated by models, were such that they could not possibly have come in contact at a point from 4 to 7 feet only from the lighter's stern, and not nearer than 13 feet; and that a greater distance would be necessary in order to produce abrasions upon several planks of the lighter such as this wound exhibited.

The libelants have not been able to meet these considerations by any direct evidence; from the nature of the case they could not. It is to be regretted that the determination of the cause of the wound could not be made upon more direct and decisive evidence than the inferences above mentioned. But the burden of proof being upon the libellant to show negligence or fault in the defendant in order to recover, this must be established by a reasonable preponderance of evidence. In the present case, this does not seem to me to be established, but the contrary.

As respects the yoke on the rudder, the lighter took all the risks of the steamer's construction in allowing her to swing in under the steamer's stern, instead of keeping her off by additional lines; and the risk of any contacts with her which were thereby caused. *The British Empire*, 24 Fed. Rep. 493; *The Willie and The Ludgate Hill*, 29 Fed. Rep. 153.

The libel is dismissed; but, under the circumstances of doubt, without costs.

CLOUD v. CITY OF SUMAS.

*(Circuit Court, D. Washington, N. D. September 7, 1892.)***FEDERAL COURTS—JURISDICTION—ACTION BY ASSIGNEE.**

The statutory rule that an assignee of a chose in action cannot sue thereon in the federal courts, unless a suit would have been cognizable therein if no assignment had been made, applies to an assignee, by indorsement, of a city warrant.

At Law. Action by J. A. Cloud against the city of Sumas on city warrants, of which plaintiff was assignee. Defendant demurred, on the ground that the United States court has no jurisdiction. Sustained.

Smith & Littell, for plaintiff.

Chambers & Lambert, for defendant.

HANFORD, District Judge. The complaint in this case alleges that the town of Sumas, a municipal corporation of this state, made and issued certain warrants payable to the order of a firm doing business in said town under the name of the "First Bank of Sumas;" that the said firm thereafter "duly sold, indorsed, and transferred said warrants to plaintiff," who is a citizen of the state of New York. There is no allegation as to the citizenship of the persons composing said firm; presumably, therefore, they are citizens of the state in which the firm was located. The first section of the statute defining the jurisdiction of United States circuit courts is in two parts. The first, in a long involved sentence, prescribes what is essential in a case to bring it within the jurisdiction of a circuit court of the United States; and the second part of the section is another long involved sentence, which specifies a variety of different circumstances which may create exceptions, and prevent jurisdiction from attaching. In this case there is a controversy between citizens of different states, and the amount involved exceeds the sum of \$2,000; therefore it belongs to one of the classes of cases described in the first part of said section, and is within the jurisdiction of this court, unless it also belongs to one of the classes of excepted cases described in the second part of said section. The defendant has filed a demurrer denying the jurisdiction of the court, and claims that the case falls within the exceptions, because it is brought by an assignee upon a chose in action, and an action in this court could not be maintained upon it, if there had been no assignment. The plaintiff insists that the fact of the warrant sued on having been made and issued by a corporation saves the case from falling within the exception.

It is my opinion that, as the warrants are not made payable to bearer, and as the plaintiff alleges a transfer of the property in the same to him by written indorsement thereon, and not by mere delivery, only that portion of the clause which is applicable to suits by an assignee, upon a chose in action, not payable to bearer, need be considered. For the purposes of this case, the clause in question should be read thus:

"Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange; to recover the contents of any promissory

note or other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover the said contents, if no assignment * * * had been made."

By omitting all portions of the statute not applicable, we find the questions concerning instruments payable to bearer, actions by subsequent holders, and instruments made by corporations to be eliminated. This reading of the statute gives a rule which is clear and unambiguous; it fits the case under consideration, and excludes it from the jurisdiction of the United States circuit courts.

The demurrer is sustained, and the action will be dismissed, without prejudice to a new action in any other court.

CHICAGO, ST. P. & K. C. RY. CO. *et al.* v. KANSAS CITY, ST. J. & C. B. R. CO.

(Circuit Court, W. D. Missouri, St. Joseph Division. December, 1890.)

MUNICIPAL CORPORATIONS—ORDINANCES—USE OF RAILROAD TRACKS:

A city ordinance giving a railroad a right of way on condition that it allow other roads the use of its tracks within the city limits, does not bind it to allow another road the use of tracks, laid since the ordinance went into effect, beyond the right of way granted thereby, but is binding in respect to tracks on such right of way.

In Equity. Bill by the Chicago, St. Paul & Kansas City Railway Company to compel the Kansas City, St. Joseph & Council Bluffs Railroad Company to allow the plaintiff the use of the defendant's tracks within the limits of the city of St. Joseph. A preliminary mandatory injunction was denied. 38 Fed. Rep. 58. The case is now on final hearing. Decree for plaintiff as to a part of its claim.

Pratt, Ferry & Hagoman, for plaintiff.

J. M. Woolworth and Strong & Mossman, for defendant.

BREWER, Circuit Judge. This case was before us last spring upon an application for a preliminary mandatory injunction. That application was refused. 38 Fed. Rep. 58. The case is now presented on pleadings and proof for final hearing. We intimated in the opinion then filed that the limit of right under the city ordinance, as against the defendant, was that portion of the track through the city limits to which the right of way had been given by ordinance. After the very careful, elaborate arguments by counsel on both sides, the intimation then given has strengthened into conviction. As noticed then, there were two ordinances. The first provided that, upon conditions named, other railroad companies should have the right "to run their cars, locomotives, and trains over and upon the said St. Joseph & Council Bluffs Railroad." And the second, passed four days thereafter, added these four words: "Within such city limits." The ordinance gave the right of way down to George alley. This right was given in relinquishment of a subscrip-

tion, and accompanied by an obligation to pay certain damages by the city. Now, as then stated, it is familiar law that all contracts are to be interpreted in the light of surrounding facts, and general words and expressions may often be limited thereby. *Nash v. Towne*, 5 Wall. 689; *Merriam v. U. S.*, 107 U. S. 437, 2 Sup. Ct. Rep. 536. The St. Joseph & Council Bluffs Company was organized with a view of building a road from Council Bluffs to St. Joseph. The city, by the first ordinance, gave it the right to enter the city, and come as far as George alley, with a proviso that other companies might use its road. Obviously, the natural interpretation of that was the whole which it was chartered to build. The second ordinance was unquestionably a limitation, and clearly reduced the right of use from the entire line to that part within the city limits. As from George alley northward was all of the road within the city limits contemplated, was all to which the right of way was given, was expressly the subject-matter of the ordinance, the provision for use had reference to that portion. It would be strange if the parties contracting for a limited right of way could be understood as having in view other lines of road, and different rights of way, to be acquired under subsequent ordinances or subsequent legislations, or from consolidation with companies having other and different rights. General words and expressions in contracts and statutes are almost always considered as limited by special words and expressions, and that which is obviously in the thought of parties the subject-matter of a contract is not to be broadened by mere general expressions, unless, from the language and surrounding circumstances, it seems imperative that it be so broadened.

As I suggested in the former opinion, suppose, instead of being a mere matter of city ordinance, the legislature had, in granting this charter to build the road from St. Joseph to Council Bluffs, burdened it with the provision that other roads should have the privilege of using that portion of the track within the state of Missouri, would not that burden be limited to the track which, by that legislation, it was authorized to build? And if subsequently the company received power to build from St. Joseph to St. Louis, could it be fairly contended that this new road, built under a new grant of power, was burdened with the same obligation which rested upon the track northward from St. Joseph to the state line? The more I have reflected on this, the more strongly am I convinced that the burden assumed was limited to the right given, and that all that was meant by the addition of the words "within said city limits" was to reduce the burden from the entire line to that portion of the road within the city limits to which the right of way was by the ordinance given. At any rate, the meaning is doubtful, and equity does not enforce the specific performance of contracts whose terms and obligations are uncertain and doubtful. With reference to that portion of the road down to George alley, it seems to me immaterial that there was in the beginning but one track, and that that is now so occupied that it would not be safe to permit its use by another company. The defendant has built other tracks on that right of way, and there is no question under the testimony but that some of these tracks might be safely used by the

complainant without prejudice to the business of the defendant. In the case of *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. Rep. 546, I considered at some length the power of a court of equity in case of a contract of this kind; and I have nothing to add to what I there said. I think a court has power to enforce a contract between parties of the same nature as those which we know, as a matter of general knowledge, railroad companies are constantly making and keeping. A decree will therefore be entered decreeing to complainant the right to use the track of the defendant from the northern limits of the city down as far as George alley; the balance of relief claimed by complainant will be denied; the costs will be divided.

KORTLANDER v. ELSTON.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1892.)

No. 23.

1. GUARANTY—APPLICATION OF COLLATERAL—CONTRACT.

A debt payable in installments was secured to its whole amount by insurance policies on certain buildings for the benefit of the creditor, and also by the guaranty of a third person for the part first due. *Held*, that the creditor had a right to hold the insurance money paid when the buildings were burned as security for the part of the debt not covered by the guaranty, although not yet due, and that the guarantor was liable for the unpaid installments covered by his guaranty. *English v. Carney*, 25 Mich. 183, distinguished.

2. SAME—RELEASE.

Where a creditor whose debt is secured by fire insurance policies, and in part by a personal guaranty, accepts from the insurance companies an amount less than the face of the policies, the burden of proof is on the guarantor to show that the creditor got less than was due him, and thereby released the guarantor from his contract.

3. SALE—RETENTION OF TITLE—INSURANCE.

Where a contract of sale of furniture provides that the title shall remain in the seller until the price is paid, and the furniture is insured for his benefit, and he pays the premium, he is entitled to all the insurance money coming from a loss, and the purchaser has no interest in it.

4. SAME.

If the purchaser pays the premium, a charge to the jury that the seller has a right to apply so much of the insurance money as is necessary to pay the balance due on the furniture, and hold the surplus under the direction of the purchaser, to reduce the liability of the guarantor of another debt due from the purchaser to the seller, is not to the prejudice of the guarantor, nor, as to him, a ground for error.

In Error to the Circuit Court of the United States for the Western District of Michigan.

At Law. Action in *assumpsit* on a contract of guaranty by Robert W. Elston against Adolph H. Kortlander. Judgment for plaintiff. Defendant brings error. Affirmed.

Statement by TATE, Circuit Judge:

Robert W. Elston, an alien, brought his action in *assumpsit* against Adolph H. Kortlander, a resident of Michigan, on a written contract of guaranty. Elston was the owner of an hotel and tract of land in Kent

county, Mich., which in June, 1890, he contracted to sell to one Edwin Carman for \$12,000, to be paid: \$200 on the delivery of the contract; \$200 or more on the 27th day of each month, up to and including June 27, 1891; and the remainder in monthly payments of \$300 on the 27th of each month thereafter, with interest at the rate of 7 per cent. per annum, to be paid semiannually from the date of the contract upon so much of the purchase money as remained unpaid. Carman agreed, among other things, to insure the buildings then erected and to be thereafter erected on said premises in companies to be approved by Elston, for Elston's benefit, in the sum of at least \$6,000, so long as any balance should remain unpaid on the contract; and to forthwith deliver the policy or policies therefor to Elston; and, in case Carman failed to insure, Elston was given the right to do so, and to add the cost thereof to the amount due under the contract, with interest at 10 per cent. A deed was to be executed when \$8,000 of the purchase money had been paid. Right of re-entry was reserved to Elston in case of default in any payment by Carman. Carman covenanted that all buildings, erections, and improvements then upon or thereafter to be placed upon the premises should stand as security for the payments of sums agreed to be paid by him, and should not be removed from the premises without the written consent of Elston.

Kortlander guarantied the payment of \$3,000 of the purchase money, as follows:

"In consideration of the making by the said Robert W. Elston with the said Edwin Carman, at my request, of the foregoing agreement, and also for other good and valuable consideration, the receipt whereof is hereby confessed and acknowledged, I do hereby become security for the punctual payment of the three thousand dollars (\$3,000) of principal first to be paid by the terms of the foregoing contract by the said Edwin Carman to the said Robert W. Elston, together with the interest thereon, at the time and in the manner expressed in said contract, and hereby guaranty the payment thereof as expressed in said contract, and, in default of payment by the said Edwin Carman, I do hereby promise and agree to and with the said Robert W. Elston to pay him said amount, with the interest thereon, without requiring notice or proof of demand being made.

"Dated this 24th day of June, 1890.

"A. H. KORTLANDER. [L. S.]

"In presence of CHARLES CHANDLER."

Carman already had possession of the premises under a lease from Elston, and now continued it under the contract. He had, in May, 1890, bought the hotel furniture from Elston for \$1,500,—\$388 in cash, and the rest to be paid in monthly installments, the last payable in May, 1891. The contract of purchase provided that the title to the chattels should remain in Elston until the purchase money was fully paid, but that Carman might use them, subject to Elston's right to repossess himself in case of default on any payment. Carman paid \$588 in cash on the furniture contract. At the date of the contracts, Elston had three policies of fire insurance on the hotel and furniture,—one in the Citizens' Fire Insurance Company for \$1,300 on buildings and \$700 on the

furniture, the second in the Underwriters Company for \$1,400 on the buildings and \$600 on the furniture, and the third in the Royal Insurance Company for \$1,300 on the buildings and \$700 on the furniture. When Elston delivered the property to Carman, he took the policies to the office of the agent of the companies. He did not find the agent, but left the policies, with notice that he had sold the place on contract. The policies were returned to Elston, and by him put away without examination. The agent had indorsed upon the Citizens' and the Underwriters' policies a memorandum that the land and buildings insured had been sold on contract to Edwin Carman, to whom the loss, if any, was payable, as his interest might appear. Upon the Royal policy there was no indorsement.

On the 14th of August, 1890, all the buildings and a large part of the furniture were destroyed by fire. On August 16th, Carman assigned his interest in the two policies indorsed to him to Elston, at the request of Elston's attorney, Fitzgerald, with whom Elston had left the policies during his absence from home. Suit was begun on all three policies, and, pending suit, the claim was settled for \$4,050 without reference to any division of the fund between the buildings and the personal property. This amount Elston kept, and on August 17, 1891, brought suit against Kortlander on the guaranty. The amount of money due on the land contract by its terms, up to and including July 27, 1891, was \$3,000 and interest. Of this, Carman had paid \$400, as Elston admitted, and he claimed to have paid \$200 more. This made one issue of fact at the trial. Another controversy was as to the manner in which the insurance money should be applied. Kortlander claimed that Elston should credit it on the first amounts due under the contract, thus paying everything which he had guaranteed; and he introduced himself and Carman as witnesses to prove that, in consideration of Carman's assigning the policies, Elston agreed to apply the money so as to release Kortlander. Elston denied having made any such agreement, and this presented another issue of fact on the evidence. Finally, Kortlander claimed to be credited with the amount received by Elston as insurance on the personal property, on the ground that Carman, having paid Elston the premium when he bought the furniture, was entitled to apply the insurance as he wished, and had applied it to the land contract and the first payments thereunder. Elston denied that Carman had paid the premium on the personal property insurance, and this made a third issue of fact for the jury. Under the instructions of the court, the jury returned a verdict for Elston of \$2,441.60. Upon this was entered the judgment which this writ of error was brought to reverse. Defendant's counsel requested several charges, which were refused, and excepted to a number of passages in the charge as given. The assignments of error, based on these rulings of the circuit court, are referred to in the opinion.

James E. McBride, Lyman D. Norris, and Mark Norris, for plaintiff in error.

Fitzgerald & Barry, for defendant in error.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

Taft, Circuit Judge, (*after stating the facts.*) The plaintiff in error has made 13 assignments of error. It will not be necessary to consider them in detail.

In the first place, it was contended on behalf of Kortlander that, as surety, he was entitled, under the terms of the original land contract and his written guaranty, to have one fourth of the proceeds of the insurance policies from the destruction of the buildings applied to the amount due on his guaranty. It was said that he had guaranteed the payment of \$3,000 out of the \$12,000 to be paid for the land, and as surety he had a right in equity to be protected by a *pro rata* distribution of the collateral over the whole debt. The court below refused a charge embodying this view of Kortlander's right to the insurance money, and told the jury that, unless there was a subsequent agreement changing the rights of the parties, Elston had the right to hold the insurance money realized on the buildings as security for the payment of the whole debt, exactly as he might have taken possession of the buildings for this purpose, and that Kortlander had no right in law or equity to demand that the money be applied to the amount due under the guaranty. In this we think the court was entirely right. The primary equity growing out of the relation of creditor, debtor, and surety is that the creditor be paid what is due him; and he does not lose this equity as against the surety, except by misconduct to the latter's prejudice. When the creditor in the original contract has received collateral covering the entire debt, and a personal guaranty on part of it, the legal and the natural presumption, in the absence of circumstances showing the contrary, is that he has taken the personal guaranty as additional or cumulative protection for his debt. In order that his debt may be paid, therefore, he has the right to exhaust all his securities, and in doing so he may apply the collaterals to that part of the debt not covered by the personal guaranty, and hold the guarantor to the full measure of his contract. The equity which a surety or a guarantor has in the collateral is merely the right, accruing only after the principal debt is fully paid, to be subrogated to the right of the creditor in respect of the collateral security. This, the surety may take from the paid creditor as security against loss by reason of his suretyship. Kortlander, therefore, could have no right to the insurance money for the buildings until Elston had been paid all the purchase price which the buildings and the insurance on them were intended to secure. Elston did not regard the land and buildings as sufficient security for the payment of so many small installments over so long a period, and he therefore demanded as additional protection Kortlander's personal guaranty of the payment of the first \$3,000. It would seem absurd to require Elston to suffer loss by sharing the collateral with Kortlander for the purpose of reducing the latter's liability on a guaranty, the only object of which could have been to supplement the collateral and increase Elston's security.

The case of *English v. Carney*, 25 Mich. 183, cited for plaintiff in error, is not in conflict with this view. There a mortgage was given to secure two notes of even date. The payee and mortgagee sold the mort-

gage and notes to a third party, indorsing one note in blank, and the other without recourse. It was held on foreclosure that the proceeds of sale must be applied *pro rata* to both notes. The *pro rata* application of the security to the notes was fixed by the original contract when the mortgage was given, and a subsequent indorser, of course, made his indorsement on the basis of the amount of the security applicable to each note thereunder. In the case at bar, the guaranty and the collateral security were given concurrently, each with reference to the other, and no one can doubt the intention of the parties to the original contract, that the creditor should use and exhaust both, if necessary, to pay his whole debt. The authorities in support of our view are numerous. In *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357, a chattel mortgage secured four notes. There was a surety upon the two notes first due. It was held that the proceeds of the mortgage might be applied by the creditor on the notes on which there was no surety. In *Nichols v. Knowles*, 3 McCrary, 477, 17 Fed. Rep. 494, Judge McCrARY decided that where a creditor held several notes secured by mortgage, one of which was also secured by the indorsement of a third party, it might be inferred, in the absence of evidence, that the parties intended to apply the proceeds of the sale of the mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. To the same effect are *Mathews v. Switzer*, 46 Mo. 301; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. Rep. 162, (where *English v. Carney*, *supra*, is distinguished;) *Gaston v. Barney*, 11 Ohio St. 506; *Bank v. Benedict*, 15 Conn. 437; *Field v. Holland*, 6 Cranch, 8; *Transportation, etc., Co. v. Kilderhouse*, 87 N. Y. 430; *Bank v. Wood*, 71 N. Y. 405; *Gordon v. Bank*, 115 Mass. 591.

It is true that when the action below was brought the installments of rent not covered by the guaranty were not due, and that, except by agreement, Elston could not then apply the insurance money to those subsequent installments. His right was to hold the money as security until the installments came due, and then, if they were unpaid, to use the insurance money to pay them. But the question of the subsequent application of the insurance money is not material in this discussion, in view of the conclusion just reached, that the insurance money could not be applied to reduce Kortlander's liability on his guaranty, until after the rest of the purchase money was paid. As the entire purchase money was not due until long after that part covered by the guaranty, and not until long after the suit was brought, the insurance money could not, for the purposes of this suit, affect Kortlander's liability at all.

The second claim made on behalf of the plaintiff in error was that Elston, in adjusting the loss on the buildings with the insurance companies at less than the full amount of the policies, had released collateral without consent of Kortlander, and so had released the latter from his contract of suretyship. A policy of insurance is not like a promissory note, in which an exact amount is unconditionally payable. The face of the policy represents only that amount beyond which, as a limit, the claim of the insured cannot go. The amount due is the actual loss.

The burden of showing facts requiring his release is on the surety. There was no evidence tending to show that the amount recovered was not fully equal to the actual loss on the buildings. The presumption is therefore that Elston recovered all that he was entitled to under the policies, and did not release anything. The charge was rightfully refused.

The chief contention of counsel for the defendant below was that by a subsequent agreement Elston had stipulated with Carman, the debtor, and Kortlander to apply the insurance money on the contract so as to relieve Kortlander. Whether such an agreement was made, was fairly submitted to the jury as a question of fact, and the jury found against the defendant.

The consideration suggested for making the subsequent agreement on Elston's part was that Carman had assigned the two insurance policies, indorsed to him, back to Elston. If it were material, we should find difficulty in supporting the agreement on such a consideration. The indorsement on the policies to Carman was a palpable mistake of the insurance agent, without the knowledge of either Carman or Elston, was in direct violation of the provision as to the insurance in the original contract, and gave Carman no greater right than if the indorsement had never been made. It was his duty to reassign the policies to comply with his original contract, and his doing so could not constitute a valuable consideration moving to Elston. The error alleged on this branch of the case was the refusal of the court to give the following charge:

"If you find from the evidence that plaintiff agreed with Mr. Carman to apply the money received on insurance as payment on contract for the sale of the premises in question, then he is obliged to apply it as any other cash payment on the amounts due and unpaid."

The court had already instructed the jury that, if the parties had agreed to apply the money on the part of the contract covered by the guaranty, plaintiff could not recover, and that the same result would follow from an agreement that the application should be upon the payments due and as they fell due.

Considering all the evidence in the record, it seems to us that the charges which the court gave covered substantially all that was contained in the charge requested and refused. It does not appear, when the evidence is all taken together, that it raised any issue upon the point whether the parties agreed in so many words to apply the insurance money generally on the contract, as distinguished from agreeing to apply it on the payments due. The evidence of Carman and Kortlander was to the effect that Elston agreed to apply the insurance money on the amount then due under the contract, and that he distinctly agreed to release Kortlander. Elston denied this. The sharp issue thus presented was fairly submitted to the jury in the charges given.

Another objection to the charge of the court, and the last one we shall notice, was to the instruction relating to the application of the money realized from the insurance on the furniture. This insurance was in the name of Elston, and was, of course, payable to him. The title to the furniture under the contract was in him at the time of the fire. The

furniture contract contained no provision as to insurance. Elston testified that Carman refused to pay the insurance premium on the personal property, and that he paid it. Carman swore that he paid the premium on all the policies covering both the buildings and the furniture. This was all the evidence on the subject. The court charged the jury that, if Elston paid the premium, he was entitled to all the insurance money coming from the loss of the furniture, and that neither Carman nor Kortlander had any interest in it. In this the court was clearly right. The insurance and the property were both in his name, and, if he paid the premium, the matter was one with which Carman had nothing to do, and from which neither he nor Kortlander could derive any benefit. *Kingsbury v. Westfall*, 61 N. Y. 356. The court further charged the jury that, if Carman paid the premium, then Elston might apply so much of it as was necessary to pay the balance of purchase money on the furniture due him from Carman, and would hold the surplus for application, as directed by Carman, to reduce Kortlander's liability. We are quite clear that Kortlander has no ground of complaint in this charge. The court proceeded on the theory that, with the property and the insurance in Elston's name, the fact that Carman had paid the premium implied a contract on Elston's part to distribute the insurance, in case of loss, between himself and Carman, as their respective interests might appear. Whether, from these facts alone, such an implication would arise, we need not definitely determine. The transaction can certainly not be viewed in any more favorable light for the plaintiff in error, in the absence of a special contract. A strong argument might be made in support of the view that the insurance all belonged to Elston, and the fact of Carman's paying the insurance only gave him a right to be reimbursed the amount of the premium. As it is, we simply hold that the error, if any, was not to the prejudice of the plaintiff in error.

The foregoing discussion has covered all the mooted points in the record worthy of consideration, and the result is that the judgment of the circuit court must be affirmed.

INTERSTATE COMMERCE COMMISSION v. TEXAS & P. RY. CO.

(Circuit Court, S. D. New York. October 4, 1892.)

1. INTERSTATE COMMERCE COMMISSION—ENFORCEMENT OF ORDER—PARTIES.

In proceedings under section 16 of the interstate commerce act (24 St. at Large, p. 384) against a carrier to enforce an order of the commissioners, it is not necessary that another carrier, making the forbidden rate jointly with defendant, be made a party to the suit.

2. SAME—UNJUST DISCRIMINATION—COMPETITIVE TRAFFIC.

Freight rates from London and Liverpool to San Francisco are fixed by the competition of the water and rail route via the Isthmus of Panama and the water route around Cape Horn. A carrier by rail from New Orleans to San Francisco gave a much lower rate on goods shipped from London and Liverpool to San Francisco on through bills of lading than from New York, Chicago, and other points to San Francisco, (in some cases less than half the latter rate.) The rate complained of was slightly remunerative to the carrier, and it would lose the traffic unless it carried at such low rate. *Held*, that under sections 2 and 3 of the interstate commerce act (24 St. at Large, pp. 379, 380) the giving of such low rate is an unjust discrimination, and a charging of one person more than another for a like service under substantially similar circumstances and conditions, and an order of the commissioners prohibiting it will be enforced.

Application by the Interstate Commerce Commission to enforce an order against the Texas & Pacific Railway Company. Petition granted.

Edward Mitchell, (*Simon Sterne* and *John D. Kernan*, of counsel,) for complainant.

Winslow S. Pierce, (*John F. Dillon*, of counsel,) for defendant.

WALLACE, Circuit Judge. This is an application to enforce an order of the interstate commerce commission, made January 29, 1891, in a proceeding instituted by the New York Board of Trade & Transportation. The petition in that proceeding complained of unjust discrimination made by various railway carriers. The defendant was duly notified of the complaint, and appeared in the proceeding, and submitted its rights. It was shown to the commission, as appears by the findings of fact in their report, that the defendant, in conjunction with the Southern Pacific Company, made joint rates from New Orleans to San Francisco covering carriage of traffic by the rails of the defendant from New Orleans to El Paso, and thence by the rails of the Southern Pacific Company to San Francisco, and also made joint rates with vessel owners in London and Liverpool covering carriage of traffic from those places to San Francisco via New Orleans. It was also shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans, and shipped at New York, Chicago, and other places in this country, for carriage from New Orleans to San Francisco, were somewhat more than double the rates charged for carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco via New Orleans. To illustrate, it was shown that the rates made by the two companies, in conjunction with Liverpool vessel owners, by through bill of lading from Liverpool to San Francisco via the rails of the defendant from New Orleans to El Paso, were, per 100 pounds, on books, on carpets, and on cutlery, \$1.07,

while the regular tariff rates of the two companies upon the articles when sent to New Orleans from other places in this country were, per 100 pounds, on books, \$2.64, on carpets, \$2.88, and on cutlery, \$3.26; and that the rates on these articles, when shipped from Liverpool, were 80 cents per 100 pounds for carriage from New Orleans to San Francisco.

The defendant contended that it was justified in making the discrimination between the foreign and domestic traffic, because, owing to the competition of sailing vessels and foreign carriers between Liverpool and San Francisco, it could not get any appreciable amount of foreign traffic without meeting the competitive rates by making the rates given. The commission, while conceding the facts to be as asserted by the defendant, ruled against the validity of the excuse, and made an order which, in substance, required the defendant to desist from carrying any article of imported traffic, shipped from any foreign port upon through bills of lading, destined to any place within the United States, at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic. It is admitted by the answer of the defendant that since the order of the commission was made it has maintained a substantially similar disparity in its transportation rates for these articles, as well as in those for the transportation of numerous other articles, depending upon the foreign or domestic origin of the shipment. The defendant insists that its action in this regard is not prohibited by the provisions of the interstate commerce act, and that, as it has not been guilty of any unjust discrimination, within the meaning of that act, the order of the commission ought not to be enforced. It also insists that the proceeding is defective, because the Southern Pacific Company is not made a party to the defense.

If the order made by the commission was a lawful one, I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Company is not at present pursued. If the defendant is violating a proper order of the commission, it should be restrained from doing so; and it cannot escape upon the objection that another wrongdoer is also violating it. The real question, as it seems to me, is whether the existence of the peculiar facts which were relied upon before the commission by the defendant as an excuse for its discrimination justifies its conduct. It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are, in effect, fixed and controlled by the competition of sailing vessels between those ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to advert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to, and the revenue derived therefrom, unless it carries it at the lower rates; and by doing so it is enabled to get part of it, which would otherwise go from

London and Liverpool to San Francisco around the Horn or by the Isthmus of Panama.

The case presents a question of much interest and importance to the defendant and carriers similarly situated, and also to our own merchants and manufacturers, who, in supplying the wants of consumers at places within the United States, have to meet the competition of foreign merchants and manufacturers, and are placed at a serious disadvantage if they are compelled by the railway carriers to pay higher rates of transportation upon their goods. The question does not, however, seem to be such a doubtful one as to require more than a brief statement of the conclusions reached. The second section of the interstate commerce act prohibits unjust discrimination, and declares that the common carrier charging a greater or less compensation for any services rendered in the transportation of passengers or property than it charges any other person for doing a like and contemporaneous service in the transportation of a "like kind of traffic under substantially similar circumstances and conditions" shall be deemed guilty of unjust discrimination. The third section provides that it shall be unlawful for the carrier to make or give any undue or unreasonable preference or advantage to any particular person, locality, or particular description of traffic in any respect whatsoever, or to subject any particular person or locality, or any particular description of traffic, to any undue and unreasonable prejudice or disadvantage in any respect whatsoever. The third section is substantially taken from the second section of the English act of parliament known as the "Railway & Canal Traffic Act of 1854." Either section is sufficiently comprehensive in its terms to prohibit an interstate carrier from making an unfair discrimination between different shippers in charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. But neither section is intended to prohibit all discriminations or preferences. In considering whether an undue discrimination has been made, the fair interests of the carrier are to be taken into account, and, although lower rates are given to one shipper or class of shippers than to another for carrying the same kind of traffic, the latter have no just ground of complaint of unjust discrimination if the conditions of the service enable the carrier to take the traffic of the former at a less cost. Nor is the discrimination unjust if made conformably to some agreement by which the favored shipper gives the carrier an adequate consideration for the reduced rates. Upon this principle it was decided not to be an unjust preference under the English act for a railway company to carry at a lower rate in consideration of a guaranty of large quantities and full train loads at regular periods, provided the real object of the company was to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect might be to exclude from the lower rate those shippers who could not give such a guaranty. *Nicholson v. Great Western Ry. Co.*, 5 C. B. (N. S.) 366. The discrimination between different shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense, or the

exceptional character of the service. *U. S. v. Delaware, L. & W. R. Co.*, 40 Fed. Rep. 101.

Prior to the enactment of the interstate commerce act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers, based solely on the ground of the quantity of freight shipped, without reference to any conditions tending to decrease the cost of transportation, were contrary to sound public policy, and inconsistent with the obligations of such carriers to the public. *John Hays & Co. v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Burlington Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652. It might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shipper to enlarge his business operations; and thus the discrimination might be profitable to the carrier. The English courts, in cases arising under the English traffic act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic to one carrier which otherwise would go to another carrier, are unlawful, and cannot be justified on the ground of profit to the carrier allowing them. *Harris v. Cockermouth & Workington Ry. Co.*, 3 C. B. (N. S.) 693; *Evershed v. London & Northwestern Ry. Co.*, 2 Q. B. Div. 254. In the first of these cases the judges in their opinion pointed out that, if they were to justify a discrimination upon such reasons, a railway company might in any case grant a preference to one person over another, provided it acted *bona fide* in the belief that such a course would be to its advantage. In the second case the court, in pronouncing against the validity of the justification, used this language:

"We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for the reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic."

The interstate commerce act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation. The order is granted.

FARMERS' NAT. BANK OF VALPARAISO, IND., v. SUTTON MANUF'G CO.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1892.)

No. 31.

1. CONFLICT OF LAWS—LEX LOCI CONTRACTUS—BILLS OF EXCHANGE.

A bill of exchange drawn in Indiana, accepted in Michigan, to be discounted in Indiana and paid in Michigan, is an Indiana contract, and the liability thereon is to be determined by the law of that state. *Tilden v. Blair*, 21 Wall. 241, followed.

2. NEGOTIABLE INSTRUMENTS—PROVISION FOR ATTORNEYS' FEES.

An acceptance of a bill of exchange with interest after maturity, and attorneys' fees, is a contract to pay a sum certain at maturity, and is therefore negotiable, for the provisions as to interest and attorneys' fees become operative only after maturity.

3. SAME—INDIANA STATUTES.

Rev. St. Ind. 1881, § 5518, providing that all agreements in a bill of exchange or other written evidence of indebtedness to pay attorneys' fees upon "any condition therein set forth" are void, does not render void an agreement to pay attorneys' fees on the implied condition that they shall be payable only in case of dishonor. *Churchman v. Martin*, 54 Ind. 380, followed.

4. SAME—CORPORATIONS—ULTRA VIRES—DECLARATORY STATUTE.

How. Ann. St. Mich. c. 124, providing in general terms that it shall not be lawful for any corporation to divert its operations to any other purpose than that set forth in the articles of association, is merely declaratory of the common law, and under it a corporation accepting a bill of exchange without consideration, merely for the accommodation of the drawee, is bound with respect to a *bona fide* indorsee for value before maturity.

5. FEDERAL COURTS—STATE DECISION.

The federal courts, when called upon to construe the general commercial law of Indiana in respect to a question which is a new one in the federal courts, should give weight to the Indiana decisions, although they are not absolutely bound thereby. *Burgess v. Seligman*, 2 Sup. Ct. Rep. 10, 107 U. S. 20, followed.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action by the Farmers' National Bank of Valparaiso, Ind., against the Sutton Manufacturing Company to recover on a bill of exchange accepted by the defendant. Judgment for defendant. Plaintiff brings error. Reversed.

Statement by TAFT, Circuit Judge:

The action in the court below was in *assumpsit* by the Farmers' National Bank of Valparaiso, Ind., as the indorsee of a bill of exchange against the Sutton Manufacturing Company of Detroit, Mich., as acceptor of the bill for the amount of the bill and interest. The bill was as follows:

"\$2,000. OFFICE OF HOPPER LUMBER & MANUFACTURING CO., SUCCESSORS TO J. S. HOPPER & SONS, WHOLESALE LUMBER DEALERS.

"MICHIGAN CITY, INDIANA, June 4, 1890.

"Ninety days after date, pay to the order of Hopper Lumber & Manufacturing Co. two thousand dollars, with interest at the rate of eight per cent. per annum after maturity, and attorneys' fees, without any relief from valuation or appraisement laws. Value received, and charge to account of

"HOPPER LUMBER & MANUFACTURING CO.

"Per J. S. HOPPER, Pres.

"To the Sutton Manufacturing Co., Room 40, Hedges Building, Detroit, Mich.

"Due Sept. 5th."

Written on the face of note:

"Accepted. Pay at Michigan Savings Bank.

"THE SUTTON MANUFACTURING Co.

"Per HENRY S. HOPPER, Treas.

Protested for nonpayment September 5, 1891.

Indorsed on back of note:

"HOPPER LUMBER & MANUFACTURING Co.

"Per J. S. HOPPER, Pres.

"Pay to G. F. Bartholomew, cashier, or order.

"C. E. ARNDT, Cashier."

C. E. Arndt was the cashier of the Citizens' National Bank of Michigan City, Ind., and G. F. Bartholomew was the cashier of the plaintiff bank. J. S. Hopper was president of both the Hopper Lumber & Manufacturing Company of Michigan City, and of the Sutton Manufacturing Company of Detroit, and Henry S. Hopper, his son, was the secretary of both companies. The Sutton Manufacturing Company was a solvent and prosperous concern, engaged in the manufacture of pails and buckets and smaller wooden ware. The Hopper Manufacturing Company was a new enterprise, engaged in making refrigerators and furniture specialties. The Sutton Manufacturing Company was a corporation organized under the general laws of Michigan, as contained in chapter 124 of Howell's Annotated Statutes of Michigan, the fourth section of which (Comp. § 4130) reads as follows:

"The stockholders of every corporation formed under this act shall * * * distinctly and definitely state in said articles (of association) the purpose for which every such corporation shall be established, and it shall not be lawful for said corporation to divert its operations, or appropriate its funds, to any other purpose except as hereinafter stated."

The acceptance sued upon was given for the accommodation of the Hopper Lumber & Manufacturing Company, and was without any consideration moving to the Sutton Company. The bill was drawn by J. S. Hopper at Michigan City, Ind., and sent to his son, Henry S. Hopper, the secretary and treasurer of the Sutton Company, at Detroit. Henry accepted it, and returned it to his father, at Michigan City, who procured the note to be discounted by the Citizens' National Bank of Michigan City. The evidence on the trial was conflicting upon the point whether the officers of the Citizens' Bank knew that this bill was accommodation paper, or knew that the Hoppers, father and son, filled the same offices in both companies. It was undisputed, however, that the plaintiff was a *bona fide* purchaser of the bill without notice and for value before maturity. At the conclusion of the evidence the court below directed the jury to return a verdict for the defendant on two grounds: *First*, that the acceptance sued on, being without consideration, was beyond the power of the defendant company to make, and was void; and, *second*, that the bill was not a negotiable instrument, and it was therefore open to the defendant to show that it was without consideration. A writ of error was sued out by the plaintiff to the judgment for defendant, and the error assigned was the direction of the court to the jury.

Don M. Dickinson and Elliott G. Stevenson, for plaintiff in error.

Henry C. Wisner and Fred C. Harvey, for defendant in error.

Before BROWN, Circuit Justice, and TAFT, Circuit Judge.

TAFT, Circuit Judge, (*after stating the facts.*) This judgment must be reversed. We cannot agree that either of the grounds upon which the learned judge directed a verdict for the defendant was well taken.

1. The feature of the bill which in the opinion of the court below destroyed its negotiability was the stipulation to pay attorneys' fees. It was said that this rendered the amount due uncertain, and that certainty in the amount due was an essential of negotiable paper.

The bill was drawn in Indiana and accepted in Michigan, to be discounted in Indiana, and to be paid in Michigan. In *Tilden v. Blair*, 21 Wall. 241, Pelton, a resident of Chicago, drew a draft payable in 60 days, and sent it to Tilden & Co., a firm resident in New York state, for their acceptance. They accepted it without consideration, and returned it to him for the purpose of enabling him to have it discounted in Chicago. The draft was made payable in New York city. The supreme court held that the draft was an Illinois contract, and that the liability of the acceptors to a *bona fide* purchaser for value before maturity was to be determined by the law of Illinois, and not by that of New York. The case cited and the one at bar are on all fours, and the contract here must accordingly be held to be an Indiana contract, the liability on which is to be determined by Indiana law. Except so far as the rights of the parties are affected by statute the question is one of general commercial law, but it is the general commercial law of the state of Indiana. Upon such questions courts of the United States, in exercising a jurisdiction concurrent with that of the state courts, have always asserted an independence of judgment as to the state law, even if they differ with the state supreme court. But where the question is a new one with the federal courts it is their rule, as it is their duty, to give weight to the decisions of the courts of the state, whose law they are administering. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10, and authorities cited on page 34, 107 U. S., and page 22, 2 Sup. Ct. Rep.

The contract of acceptance is, by the face of the bill, to "pay * * * two thousand dollars, with interest at the rate of eight per cent. per annum after maturity, and attorneys' fees, without any relief from valuation or appraisement laws." The stipulation as to interest expressly applies only in case the bill is not paid at maturity. The provision as to valuation and appraisement laws can, in view of the operation of such laws, have reference only to the execution of a judgment or attachment on suit brought, and is therefore also applicable only in case the bill is not paid at maturity. On the principle of *noscitur a sociis* it clearly follows that the agreement to pay attorneys' fees could only become operative after the bill had been dishonored. Such would be the reasonable interpretation of the contract without the aid of the other stipulations, for it is not usual or necessary to employ attorneys to collect bills before they are due. In *Proctor v. Baldwin*, 82 Ind. 377, it was held by the

supreme court of Indiana, that in a promissory note in which the maker agreed to pay an amount certain, "with ten per cent. interest and attorneys' fees," the condition was implied that only such attorneys' fees could be charged against the maker as were incurred after dishonor. That was a stronger case than this. In *Maxwell v. Morehart*, 66 Ind. 301, the words, "with interest at ten per cent. per annum after maturity and attorneys' fees," were similarly construed. See, also, *Garver v. Pontious*, Id. 191.

Lest it may be supposed to have escaped our attention, a statute of Indiana, which took effect March 10, 1875, (section 5518, Revised Statutes of Indiana, 1881,) should be noticed in this connection. It reads as follows:

"Attorneys' Fees. Any and all agreements to pay attorneys' fees upon any condition therein set forth, and made a part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void: provided, that nothing in this section shall be construed as applying to contracts made previous to the taking effect of this act."

Our construction of the bill in suit is that the attorneys' fees therein provided are payable only on condition of nonpayment of the bill at maturity, and this might seem to bring the stipulation within the inhibition of the section just quoted. That the section is not to be regarded as having such effect is authoritatively settled by the supreme court of the state in *Churchman v. Martin*, 54 Ind. 380, where it was held that a stipulation to pay the amount of the note "and five per cent. attorneys' fees" was not void under the statute, although there was an implied condition that they should only be payable in case of dishonor, because the statute only forbade such stipulation when the condition was expressed in the instrument. As the condition is not expressed in the bill in suit, but is implied, the statute does not apply to it.

The law of bills of exchange, established as it has been by ancient usage, is frequently arbitrary, and not deducible from logical considerations. Upon the point at issue here, however, the authorities are in such hopeless conflict that we are able to select that view which seems to us most consistent with the general character of such instruments. The indispensable qualities of a bill of exchange are that it shall be payable in a sum certain, at a time certain, to a person certain. It is intended to be a circulating medium until maturity. For this purpose every purchaser must know exactly what will be or ought to be paid on it at maturity. It only has currency on the hypothesis that it is to be paid at that time. If the sum then to be paid is fixed and certain, we do not see why that is not sufficient. A stipulation as to what shall be done in case the bill is not paid does not affect its character as a financial medium before it is dishonored. As soon as the bill is dishonored, it loses its value as a negotiable instrument, for thereafter an indorsee gains no better title than his transferor. It is unreasonable to hold that the negotiability of a bill is lost because of a provision having no effect while it remains negotiable.

As already intimated, it is impossible to reconcile the authorities. For the reasons given we prefer to follow those courts which hold that the agreement to pay attorneys' fees after maturity does not destroy the negotiability of a bill of exchange. We are the more inclined to do so because we are considering an Indiana contract, and this view has been established as the law of that state in a series of decisions, beginning with *Stoneman v. Pyle*, 35 Ind. 103. The other cases are *Proctor v. Baldwin*, 82 Ind. 377; *Tuley v. McClung*, 67 Ind. 10; *Maxwell v. Morehart*, 66 Ind. 301; *Snock v. Ripley*, 62 Ind. 81; *Hubbard v. Harrison*, 38 Ind. 323.

The court of appeals of Kentucky reached the same conclusion in *Gaar v. Banking Co.*, 11 Bush, 186; the supreme court of Iowa in *Sperry v. Horr*, 32 Iowa, 185; the supreme court of Kansas in *Seaton v. Scovill*, 18 Kan. 434; and the supreme court of Illinois in *Nickerson v. Sheldon*, 33 Ill. 372, and in *Houghton v. Morrison*, 29 Ill. 244. Judge PARDEE, of the fifth circuit, in *Adams v. Addington*, 16 Fed. Rep. 89, and Mr. Justice BREWER, while circuit judge, in *Hughitt v. Johnson*, 28 Fed. Rep. 865, expressed the same views. Other authorities to the same effect are *Trader v. Chidester*, 41 Ark. 242; *Heard v. Bank*, 8 Neb. 10; *Dietrich v. Bayhi*, 23 La. Ann. 767; *Howenstein v. Barnes*, 5 Dill. 482; *Bank v. Fuqua*, (Sup. Ct. Mont.) 28 Pac. Rep. 291. See, also, *Towne v. Rice*, 122 Mass. 67, and *Arnold v. Railroad*, 5 Duer, 207. The contrary decisions in Dakota, Minnesota, Wisconsin, Missouri, South Carolina, North Carolina, California, Pennsylvania, Maryland, and Michigan it would be useless to consider or to attempt to distinguish.

2. The remaining question is whether the Sutton Manufacturing Company can avoid their acceptance in the hands of a *bona fide* purchaser for value before maturity on the ground that it was *ultra vires*.

The evidence shows conclusively that Henry S. Hopper, the secretary and treasurer, had full and general authority to sign and issue business paper on behalf of the corporation. The only limitation of his authority was the same as that upon the corporation itself, namely, the extent of its charter powers.

Every one dealing with a corporation is charged with notice of its corporate powers. If, therefore, a reference to the charter shows a seeming act of the corporation to be beyond its powers, it is void, and cannot be made the basis of any claim of liability against the corporation. But there are acts that may or may not be within the charter powers, their lawful character being dependent on the existence of a fact which cannot be known from the act itself. If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped to deny against any person who in dealing with the corporation has parted with value on the faith of it. The principle has been frequently applied in cases of commercial paper issued in the name of the corporation by its officers having general authority to issue such paper.

A leading case is that of *Stoney v. Insurance Co.*, 11 Paige, 635. Chancellor WALWORTH there decided that a negotiable security of a corporation which upon its face appeared to have been duly issued by the corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the company, and in violation of the laws of the state where it was actually issued. See, also, to the same effect, *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Bissell v. Railroad Cos.*, 22 N. Y. 289; *Mechanics' Banking Ass'n v. New York & S. White Lead Co.*, 35 N. Y. 505; *Bank v. Young*, (N. J. Err. & App.) 7 Atl. Rep. 488; *Wright v. Line Co.*, 101 Pa. St. 204; *Water Co. v. DeKay*, 36 N. J. Eq. 548; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 8 Atl. Rep. 472; *Gelpcke v. City of Dubuque*, 1 Wall. 203; *Genesee County Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438, 18 N. W. Rep. 206; *Bird v. Daggett*, 97 Mass. 494.

The learned judge below held that these authorities did not apply because of the general statutes of Michigan, above referred to, making it unlawful to divert the operations or to appropriate the funds of a corporation to purposes not set forth in the articles of association.

In his view this statutory denunciation of *ultra vires* acts renders accommodation paper absolutely void. We cannot agree with him. The general terms of the statute indicate that it was in this respect merely declaratory of the common law. If the legislature of Michigan had intended to establish a rule of liability for corporations of that state different from that applied to corporations everywhere else, it would have used more specific language, so that its purpose could not be misunderstood.

Negotiable instruments having their origin in a transaction forbidden by statute are not void in the hands of a *bona fide* holder for value without notice unless the statute expressly declares them to be void. Chit. Bills, 95; Story, Prom. Notes, § 192; Daniel, Neg. Inst. § 188; *Norris v. Langley*, 19 N. H. 423; *Bank v. Thompson*, 42 N. H. 369; *Converse v. Foster*, 32 Vt. 828, 831; *Wyatt v. Bulmer*, 2 Esp. 538.

Here is not a specific avoiding of accommodation paper issued by corporations, and we think it would be going much too far to give such effect to the very general language under consideration.

In *Bird v. Daggett*, 97 Mass. 494, it was held that where an agent of a corporation, duly authorized to sign all notes and business paper, unlawfully gave accommodation paper in the name of the company, the company was liable to a *bona fide* holder for value before maturity. The general statute of Massachusetts, like the Michigan statute, provided that it should be unlawful for it to divert its operations or appropriate its funds to other purposes than those set forth in its articles of association. The case is exactly like the one at bar.

The Michigan cases cited do not meet the point. In *Beecher v. Dacey*, 45 Mich. 98, 7 N. W. Rep. 689, the making of accommodation acceptances was said not to be within the powers of the corporation, but

there was in that case no question of the rights of a *bona fide* holder for value. The same is true of the cases of *McLellan v. File Works*, 56 Mich. 582, 23 N. W. Rep. 321, where the court held that the plaintiff had notice of facts from which he ought to have inferred the real character of the paper. The case of *Merchants' Nat. Bank v. Detroit Knitting & Corset Works*, 68 Mich. 620, 36 N. W. Rep. 696, seems to be based wholly on *McLellan v. File Works*, and turned on the question of the general authority of the agent signing the acceptance. The statute and its effect are not considered at all.

The judgment of the circuit court is reversed, with instructions to order a new trial.

POUILIN v. CANADIAN PAC. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1892.)

No. 42.

1. CARRIERS—EJECTION OF PASSENGER—DEFECTIVE TICKET.

The face of a railway ticket is conclusive evidence to the conductor of the terms of the contract between the passenger and the company, and the purchaser of a defective ticket, who is ejected from a train, must rely upon his action against the company for the negligent mistake of the ticket agent. *Railway Co. v. Bennett*, 50 Fed. Rep. 496, 1 C. C. A. 544, followed.

2. SAME—CONTRIBUTORY NEGLIGENCE.

At the city ticket office of a railroad company a passenger paid the price of a ticket from Detroit to Quebec and return, but, by mistake of the agent, was given a ticket, both parts of which were stamped for passage from Detroit to Quebec. He discovered the mistake when about to take the train, and thereupon consulted a person temporarily in charge of the station office during the absence of the agent. This person said he had no authority to correct the mistake, but thought the matter would be all right. The passenger went to Quebec, and spent several weeks, but on the way home was ejected from the train. *Held*, that he was bound to know that the conductor had a right to refuse the ticket, and therefore, in boarding the train, was guilty of negligence barring a recovery in tort, and rendering his damages merely nominal if his action is on contract. *Brown, J.*, dissenting on the ground that, under all the circumstances of the case, the question of contributory negligence was one for the jury. *Eddy v. Wallace*, 49 Fed. Rep. 801, 1 C. C. A. 435, and *Evans v. Railroad Co.*, (Mich.) 50 N. W. Rep. 886, distinguished.

3. SAME.

The fact that one conductor allowed a passenger, who was subsequently ejected by another conductor, to ride on a defective ticket, does not affect the proper standard of due care on the part of the passenger in trying to cure the defect.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action on the case by John B. Poulin against the Canadian Pacific Railway Company to recover damages for ejection from a train. The declaration was demurred to on the ground that it should have sounded in contract. Demurrer overruled. 47 Fed. Rep. 858. Jury instructed to find for defendant. Plaintiff brings error. Affirmed.

Statement by TART, Circuit Judge:

Plaintiff was a resident of the city of Toledo, Ohio, and the defendant was a railway corporation organized under the laws of the Dominion of Canada. The facts shown by the evidence were as follows: Plaintiff

applied to the ticket agent of defendant in the city ticket office in Detroit for two tickets from Detroit to Quebec and return. The ticket agent received his money and gave him two tickets, made up of two coupons each. After leaving the ticket office, plaintiff went to the station to which the ticket agent had directed him, and while there gave one of the tickets to a friend for whom he had purchased it. In doing so his attention was directed to his own ticket, which led him to think, as he says, that "it was not exactly right," for he saw that though he had asked for a ticket from Detroit to Quebec, and from Quebec to Detroit, the agent had given him a ticket made up of two coupons, each of which purported to entitle him to passage from Detroit to Quebec. He went to the ticket office in the station, and asked the person who was there to exchange the ticket for a proper one. This person replied that the agent who had authority to make the exchange was not in, but that he thought the ticket as it was would be all right, and that conductors would understand the mistake. Plaintiff took the train in a few minutes thereafter, and by giving up the first coupon of his ticket obtained passage to Quebec, where he visited friends for several weeks. Returning, plaintiff offered the remaining coupon of his ticket to the conductor of the train between Quebec and Montreal, who said it was a mistake which he could not understand, but that it was all right, and he punched it. On the train from Montreal to Toronto, however, another conductor declined to take the ticket, on the ground that it was not good, and required plaintiff to pay his fare or leave the train. Plaintiff had not sufficient money to pay his fare, and was obliged to leave the train at a station 20 miles west of Montreal. Returning thence to Montreal, he applied to the main offices of the defendant, where his ticket was exchanged for a correct one, and he then resumed his journey. He suffered considerable inconvenience because of the delay. It appeared that the rules of the company forbade conductors to accept such a ticket for passage from Quebec to Detroit.

The plaintiff declared in trespass on the case on the negligence of the ticket agent in selling him a wrong ticket, and asked damages for all its consequences to him. The evidence showing the facts as stated, the court directed the jury to return a verdict for the defendant, because the injury which the plaintiff had suffered was the consequence of his contributory negligence. A writ of error was sued out to the judgment entered on the verdict, and the error assigned was to the direction of the court.

Charles T. Wilkins, for plaintiff.

F. H. Canfield, (*Angus McMurchy*, on brief,) for defendant.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

TAFT, Circuit Judge, (*after stating the facts*.) Counsel for the defendant contends that under the practice in Michigan, where the common-law form of procedure still obtains, the judgment for defendant should not be disturbed, because the gist of plaintiff's action is breach of contract, whereas he has declared in tort. The objection was raised

on demurrer in the court below, and overruled. The reasons of the learned district judge for this ruling are fully set forth in *Poulin v. Railway Co.*, 47 Fed. Rep. 858. Upon the correctness of the conclusion there reached we do not express an opinion, because we think that, irrespective of the form of action, the court was right in directing a verdict for the defendant on the admitted facts of the case. The contract of carriage between the parties was made by the plaintiff with the city ticket agent of the defendant at Detroit. The terms of that contract were that, in consideration of the fare paid, the defendant company would give to the plaintiff a token or ticket which, upon exhibition to defendant's conductors or other agents in charge of defendant's trains, would secure his safe carriage from Detroit to Quebec and back again. The city ticket agent committed a breach of the contract by delivering a token or ticket purporting to entitle the plaintiff to two passages from Detroit to Quebec. The plaintiff had his right of action for all the damages which would naturally flow from such a breach, in the contemplation of the parties when the contract was made. It is possible that, if trespass also lies at the election of the plaintiff, the measure of damages would be somewhat wider. The question is immaterial here. The plaintiff, before he went aboard the train from which he was ejected, discovered that the agent had made a mistake, and that he had not delivered to him a ticket which on its face entitled him to return from Quebec to Detroit. The law settled by the great weight of authority, and but recently declared in a case in this court, (*Railway Co. v. Bennett*, 50 Fed. Rep. 496, 1 C. C. A. 544,) is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting its fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud, and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent. There is some conflict among the authorities, but the great weight of them is in favor of the result here stated. *Bradshaw v. Railroad*, 135 Mass. 407; *Townsend v. Railroad*, 56 N. Y. 295; *Frederick v. Railroad Co.*, 37 Mich. 342; *Shelton v. Railway Co.*, 29 Ohio St. 214; *Dietrich v. Railroad Co.*, 71 Pa. St. 432; *Petrie v. Railroad Co.*, 42 N. J. Law, 449; *Railroad Co. v. Griffin*, 68 Ill. 499; *Hall v. Railway Co.*, 15 Fed. Rep. 57; *Pennington v. Railroad Co.*, 62 Md. 95; *Johnson v. Same*, 63 Md. 106; *Mechem's Hutch. Car.* § 580i.

In the opinion of the majority of the court, the plaintiff was bound to know the law, and, when he discovered that his ticket on its face did

not secure him carriage from Quebec to Detroit, he was bound to know that the conductor of the defendant would be justified in refusing to recognize it as evidence of his right to such carriage. Could he then incur the risk of expulsion from the train by taking passage with this ticket, and, if expelled, charge his consequent injury and inconvenience to the mistake of the ticket agent? A majority of the court is of opinion that he could not. It matters not whether his action sounds in tort or in contract. If in tort, then the rule is that he cannot recover any damages for an injury growing out of the negligence of the defendant, which, by the use of due care, he might have avoided. If in contract, then it was his duty to use due diligence to reduce the damages from the breach, and failure to do so prevents recovery for any damages which might by due diligence or care have been avoided. Knowing, as the plaintiff did, that his ticket did not purport to give him a right to be carried on defendant's train from Quebec to Detroit, and charged, as he was, with the knowledge that this was conclusive evidence of his contract to the conductor, his conduct in getting upon the train at Quebec with the ticket was negligence as a matter of law, and it was unnecessary to submit the question to the jury. The plaintiff admittedly suffered no injury or inconvenience before he was put off the train west of Montreal. The injury, delay, and other inconvenience, suffered by him from the ejection, he might have avoided by exercising due care. Therefore, if his right of action sounds in tort, as he has laid it, he was entitled to recover no damages. If his right of action was the breach of the contract, as he might have declared it, his damages could only have been nominal.

Much reliance is placed on the fact that plaintiff consulted a person in a ticket office in the station, who told him that he thought the ticket would be all right, and that the conductor would see the mistake. But this person expressly disclaimed any authority to rectify the mistake, by saying that the agent who had such authority was not there. It is said, however, that, without regard to the person's actual authority, this circumstance ought to have been submitted to the jury, as bearing upon the question whether plaintiff acted with ordinary prudence, and counsel cites, as authority to the point, a railway crossing accident case, where it was held proper to submit to the jury, as affecting the question of requisite caution on the part of the plaintiff in approaching the track, the circumstance that he was beckoned to come on by some one who was apparently the gate flagman, although in fact he was not so. *Evans v. Railroad Co.*, (Mich.) 50 N. W. Rep. 386. There is no analogy between the case cited and the one at bar. The question of the due care of the plaintiff in the accident case depended, of course, upon the seeming situation as it would appear to any ordinarily prudent man in his position, and, if the man who beckoned had the appearance of a flagman, the plaintiff's conduct was reasonably prudent in acting on that appearance, or, at least, the circumstance as to the pseudo-flagman was one for the jury to consider in deciding the question of plaintiff's care, or his want of it. But in this case plaintiff knew from his express statement that the man

in the station office was not the station ticket agent of the defendant, and had no authority to act in regard to the mistake of the city ticket agent.

This is not a case, it will be observed, where the terms of the ticket, in order to be understood, had to be read in the light of rules of the company not known to the passenger. Here was no representation by the ticket agent selling the ticket as to the effect of ambiguous language or signs on its face, on which the passenger might rely, as in the case of *Murdock v. Railroad Co.*, 137 Mass. 293. The language of the ticket was plain, and there was no attempt to vary its meaning by any verbal statement by the ticket agent selling it. If there had been, a case would be presented which might call for the application of different principles. Under such circumstances, the passenger would probably have the right to rely on the representation by the agent that the ticket was all right, as being, in effect, a statement that the rules of the company permitted conductors to receive a ticket, good on its face for passage from one point to another, as good for passage either way between the points. But here the agent's act in selling the ticket was, as plaintiff himself admits, a palpable mistake, which plaintiff, when he discovered it, had no right to rely upon as a deliberate representation that the ticket was good for passage from Quebec to Detroit.

The proper course for the plaintiff to have pursued would have been to visit the city ticket office at Detroit, and have the mistake rectified, or he might before his return have obtained a proper ticket in exchange at the ticket office at Quebec, where he spent several weeks; in either case, holding the company responsible for any damages arising from his delay or inconvenience. The contention of counsel for plaintiff is that, if he had taken this course, the company could have made a complete defense on the ground that plaintiff had been advised by the man in the station ticket office that the ticket was all right, and that the delay was unnecessary. We cannot agree to this. The legal effect of the mistake in the ticket would have been full justification for the delay, and the opinion of a person with no authority to act in the premises would have been a poor shield for the railway company in such an action. The case of *Eddy v. Wallace*, 49 Fed. Rep. 801, 803, 1 C. C. A. 435, relied on by counsel in this connection, was where a passenger jumped off a train on the advice of the brakeman, and was injured. It was left to the jury to say whether, in doing so, he acted with proper care. The fact that the brakeman advised him to do so was a circumstance tending to show that, in jumping, he acted with prudence. The difference between that case and this is that there it was within the brakeman's lawful authority to advise passengers when to alight, while here the advice acted on came from one not only without actual authority, but also without assumed authority. The question is not involved in this case of the rights of a passenger who, relying entirely on the ticket agent, does not examine his ticket, and finds the mistake for the first time when the ticket is presented to the conductor. Such a case might present different considerations.

The circumstance that one of defendant's conductors allowed the ticket to be used for passage from Quebec to Montreal does not aid plaintiff. The conductor simply did not follow the rules of the company, and thus saved the plaintiff the greater inconvenience of having to leave the train before reaching Montreal. Even if the conductor did thereby mislead the plaintiff as to what subsequent conductors would do with the ticket, it was not to the plaintiff's disadvantage. As the conduct of the plaintiff in attempting to ride on a ticket which he knew did not purport to give him a right to do so, was, in our view, negligence, as matter of law, the fact that a conductor was negligent could not affect the proper standard of due care on the part of the passenger. *Dietrich v. Railroad Co.*, 71 Pa. St. 432. It follows that there was no error in the charge of the court directing a verdict for the defendant, and that the judgment thereon must be affirmed.

BROWN, Circuit Justice, (*dissenting*.) I fully concur in the opinion of the court, that, as between the plaintiff and the conductor, the ticket must be deemed conclusive evidence of the contract with the company, and therefore that the conductor was justified in ejecting the plaintiff from the car. I am also of the opinion that defendant's agent was guilty of negligence in delivering an improper ticket, and under the Michigan practice I am inclined to think an action upon the case was the proper remedy.

In determining the question whether the plaintiff was guilty of contributory negligence, it is pertinent to consider that he was a teacher of music; had not traveled much; that he purchased his ticket at an up-town office of the company, some considerable distance from the station, and then went to the station to take a particular train, and on arriving there noticed the mistake in the ticket. The train was advertised to leave within a half or three quarters of an hour, and, having no time to go back to the office where he purchased the ticket, he asked a man in charge of the ticket office at the station to exchange the ticket, and was told that the agent was not there, and he could not exchange it, but he thought that it was all right,—they would understand the mistake. The very fact that the company did not have an agent at the station with authority to correct a mistake of this kind is somewhat singular, and probably induced the plaintiff to rely upon the statement of the person he found there, that it was all right. It appears to me immaterial, as bearing upon the negligence of the plaintiff, whether this man was actually an agent of the company or not, though the fact that he was the only person in the ticket office just before the departure of a train would naturally lead to the inference that he was the ticket agent. In judging of the reasonableness of a man's conduct, the information upon which he acted is always pertinent. In the view I have taken of the case, if he had asked any experienced railroad man, whether connected with the company or not, the information he received would have been equally available to him. It is a matter of common knowledge that conductors do sometimes, either through inadvertence or through an imperfect ob-

servance of their own rules by the company, accept tickets which have expired, or take up tickets which are being used in the wrong direction, as was actually done by the conductor from Quebec to Montreal in this case. Such conduct might easily induce a person of ordinary intelligence to suppose that the company waived a strict compliance with the terms of the ticket in this particular. The question of negligence depends, too, not wholly upon what was done in a particular case, but somewhat upon the age, capacity, and experience of the party doing the act. Had the plaintiff been an experienced railroad man, a jury would probably find little difficulty in holding that he must have known his ticket would not have been accepted, and that he should have returned to the office of the company, and had the mistake corrected. On the other hand, had he been an ignorant man, wholly unacquainted with traveling and the usages of railroads, a jury would be quite likely to find that he was not guilty of negligence in acting upon the advice of a man in charge of the office of the company at the station, and I should have been disposed to uphold a verdict in his favor. The question for the court in every such case is whether the evidence of contributory negligence is so clear that intelligent men should not differ in their conclusions. This being the test, it seems to me the question in this case should have been submitted to the jury.

The opinion of the court seems to hold that the plaintiff was bound to know, as a matter of law, that his ticket would not have been accepted. This is practically holding that if the agent who sold the ticket, himself had told the plaintiff that his ticket, though defective, would be accepted, the plaintiff would still be guilty of contributory negligence in acting upon his advice.

It seems to me that this is carrying the maxim concerning ignorance of the law to an unwarranted extent.

UNITED STATES v. CHIN QUONG LOOK.

(District Court, D. Washington, N. D. August 30, 1892.)

CHINESE EXCLUSION ACTS—MERCANTILE DOMICILE.

A Chinaman who formerly resided in the United States, and acquired an interest in a firm long established and doing business here, although he returned to China, and remained over six years, retaining his interest in the firm, and receiving his share of the profits, has a "commercial domicile" in the United States, and cannot be sent back to China under the exclusion act. *Lau Ow Bew v. U. S.*, 12 Sup. Ct. Rep. 517, 144 U. S. 47, followed.

At Law. Proceeding to enforce Chinese exclusion act. Appeal from judgment of United States commissioner convicting the defendant of being unlawfully in the United States. Reversed, and defendant discharged.

P. C. Sullivan, Asst. U. S. Atty.

W. H. White and *F. Hartley Jones*, for defendant.

HANFORD, District Judge. The defendant was arrested on his arrival at the city of Seattle from China, via Vancouver, B. C., and after a hearing before JAMES KIEFER, one of the commissioners of the circuit court, he was adjudged to be a Chinese person not lawfully entitled to enter the United States, or to remain therein, and ordered to be sent back to China. By an appeal he has secured a new trial in this court.

The evidence is very clear and satisfactory, and establishes the following as the material facts: The defendant formerly lived in Seattle, and while here he acquired a one-fifth interest as a member of a firm called the Gee Lee Company. Said firm has maintained a mercantile establishment in Seattle continuously for nearly 18 years. The business of the firm is importing, buying, and selling groceries and all kinds of goods used by the Chinese people, and it is now doing a business amounting to from \$40,000 to \$50,000 per annum. The defendant returned to China six or seven years ago, but retained his interest in the Gee Lee Company, and has received from time to time his dividends from the profits of said business. I understand the commissioner to have held that, by returning to his domicile of origin, and remaining there over six years, the defendant surrendered his right to claim a domicile in this country. Conceding this to be true, still, by maintaining a mercantile establishment, he has a commercial domicile here, which, according to my understanding of the decision of the supreme court in the case of *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. Rep. 517, is sufficient to entitle him to come and go freely, as any other merchant may. In that case Chief Justice FULLER says:

"We are of opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin, nor that resident merchants should be subjected to loss of rights guaranteed by treaty, if they failed to produce from the domicile of origin that evidence which residence in the domicile of choice may have rendered it difficult, if not impossible, to obtain; and, as we said in considering the application of this petitioner for the writ of *certiorari*, (141 U. S. 583, 588, 12 Sup. Ct. Rep. 43,) we do not think that the decision of this court in *Wan Shing v. U. S.*, 140 U. S. 424, 12 Sup. Ct. Rep. 729, ruled anything to the contrary of the conclusions herein expressed. As there pointed out, Wan Shing was not a merchant, but a laborer. He had acquired no commercial domicile in this country, and whatever domicile he had acquired, if any, he had forfeited by the departure and absence for seven years with no apparent intention of returning."

Evidently the phrase "commercial domicile" was selected and used intentionally by Chief Justice FULLER, for the purpose of conveying the idea that the rule which that decision affirms is broader than would be necessary to merely open a way for the ingress and egress of those Chinese merchants who personally dwell continuously within the country. Bouvier's definition of "commercial domicile" is as follows: "There may be a commercial domicile acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments." 1 Bouv. Law Dict. (15th Ed.) 557.

It is my conclusion, therefore, that the commissioner's decision should be reversed, and that the defendant is entitled to be discharged.

FOX v. PERKINS *et al.*

(Circuit Court of Appeals, Sixth Circuit. October 5, 1892.)

No. 30.

1. PATENTS FOR INVENTIONS—NOVELTY—PRIOR ART.

Reissued letters patent No. 11,062, issued February 25, 1890, to William R. Fox, for an improvement in miter cutting machines, are void for want of patentable novelty, in view of the prior state of the art, as shown more particularly in the Howard patent of August 21, 1886, No. 57,325; the Aiken patent of February 21, 1871, No. 111,896; the Jones patent of July 21, 1874, No. 153,343; the Nichols patent of July 18, 1876, No. 179,944; and the Lannartson patent of April 16, 1878, No. 202,445.

2. SAME—EXTENT OF CLAIM—PRIOR ART.

If the Fox machine could be held to show patentable invention, it constitutes one of a series of improvements, all having the same general object and purpose, and the patent must therefore be limited to the precise form and arrangement of parts described in the specifications, and to the purpose indicated therein. *Bragg v. Fitch*, 7 Sup. Ct. Rep. 980, 121 U. S. 483, and *Caster Co. v. Spiegel*, 10 Sup. Ct. Rep. 409, 133 U. S. 360, followed.

3. SAME—ABANDONMENT.

This construction of the patent is also rendered necessary by the fact that various broader claims were rejected and abandoned, under both the original and the reissue applications.

4. SAME—NOVELTY—EFFECT OF LARGE SALES.

Large sales of a patented machine, while evidence, more or less cogent, of value and usefulness, are not conclusive evidence of patentable novelty, and are of little weight when it appears that such sales are the result of active and energetic efforts by means of circulars and traveling agents. *McClain v. Ortmyer*, 12 Sup. Ct. Rep. 76, 141 U. S. 427-429, followed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

In Equity. Bill by William R. Fox against Harford J. Perkins, William J. Perkins, and Joseph W. Oliver for infringement of a patent. Decree for defendants. Complainant appeals. Affirmed.

George H. Lothrop, for appellant.

Edward Taggart and *Arthur C. Denison*, for appellees.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

JACKSON, Circuit Judge. This is a suit in equity, brought by appellant against appellees for the alleged infringement of reissued letters patent No. 11,062, granted to William R. Fox, February 25, 1890, for certain new and useful "improvements in miter cutting machines." The defenses chiefly relied on are that the supposed invention was described in previous patents; that, in view of the state of the art, the device claimed as new was not a patentable invention; and that, upon a proper construction of the patent, the defendants do not infringe it. The circuit court entertained doubts whether, in view of the previous patented devices set up in the answer and shown by the exhibits, there was anything patentable in the alleged invention covered by said reissued letters patent, but, without deciding that point, held that defendants' machine was not an infringement of complainant's patent, even assuming the latter to be valid, and thereupon dismissed the bill. From this decree the complainant has appealed, assigning as ground for its reversal that the lower court erred in deciding that the defendants had not infringed, and in dismissing his bill.

The original patent, No. 393,970, was granted December, 1888. The reissue was applied for August 30, 1889, and was issued February 25, 1890. The specifications, which were substantially the same in both the original and reissue applications and patents, after referring to and describing the drawings of the machine, which accompany the same, state that "the gauges arranged at either end of the machine are" adjustable in a curved slot formed in the bed plate, the gauges being guided in their movement by a pin projecting from the gauges into the slot, with a bearing plate connected upon the other side, as shown in Fig. 2, at 2. The gauges are formed with plane faces, and the edges nearest the center are arranged in proximity to the plane of movement of the cutting knives, so that their edges, which I have marked 'E,' act in conjunction with the knives, to form a shear cut. The edges of the gauge nearest the ends of the frame bear against the end posts, which serve as a lateral support, both at the upper and lower parts of the front edge, to sustain the gauge against the cutting action of the knife. The gauges have a cut-away portion at their upper ends, as shown in Figs. 1 and 2, terminating in a curved arm, having a semicircular bearing face, which is in bearing contact with a projection, F, on the cross bar of the frame. Thus each gauge has two bearings at its inner edge."

The operation of the machine is described as follows:

"The stock to be operated upon is placed upon the bed and against the gauge, D, the end of it passing through between the upright line, e, of the gauge and the knife, c. The knife is then carried forward by means of the lever, L, cutting the stock at the angle indicated upon the bed, which may be indicated by lines, as shown in Fig. 3. These lines may be marked either upon the edge of the bed, as shown, or upon the slotted areas, M, M. For convenience I construct my devices double, so that they may be operated in either direction; and the two gauges may be set so that one is the complement of the other, if desired. By means of this device, wood or other similar material may be readily and quickly cut upon any desired angle. By adjusting the gauges by means of the thumbscrews, the angle upon the wood will correspond to the angle to which the gauges are adjusted. The cutters are attached to the carriage, so as to be readily removed or set, as occasion may require. It will be understood that one of the cutters may be dispensed with, but I consider two as desirable. I do not wish to be understood as broadly claiming a bed with guides thereon to locate the work, and a sliding cutter to cut the work upon the angle indicated by said gauges, as I am aware that miter cutters of various kinds have heretofore been used embodying such device."

The claim of infringement is limited to the 1st, 3d, and 5th claims of the reissue, which are as follows, viz.:

"(1) In combination, the bed, the knife moving on suitable ways, an adjustable gauge having a shearing edge, and two independent bearings for its inner end, said bearings being in different directions, whereby the shearing edge is always held in the same relation to the knife, substantially as described." "(3) In a miter cutting machine, the combination, with a carriage arranged on a bed in longitudinal ways, carrying a cutting knife of an adjustable gauge, provided with an edge, e, acting in connection with the knife to form a shear cut, and having a semicircular bearing struck from the edge, e, of the gauge as a center, whereby the said gauge is always in the same relative position to the cut of the knife, substantially as described."

And "(5) In a machine for cutting miters, the combination with the cutting knife of a gauge having an edge, *e*, and a circular bearing and plate or bearing face therefor on the machine frame, the circle of the bearing being struck from the edge, *e*, as a center, whereby the said edge is always maintained in the same relative position to the knife, substantially as described."

Said third and fifth claims of the reissue are the same as the first and third claims of the original patent, and their validity is therefore not affected by the reissue, (*Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819;) nor is it seriously questioned that the first claim of the reissue was not covered by the original patent, or that it was not for the same device or invention therein described; hence there are no questions on the validity of the reissue as such.

In order to determine the proper construction to be placed upon said three claims of the reissue, a brief reference to the prior state of the art, and to the proceedings had in the patent office on both the original and reissue applications, is necessary. In his original application, dated December 4, 1886, as appears from the file wrapper and contents, Fox presented the following, among other, claims:

"In a miter cutting machine, the combination of an adjustable gauge, a carriage arranged on a bed in longitudinal guides, carrying one or more knives, said gauge adapted to be adjusted at any required angle to the knife, and having a perpendicular edge in a perpendicular plane, and always in the same relative position to the cut of the knife, said perpendicular edge and knife forming a shear cut, substantially as described.

"In a miter cutting machine, the combination of the adjustable gauge, the upright frame, and the cutting knife, said gauge having two perpendicular parallel edges, one edge of which is adapted to rest against the upright frame, and the other to remain parallel with the track of the knife, and in such close proximity thereto as to form with such knife a shear cutting device, substantially as described.

"In a machine for cutting miters and leads, a gauge, a portion of which is circular in form, and bearing against a suitable portion of the machine, thereby retaining the edge, *e*, in the same relative position to the cut of the knife, substantially as described."

These claims were rejected and abandoned. There was also presented the following claim:

"In a machine for cutting miters, the combination with the cutting knife of a gauge having a circular bearing adapted to a plate or bearing point on the machine, the circle of the bearing being struck from the edge, *e*, as a center, whereby said edge is always maintained in the same relative position to the knife, substantially as described."

This claim was amended to read as follows:

"In a machine for cutting miters, the combination with the cutting knife of a gauge bearing on edge, *e*, a circular bearing, a plate or bearing point therefor on the machine, the circle of the bearing point being struck from the edge, *e*, as a center, whereby the edge, *e*, is always maintained in the same relative position to the knife, substantially as described."

These two claims were both rejected. Fox was required by the patent office to erase the words "bearing point." The patent was subsequently granted, embracing, among others not necessary to be noticed, claims 1 and 3, corresponding or identical with the aforesaid claims 3

and 5 of the reissue. In the application for reissue, made August 20, 1889, as shown by file wrapper and contents, the following claims were made:

"(1) In combination, the bed, having a curved slot; the knife, moving in suitable ways; a gauge, having a shearing edge, and its outer edge held adjustable in the curved slot; and a post, against which the end of the gauge bears, opposed to the pressure of the knife,—all substantially as described. (2) In combination, the bed, having a curved slot; the knife, moving in suitable ways; a gauge, having a shearing edge, and its outer end held adjustable in the curved slot, and its inner end provided with two bearings, whereby the shearing edge is always held in the same relation to the knife,—all substantially as described. (3) In combination, the bed, having the curved slot; the knife arranged to move in suitable ways; a gauge, having a shearing edge, and its outer end held adjustable in the slot; and a lateral bearing upon the machine frame for the inner end of the gauge at the upper and lower parts,—all substantially as described."

These claims were rejected. The following additional claim was presented:

"In combination, the bed; the knife, moving on suitable ways; an adjustable gauge, having a shearing edge, and two bearings for its inner end, whereby the shearing edge is always held in the same relation to the knife,—substantially as described."

This claim was required to be and was amended by inserting "independent" before "bearings," and by inserting after the word "end" the words "said bearings being in different directions." As thus amended, the claim was allowed, and forms the first claim of the reissued patent. It will be observed that the rejected claims of both the original and reissue applications were quite broad and indefinite; so general, in fact, as to cover and embrace more than the particular structure or device described in the specifications, especially in respect to the bearings of the adjustable gauge and the supports therefor, which constitute the chief matter of controversy on the question of infringement. Said rejections clearly operate to limit the scope of complainant's patent; it being well settled that no construction can be given to the claims of the reissue involved in this suit which will include what was covered by the rejected claims under either the original or reissue applications. *Shepard v. Carigan*, 116 U. S. 597, 598, 6 Sup. Ct. Rep. 493; *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. Rep. 376; *Dobson v. Lees*, 11 Sup. Ct. Rep. 71; *Roemer v. Peddie*, 132 U. S. 313-317, 10 Sup. Ct. Rep. 98. In connection with said rejection, the prior state of the art, as shown in the prior patents for mitering machines and improvements thereon, filed as exhibits in the case, will serve still further to establish the proper construction to be placed upon said claims of the reissued patent, if the margin of improvement or advance made therein by complainant can be regarded as patentable. Such of said exhibits as best illustrate the subject will be noticed briefly in the order of their issuance.

The Howard patent, No. 57,325, granted August 21, 1866, for an improved mitering machine, while not confined to that particular purpose, was especially adapted for cutting moldings, such as picture frames.

It had a bed and inclined knife moving in suitable ways, a slotted adjustable gauge with a shear edge, which always remained at the same distance from the line or plane of travel of the knife. The adjustment of the gauge was made by the use of two set screws, instead of one, as in complainant's machine. The strip of wood to be acted on by the cutter knife was placed on the bed and abutted against the rest or gauge, which could be adjusted to any desired angle with the cutter head, from 90 degrees down to 5 degrees or less, by releasing the two set screws, and moving the outer end of the gauge in a curved slot. For the purpose of mitering articles edgewise, the rest and knife were adjusted in one position, and for mitering articles flatwise the gauge and knife were adjusted in a different position. This machine went into general use, and seems capable of doing the different kinds of work performed by complainant's machine, although not so rapidly or easily. It differs from complainant's device in the method of supporting the inner edge of the gauge, and in the use of two set screws to effect the adjustment of the gauge.

The Tucker patent, No. 89,183, granted April 20, 1869, for an improvement in machines for mitering printers' rules, shows a bed, a knife moving in ways, a gauge and edge always held in the same relative position to the cut of the knife, whose thrust is taken or received chiefly by the bed of the machine. It is conceded by complainant that there is no difficulty in so locating the gauge of this machine as to hold the front end thereof in position close up to the travel of the knife without reference to the angle at which the gauge is placed; and it is shown by defendants' expert that if the knife traveled in a different direction the gauge would receive the thrust of the knife, rather than the bed, in performing the shear cut. Complainant says that the object sought in this machine, and others of like character, is not to have a gauge which will make a shear cut with the knife, but to locate the angle at which the material is presented to the knife. But the question is, does it not suggest more than that?

The Howell patent, No. 104,458, granted June 21, 1870, for an improvement in hand-mitering machines, shows a bed, knives moving in ways, gauges, and posts against which such gauges rest, said posts being adapted to support the gauges in the different directions or positions into which the latter may be moved. The lower part of this gauge, which rests against the bed and at right angles to the board, furnishes a support to the stock operated upon against the thrust of the knife, which in this machine is set to a plane stock, like an ordinary plane, and passes over the wood with a scraping or shearing motion. But it appears that if a knife like complainant's or defendants' was substituted for this planing cutter, nothing more would be required to make this Howell machine perform the work of complainant's machine except the independent adjustment of each end of the gauge. By means of such substitution and adjustment its gauge would make a shear cut with the knife. The upper end of this Howell gauge is not otherwise supported than by the strength of the material or metal of which it is composed.

But it would hardly require anything more than mechanical skill to give it such support or strengthen it in that particular.

The Aiken patent, No. 111,896, granted February 21, 1871, for an improved machine for cutting and mitering printers' rules, shows a bed, a cutting or filing tool to dress the material operated on, and a gauge or guide bar, pivoted at its inner end, with its edge always held in the same position with reference to the dressing or cutting device, and adapted to be set at any angle to make a required bevel. If a knife were substituted for the Aiken cutting device, and set at an angle with the line of motion necessary in cutting the end grain of wood, the gauge could be readily arranged to make a shear cut with the knife. In making such substitution, and to produce such shear cut, the bed of the Aiken machine might have to be changed so as to permit a full and unbroken line to support the wood as the knife goes over it. This would involve merely mechanical arrangement and construction.

The Malin patent, No. 125,745, granted April 16, 1872, for an improvement in mitering machines, presents another device for mitering. It has a knife set in a plane stock, somewhat like that in the Howell patent, and moving in ways; a bed, which is adjustable at different angles to the line of movement of the knife, so as to cut the stock at any desired angle, said bed or rest being provided with a shear edge; and a gauge that may be set in any required position, adapted to maintain the same relation to the knife. Detendants' expert states that this machine more nearly resembles the construction of defendants' machine than that of the complainant, but that it presents substantially all the elements found in each of them. It is conceded by complainant, on cross-examination, that if the gauge of this machine was arranged to lie close to the knife, and its edge was provided with some metallic support, coming in close proximity to the knife, the wood could be cut clean at any required angle from 45 to 90 degrees.

The Jones patent, No. 153,343, granted July 21, 1874, for an improvement in mitering machines, shows a combination of a bed, a knife traveling in ways, and an adjustable gauge, pivoted a little distance from the path of the knife. The specification states that "when the gauge is adjusted at other than a right angle with the front edge of the frame and bedplate, there is necessarily an open space between its end and the face of the plane, so that no rest is provided for the end of very thin or very narrow material. To obviate this difficulty, I have provided an auxiliary plate, *m*, attached to the rest, *l*, by means of tongue and groove joints and bolt, *m*, which forms the pivot for said rest, on the upper end of which bolt is a thumb nut, *n*, etc. The gauge, thus supplemented by the additional plate, *m*, has its edge always flush with the edge of the bed, and thus remains in the same relation to the knife."

The Lannartson & Bergstorm patent, No. 179,662, granted July 11, 1876, for an improvement in miter planing machines, presents a bed hinged to its vertical structure, with the axis of its hinges in line with the cutting knife. The bed is made adjustable up and down, with co-

working lateral gauges. The table and gauge, by means of suitable screw arrangements, can be adjusted to any desired angle, while its edge opposite to the cutting knife from the point at which it is hinged remains in the same relation to the knife. The gauge in this machine does not swing in an arc whose center is its inner edge; but the table gauge, B, which is the principal gauge of this device, does swing in such an arc, and its inner edge is the center of such arc, thus presenting the principle of an unchanging center, as found in the machines under consideration.

The Lannartson patent, No. 202,445, granted April 16, 1878, was for an improvement in the said Lannartson & Bergstorm mitring machine, and shows a vertical structure or device for miter work, in which the table is adjustable to any position required, and which operates as a rest or gauge. This table rest or gauge, in whatever position adjusted, always remains in the same relation to the knife, which moves perpendicularly, instead of horizontally. It is stated by complainant's expert "that if the machines are arranged with the parts of the knife in vertical plane, and the gauge was made with its circular bearing and shearing edge in the same relative positions, I do not see that there would be any substantial change made." This is manifestly so, and would require only the exercise of mechanical skill in changing the relative positions of the several parts. In this Lannartson machine, the knife, with the table, forms a shear cut upon the wood or stock; but there is no claim of this nature either in the specification or claims of the patent. It is also conceded that it will cut wood in as many different forms as the complainant's machine. It is shown by stipulation of the parties that many of these Lannartson machines were manufactured and in practical use at Erie, Pa., as early as 1877.

The Nichols patent, No. 179,944, granted July 18, 1876, for improvements in mitring machines, shows the following elements in combination: A table or bed, adjustable gauge, and a saw cutting device, instead of a knife. The adjustment of the gauge is effected by means of two screws. The gauge on this machine, as stated in the specification, "may be adjusted and fastened at any angle desired, with the beveled inner end of the gauge always at the same point; and the miter will always be true, and be supported close to the saw." It is admitted by complainant that this gauge can, by independent adjustment at each end, be adjusted so that the point, *x*, will always lie close to the edge of the saw. If a knife were substituted for the saw employed in this machine, (and which would not require the exercise of invention,) we would have substantially the same arrangement as found in the machines under consideration. The defendants' expert states that the point, *x*, constitutes an unchanging center, with the edge of the gauge always in the same relative position to the plane of the cutting device.

The Schreppel patent, No. 223,819, granted January 27, 1880, for a new and useful mitring machine, like the preceding machine shows in combination a bed, a knife moving in ways, and adjustable gauges, which do not rest against end posts, as in complainant's machine. The gauge

in this Schreppel patent, as shown in the drawing, will make, as complainant admits on cross-examination, both a shear cut and a draw cut. He claims as a defect in the machine that it has no support for the top of the gauge other than the strength of the material of which the gauge is made, and if the gauge is swung into a position at right angles to the knife it would leave an opening between the gauge and knife, and in that position would not form a support for the wood as last acted upon by the knife, which would result in leaving a ragged edge to the wood. This Schreppel machine closely resembles complainant's in outline and operation, and the specifications and claims of the patent are hardly distinguishable without drawing the most refined distinctions.

The Kinch patent, No. 243,597, granted June 28, 1881, for improvement in miter boxes or machines, presents a device with the bed so adjustable that the front upper edge next to the knife is always held in the same relative position to the knife, at whatever angle the bed is adjusted.

The Leffingwell patent, No. 334,247, granted January 12, 1886, for improvements in mitring machines, presents the same general features found in most of such machines, consisting of a table or bed, a moving knife, adjustable gauges adapted to be set at any angle, and in proper relation to the knife. The defect which complainant finds in this machine is that the gauge is pivoted back of the corner or edge which makes the shear cut, so that it will only form a shear cut in one position. The gauges of this patent are pivoted to the table at or near their inner end, instead of being loosely supported. The specification states that the machine "will cut miters on wood in any shape from an angle to directly across the grain of the wood." It further appears that in June, 1879, the complainant obtained a patent for an improved mitring machine, called a "trimmer," which had the same general features as those already referred to, but was defective in not having a gauge that would make a shear cut with the knife at different angles. While these prior patents differed in mechanical construction, details, and operations,—some having the bed, instead of the gauge, adjustable; some having the gauge adjustable, and by different devices; some having the gauge so pivoted that its inner edge would make a shear cut with the knife at any angle; some with the gauge so pivoted or arranged that it would make a shear cut with the knife in only one position; some making the adjustment of the gauge with one set screw, others with two set screws; some with the gauge supported at both the upper and lower ends, and others with the gauge supported at only the lower end; some with saw and plane cutting tools, others with knives set in different ways and in different relations to other parts of the machine; and some specially adapted to one purpose, others for different purposes,—there is found in all of them the same general idea or principle, and substantially the same elements in combination, as shown in the patent sued on. It may be true, as claimed, that complainant's machine is superior to prior devices in the smoothness of its cut, and in leaving less of ragged and broken edges of the wood operated on; but the question is whether, in view of what is

disclosed in the previous machines, it can be properly said that his machine or combination constitutes such a substantial advance or improvement over prior devices as involves invention, and will entitle him to a patent therefor. "It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception. A mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention." *Burt v. Ivory*, 133 U. S. 358, 10 Sup. Ct. Rep. 394; *Smith v. Nichols*, 21 Wall. 112-119; *Howe Mach. Co. v. National Needle Co.*, 134 U. S. 397, 10 Sup. Ct. Rep. 570; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11-19, 12 Sup. Ct. Rep. 601; *Roller Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. Rep. 292.

"A shear cut," as complainant understands it, is "a cut that is made by at least one cutting edge against some kind of a support," while "a draw cut" is made with a knife inclined to the plane of motion. It was customary, as he explains, in pattern making with plane in different positions, to use a piece of hardwood as such support for the end of the wood last acted upon, to prevent its edge from breaking or being left ragged. The gauge was employed in mitering machines, or many of them; not only to determine the angle of cut, but to furnish the edge support, which, with cutting device, would produce the shear cut. Now, what the complainant did was to so locate his gauges that the edges thereof, marked "e," should be in proximity to the plane of movement of the cutting knives, and form an unchanged center in the adjustment of the gauges, whose edges were provided with lateral support in the shape of posts at the ends of the frame, to sustain the gauge against the cutting action of the knife. At their upper ends the gauges have a cut-away portion, terminating in a curved arm over the upper part of the frame, said curved arm having a semicircular bearing face, which is in bearing contact with a projection on the cross bar of the frame, thereby preventing the upper end or edge of the gauge from moving into the line or plane of the knife's movement, while permitting some degree of motion in the other direction. These mechanical changes suggested, if not actually shown, in prior machines, (whether covered by the specifications and claims thereof is not material,) do not rise to the dignity of invention.

The large sales of complainant's machine, (about 2,400 of them having been sold from the beginning of 1886 to the middle of 1890,) is relied on as strong evidence of the validity of the patent. It is true that such extensive public use, superseding other similar devices, is evidence, more or less cogent, of value and usefulness. "It is not conclusive of that; much less of its patentable novelty." *McClain v. Ortmyer*, 141 U. S. 428, 429, 12 Sup. Ct. Rep. 76. Complainant was active and energetic in pressing the sale of his machine by means of circulars and traveling agents; the latter drumming for it in 13 states. Under such circumstances, extensive sales constitute little or no evidence or test of patentability, as is clearly explained by Mr. Justice Brown in delivering the opinion of the court in *McClain v. Ortmyer*, 141 U. S. 427-429, 12 Sup. Ct. Rep. 78, 79. In our opinion the Howard, Aiken, Jones, Nichols,

and Lennartson devices, above referred to, present substantially the same elements in combination as those contained in complainant's machine, and our conclusion is that the latter is wanting in patentable novelty.

But if the complainant's device constituted a patentable invention, it is clearly "one in a series of improvements, all having the same general object and purpose; and that, in construing the claims of his patent, they must be restricted to the precise form and arrangement of parts described in his specifications, and to the purpose indicated therein." *Bragg v. Fitch*, 121 U. S. 483, 7 Sup. Ct. Rep. 978; *Caster Co. v. Spiegel*, 133 U. S. 360, 369, 10 Sup. Ct. Rep. 409. The rejected and abandoned claims under both the original and reissue application would require this restricted construction and limitation. Complainant's expert is asked in cross-examination (question 36) how a rejected claim of the original application differed from the first claim of the reissue patent, and his reply was: "In not specifying two independent bearings for the inner end of the gauge," and in not having the clause, "the bearings being in different directions." These clauses or specific descriptions of the bearings were required to be inserted before the first claim of the reissue would be allowed by the patent office. By force of the words, "substantially as described," found in each of the three claims of the reissue involved in this suit, there must be read into each of said claims (*Shepard v. Carrigan*, 116 U. S. 598, 6 Sup. Ct. Rep. 493) that portion of the specification showing that "the two independent bearings" referred to were the bearings against the posts at the ends of the frame and the projection, *f*, on the upper part of the frame, against which the curved arm of the gauge rested, said bearings being at right angles to each other, or "in different directions." The three claims are thus substantially the same. The defendants' machine does not adopt the form and arrangements of parts described in complainant's specification, and covered by his claims. Their gauge is supported or secured by pivots concentric with the inner edge of the gauge, and having circular bearings. It has no end posts, furnishing or serving as a lateral support at the upper and lower parts of the front edge to sustain the gauge against the cutting action of the knife; neither has it the projection upon the upper part of the frame, which forms the rest or support of complainant's upper bearing. There are other particulars in which they differ, as explained by defendants' expert, whose testimony is direct and convincing that there is no infringement. He has shown to our satisfaction, in view of the prior state of the art, and of what occurred upon the original and reissue applications, that, if complainant's claims should receive such construction as would cover defendants' machine, then it was clearly anticipated in the prior devices, already referred to; that if valid under a narrow and restricted construction, which would limit the patent to the specific device described in the specification, then it is not infringed by defendants. Our conclusions, however, are that the complainant's patent is wanting in patentable novelty; and, furthermore, that, if valid to any extent, it is not infringed by the defendants' machine. It follows that the judgment of the lower court should be, and the same is, affirmed.

ILLINOIS WATCH CO. v. ROBBINS *et al.*

(Circuit Court of Appeals, Seventh Circuit. October 1, 1892.)

No. 32.

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—STEM-WINDING WATCHES.

In reissued letters patent No. 10,631, granted August 4, 1885, to Duane H. Church, for an improvement in stem-winding watches, consisting in a combination of a short stem arbor, and a winding and hands-setting train, having no positive connection therewith, each claim, being couched in general terms, and concluding with the words, "as and for the purposes specified," is to be construed as including such devices and combination shown in the specifications as are necessary to meet the requirements of its general terms, and the claims must be limited to this extent. *Corn Planter Patent*, 23 Wall. 181, applied.

2. SAME—INVENTION—PRIOR ART.

In view of the prior state of the art as shown by the patent of February 9, 1833, to Charles F. Woerd, and patent No. 206,674, to Hoyt, there was no invention in the mere introduction of springs in the mechanism for effecting the winding and hands-setting engagement, in order to avoid liability of injuring the wheels by the force of the push or pull upon the short stem arbor; but the claims are valid as covering a new and useful combination, the peculiar usefulness consisting principally in rendering watches and cases interchangeable. 50 Fed. Rep. 542, modified.

3. SAME—INFRINGEMENT—MECHANICAL ADAPTATION.

The Church patent is infringed by watches made under the patent of January 3, 1883, to Thomas F. Sheridan, No. 376,015, and reissued August 5, 1890, No. 11,100; for, although there is a plain difference in the operation of the springs which produce the winding and hands-setting engagement in each watch, that difference is produced by a simple mechanical change, and the other differences arise from the use of mechanical equivalents.

4. SAME.

A certain lever in defendant's watch movement could, when the works were out of the watch case, be adjusted to produce normal winding engagement, but in a stem-set watch, when the works are in the case, it is always held adjusted in such manner as to produce normal setting engagement. *Held*, that such a construction, when used in stem-set watches, is to be regarded as operating on the principle of normal setting engagement, and as not different in that respect from the construction of the Church watch.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In Equity. Bill by Royal E. Robbins and Thomas M. Avery against the Illinois Watch Company for infringement of patent. Decree for complainants. 50 Fed. Rep. 542. Defendant appeals. Affirmed.

Statement by Woods, Circuit Judge:

By the decree of the circuit court the appellant was held to have infringed the 1st, 3d, 4th, 5th, and 6th claims of reissued patent No. 10,631, issued August 4, 1885, to the appellees, as assignees of the original letters No. 280,709, granted July 3, 1883, to Duane H. Church. Here, as in the court below, the appellant, besides denying infringement, disputes both the validity of the reissue and the novelty of the claims. Only the first and second claims of the original patent are relevant to the question of the validity of the reissue, and they are as follows:

"(1) In a pendant winding and setting watch, a movement having winding and setting mechanism, adapted to be operated by the endwise movement of a winding bar or key, and normally in position to operate the hands, whereby a positive connection between the movement and the winding bar

is avoided, as set forth. (2) In a pendant winding and setting watch, a movement having winding and setting mechanism normally in position to operate the hands, a winding bar or key having no positive connection with said mechanism, and a loose or sliding device, adapted to communicate the inward end thrust of the winding bar to the devices for engaging the winding portion of said mechanism with the main winding-wheel, as set forth."

The following are the reissued claims:

"(1) ~~As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor that has no positive connection with said train, substantially as and for the purpose specified.~~ * * * (3) ~~As an improvement in stem winding and setting watches, a winding and hands-setting train, which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor, and is normally in engagement with said dial wheels, substantially as and for the purpose set forth.~~ (4) ~~As an improvement in stem winding and setting watches, a winding and hands-setting train, which is normally in engagement with the dial wheels, in combination with a rotatable stem arbor that has no positive connection with said train, and is adapted to be moved longitudinally within the case stem, to cause said winding and hands-setting train to engage with the winding wheel, and to be simultaneously disengaged from said dial wheels, substantially as and for the purpose shown and described.~~ (5) ~~As an improvement in stem winding and setting watches, a winding and hands-setting train, which is normally in engagement with the dial wheels, in combination with a rotatable longitudinally movable stem arbor that has no positive connection with the watch movement, and, when moved longitudinally to the inner limit of its motion, will cause said winding and setting train to be disengaged from said dial wheels, and engaged with the winding wheel, and, when moved longitudinally to the outer limit of its motion, will permit said train to be disengaged from said winding wheel and engaged with said dial wheels, substantially as and for the purpose specified.~~ (6) ~~As an improvement in stem winding and setting watches, the combination of a winding and hands-setting train, which is normally in engagement with the dial wheels, a stem arbor having no positive connection with said train, and an intermediate device which is adapted to communicate the longitudinal inner movement of said stem arbor to said winding train, and cause the same to engage with the winding wheel, substantially as and for the purpose shown and described.~~"

The original letters contained this statement:

"My invention has for its object to obviate a positive connection between the winding bar and the intermediate mechanism in a watch of the class above named, and thereby make the movements and cases freely interchangeable, without special adaptation of any movement to any case. To this end, my invention consists in making the intermediate mechanism above referred to normally in position to operate the hands, so that only an inward movement of the winding bar will be required to change the connection of said intermediate mechanism, the winding bar having only to exert a pushing pressure against said mechanism, and requiring no positive connection therewith."

The reissue contains the following:

"The object of my invention is to render watch movements and cases readily interchangeable, to which end said invention consists principally as an improvement in stem winding and setting watches, in a winding and hands-setting train, which is adapted to be placed in engagement with the winding

wheel or the dial wheels by the longitudinal movement of a stem arbor that has no positive connection with said train, substantially as and for the purpose hereinafter specified."

And besides this there are added statements of what the invention consists in, substantially in the language of the several claims respectively. The illustrative cuts, letters indicating parts, and the explanations of the respective uses of the parts are not essentially different in the two instruments.

In deciding this case the judge below reaffirmed his own ruling and opinion in the case of *Same Plaintiffs* against *Aurora Watch Co.*, 43 Fed. Rep. 521; and as a convenient mode of presenting clearly and comprehensively the questions to be considered we quote at length from that opinion:

"The improvement covered by the Church patent is applicable to the class of watches where the watch is wound and the hands set by means of the stem, and consists of an oscillating yoke, carrying upon its under side, pivoted at or near its longitudinal center, a pinion, which is so set as to engage with smaller pinions carried at each end of the yoke; this central wheel or pinion having beveled cogs on the under side thereof, which engage with the beveled pinion, which is set in the line of the stem, and into which the inner end of the stem arbor enters a short distance, by a square or octagonal opening, so that this beveled pinion can be rotated by the stem arbor. By rotating the stem arbor, motion is imparted to the central pinion of the yoke, whereby such motion is communicated to the two pinions at the end of the yoke. Passing the small beveled pinion with which the stem arbor engages is a loose sliding block or bar, which meets the inner end of the stem arbor, for the purpose of a thrust or push motion of the stem arbor, and acts as an extension or prolongation of the stem arbor. By pressing the stem arbor inward, this sliding bar acts upon a spring, which throws the stem winding and setting train into engagement with the winding wheel, which is done by swinging the yoke so as to bring the pinion on one end of it into contact with the winding wheel, when, by rotating the stem arbor, the watch can be wound up, there being a latch in the sheath or case of the stem, which is arranged to hold the stem arbor at the extreme of its inward movement, whereby the winding wheels are kept in winding engagement; while, when it is desired to set the hands, the stem is drawn outwardly, which allows a spring arranged for that purpose to swing the yoke out of winding and into setting engagement. It will be seen that a latch or catch in the stem, which shall hold the stem arbor safely at the points of its extreme inward and outward movement, is necessary to the stem-winding and stem hands-setting device, and the patent shows a latch or retaining device in the stem to lock the arbor in either the winding or setting position, of which Church claimed to be the inventor, and for which claims were allowed him in his original patent; but on the application for a reissue an interference was declared between himself and Colby as to these claims, on the hearing of which Colby was decided to be the prior inventor of the locking device in the stem, and Church's claims for that part of his device were disallowed, and the patent for that feature awarded to Colby. The Church patent, therefore, while it contains a description of the latch or retaining device in the stem sheath, has no claims covering it, but the stem-winding and stem-setting devices of his patent are adapted to be used only with some device for locking the stem arbor in its inward and outward positions; and perhaps this comment will hold true as to all practical stem-winding and stem-setting watches. Infringement is charged in this case of the first, third, fourth, fifth, and sixth claims of the reissued patent, which are as follows, [given above:]

* * * The defenses insisted upon are (1) that the patent is void for want of novelty; (2) that the claims sued upon are too general, and do not describe with sufficient certainty the device by which the results are effected; (3) that defendant does not infringe.

"The distinctive characteristic of the Church device is that the winding and hands-setting engagements are not effected by the direct force of the push and pull upon the stem arbor, which is objectionable, because the force of the hand of the operator directly applied is liable to injure the delicate cogwheel mechanisms which are thus forced into contact with each other. These winding and hands-setting engagements are brought about by longitudinal movements of the stem arbor, which bring into action certain light springs, arranged to swing the yoke which carries the winding and setting trains. For instance, the watch, as ordinarily carried in the pocket, is always in winding engagement, and this is effected by pushing the stem arbor inwardly, to the limit of its movement in that direction, when it is caught and held by the latch in the sheath of the stem. This inward movement of the stem arbor carries inward the loose sliding bar or block, N, as it is called in the specifications, which by such inward movement comes in contact with and swings inwardly an arm, which by such inward movement causes a spring to bear upon the end of the yoke which carries the winding train, and thereby brings the winding pinion in contact with the winding wheel of the mainspring. This spring being light, if the cogs of these wheels meet on end, or do not mesh, they rest in contact until the winding pinion has revolved, when its cogs come at once into engagement with the cogs of the winding wheel, when they are kept in winding engagement so long as the stem arbor is held at its inward limit. When the stem arbor is released from its inward movement, and drawn outwardly, it releases the arm upon which the bar, N, has been pressing, and another spring is brought into action, which swings the yoke out of the winding engagement, and brings the end carrying the hands-setting pinion into contact with the dial wheels, and the cogs of the respective wheels mesh, if they happen to meet in the proper relation, and, if not, they are retained in contact until the rotation of the pinions bring the cogs into engagement.

"It will be seen from this description, if I have made it clear, that the engagements of the pinions of this yoke with the winding and dial wheels are effected by the operation of springs, which are brought into operation by the inward and outward movements of the stem arbor. It is because these springs are in their natural positions, and not constrained, when the parts are in the hands-setting engagements, that the inventor says 'that the hands-setting engagement is the normal condition of the mechanism.' It is not claimed that Church was the first to make a stem-winding and stem hands-setting device for a watch. The English patent shown in this case, granted in 1844, to Adolphe Nicole, shows a device for winding a watch and setting its hands by the stem arbor, the winding and hands-setting train consisting in a V-shaped metal plate with a pinion pivoted near its center, having cogs or teeth on its outer periphery, and beveled cogs on the under side of its rim. The beveled cogs engage with the beveled pinion attached to the inner end of the stem arbor, which has an endwise movement. This V-shaped metal plate carries upon its point a small pinion, which gears with the large central pinion, so that by rotating the stem arbor motion is transmitted to this small pinion on the end of the plate. This V-shaped metal plate is pivoted to the rim, which holds the movement at its right-hand corner in such a position that the small pinion on its point rests between the winding wheel and dial wheels of the watch, and by pressing on the stem arbor this small pinion is swung into contact with the winding wheel, while, when the stem arbor is drawn outwardly, it brings the pinion into engagement with the dial wheels,

Here, then, is shown a device for winding and setting the hands of the watch by a longitudinal movement of the stem arbor, and the V-shaped plate shown operates substantially in the same manner as the oscillating yoke in the Church patent. But the stem arbor was positively connected with the winding and setting train, and these two engagements for winding and setting were brought about by the direct pull and push of the operator upon the stem arbor, which was liable to injure the delicate structure of the small wheels, if they happened to come in contact in such a way as not to directly engage or mesh into each other. In the Lehman American patent of July, 1866, a stem-winding and stem hands-setting device is shown, in which a rotating and longitudinally moving stem arbor is made to work the winding and hands-setting mechanism without the oscillating yoke or plate; the winding and hands-setting engagements being brought about by clutches arranged upon the stem arbor within a movement, so that this stem arbor has a positive connection with the movement or works of the watch, and with the hands-setting and winding train. The engagements of the winding and hands-setting train are also effected by the pull and push of the stem arbor, which makes the mechanism liable to be injured in bringing about these engagements, as I have already described. These two patents seem to me to be fair representative types of the different classes of stem-setting and stem-winding watches, which are shown in the art, from the proofs in the case. The Carnahan patent of October, 1881, shows an oscillating yoke, carrying the wheels at each end, which are respectively brought into engagement with the winding and setting wheels by longitudinal movements of the stem arbor. The patent granted to Charles V. Woerd, February 9, 1883, also shows an oscillating yoke, carrying a winding pinion at one end, and the hands-setting pinion at the other end, by means of which the winding and hands-setting engagements are obtained through the instrumentality of a longitudinally moving stem arbor; but in both the latter devices, as in the Nicole patent, the force of the pull or push to effect these engagements is expended upon the wheels, and is therefore liable to injure the wheels in the manner which has been described; so that Church seems to have been first in the art to obtain the winding and setting engagements by means of springs, which were brought into action by the inward and outward movements of the stem arbor, thereby avoiding the liability to injure the wheels.

"It is true there is but little difference, mechanically speaking, between the operations of the Carnahan and Woerd devices and the device of Church. Both Carnahan and Woerd show the winding engagement as the normal condition of their watch, and the hands-setting engagement to be the exceptional or constrained condition. But, as I have already said, their mechanism and arrangement of operative parts are such that the pull and push upon the stem arbor is transmitted directly to the wheels which are to be brought into engagement, and therein they differ from the Church device. The advantages claimed for the Church device are (1) that the movement can be removed from the case of the watch without taking the movement apart so as to remove the stem arbor; (2) that there is no liability to injure the wheels in effecting either the setting or winding engagements.

"As to the first advantage insisted upon, it appears clearly from the proof that Church was by no means the first to show a device whereby the movement could be taken from the watch without removing the stem arbor or disturbing the same. It is shown in the Brez patent of July, 1875, in the Fitch patent of April, 1879, in the Eisen patent of December, 1880, and in the Woerd patent, which I have already cited, besides in several other patents which appear in evidence in the case, and which it is unnecessary to refer to. But I find in none of the patents cited any mechanism which effects the winding and setting engagements by means of springs which are brought

into action in such a manner as to relieve the wheels from the direct force of the pull and push upon the stem arbor. As I have said, Church did not invent the short stem arbor, which allowed of the removal of the movement from the case of the watch, nor did he invent the latch or lock, in the sheath of the stem arbor, by means of which the stem arbor is retained at the limit of its inward and outward movement; but he has adjusted and attached what he did invent to be used with such a stem arbor, and I therefore think he has the right to claim that his winding and hands-setting train has no positive connection with the stem arbor, as he has, by means of his sliding block, N, within the movement, secured all the results which would be accomplished by a longer stem arbor; this sliding block or bar, while it has no positive connection with the stem arbor, being so arranged in connection with the stem arbor that it is pushed inwardly by the inward movement of the stem, and follows the stem arbor outwardly when the stem is withdrawn to (from) its inward limit, by reason of the action of the springs belonging to the winding and hands-setting trains.

"As to the criticism that the claims of the plaintiff's patent are too broad, and include results rather than devices, I will merely say it is one of the settled canons for the construction of the claims of a patent that they must be so construed, if possible, as to uphold the patent; and in the light of this rule, when the first claim is, in terms, for a winding and hand-setting train that is adapted to be placed in engagement with the winding and dial wheels of the watch by a longitudinal movement of the stem arbor that has no positive connection with the train, the claim cannot be held to mean any kind of a winding and hands-setting train, but such a one as is shown in the specifications and drawings of the patent. If the claim is held to mean any winding and setting train adapted to be put into winding and setting engagement by a longitudinal movement of the stem arbor, which has no positive connection with the train, then it would manifestly be anticipated by the Woerd and Carnahan patents, and perhaps other inventors who show winding and setting trains adapted to be placed in winding and setting engagements by endwise movements of stem arbors that have no positive connection with such trains. And this explanation applies to all the claims. If they are to be read in the broadest sense of which their language is capable of being understood, then they are obnoxious to the criticism that they are claims for results and not devices. But the words 'substantially as and for the purpose shown,' take us back to the specifications and drawings, and bring the devices there shown into the claims, and I construe the claims as for the devices there shown. Therefore, while these claims are broad, I think they can be sustained as for the devices which are described. *Corn Planter Patent*, 23 Wall. 218. * * *

In respect to infringement in this case, the court below, after giving a list of patents in proof, which had not been adduced in the *Aurora Company Case*, said:

"A careful study of these additional patents, as well as a re-examination of those considered in the former case, has failed to change the conclusion announced in that case as to the novelty and validity of the device covered by the Church patent as reissued. There is therefore no question left in this case but that of infringement. A comparison of the Church patent with the defendants' watches, shown in evidence, and a consideration of the expert testimony in the case, satisfies me that the defendants' watches embody all the essential elements of the Church watch, as covered by this reissued patent. Both use a pivoted yoke to effect the engagement of the winding and setting wheels. In each case this yoke is acted upon by two opposing springs, one to obtain the winding, and the other the setting, engagement. In both the

spring producing the setting engagement is the stronger of the two; hence, when they are equally free to act, this stronger spring controls the action of the train,—automatically puts it into setting engagement. In other words, the watch would normally be in setting engagement if these two springs were left to the operation of their respective forces. In each watch the winding engagement is effected by restraining the action of the stronger spring, and allowing the weaker one only to act without restraint. In both watches this stronger spring is held out of action by pressing the stem arbor inward, and locking it at the innermost position. In both the restraining force upon the stronger spring is applied by means of a short pin or nib upon the sliding stem arbor, and in each the inward movement of the stem arbor bends and holds the strong spring from its normal work, and the withdrawal of the stem arbor releases this spring, so that it at once brings the train into setting engagement. It is true that in defendants' watch there are some slight changes in the shape and location of the operative parts, and by reason of these changes intermediate levers and pins are interposed at some points and dispensed with at others, to effect the connections and movements of the operative parts, which, as I think, is quite tersely stated by the complainants in their brief: "The operative parts of each watch receive power from the same source, under the same conditions, transmit it to the same destination for the same purpose, and with the same result."

The Church patent has been upheld by Judge SAGE of the sixth circuit in a case of *Same Plaintiffs* against *Columbus Watch Company*, reported in 50 Fed. Rep. 545.

In respect to the question of infringement the appellant insists that the evidence establishes the following propositions: *First*, that the normal engagement of appellant's shifting train is with the winding wheels, instead of with the dial wheels, as in Church's; *second*, that the stem arbor has no thrust operation in effecting a winding connection, as the Church has; *third*, that it has the improvement for preserving the teeth on both sides of the watch, as stated by Hoyt to be the object of his improvement, which Church does not mention, and has only on one side; *fourth*, appellant overcomes a weak spring by a stronger one, while Church overcomes a strong spring by a hand thrust on the knob or crown of the stem; *fifth*, that appellant's shifting spring acts directly on the yoke, while the single Church spring acts on one arm of the four-pronged rock shaft; *sixth*, that appellant's train has no block, N, as the Church has; *seventh*, that appellant does not have the four-armed rock shaft that Church has; *eighth*, that appellant does not have the three-wheeled yoke which is essential to the Church combinations; *ninth*, that appellant's combinations are new, and radically different from the Church.

Bond, Adams & Pickard, for appellant.

Geo. S. Prindle and Lysander Hill, for appellees.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and JENKINS, District Judge.

WOODS, Circuit Judge, (*after making the foregoing statement.*) In conformity with the ruling of the supreme court in the case of *Corn Planter Patent*, 23 Wall. 181, 218, it was right, we think, to construe the claims of the patent in question as embracing the devices shown in the specifications, each claim being regarded as including such devices

and combination as are necessary to meet the requirements of the general terms in which it is expressed. When the claims are so construed, it may be said of each of them, in the language of that case: "The claim thus limited is considerably narrowed in its operation. It is substantially for a combination of the material parts of the entire machine, and no one can be said to infringe it who does not use the entire combination." This, of course, does not exclude the doctrine of equivalents, of which Church was careful in explicit terms to reserve the benefit. How far, when properly construed, the several claims may be distinguished from each other, the court below did not indicate, and we do not deem it necessary now to consider. It may be that there is no essential difference, since the reference in all is to the same devices as arranged in a single combination.

The devices and combination described in the reissued letters are not different from those of the original patent, and as the corresponding claims of both must be regarded as limited by the devices, we do not perceive that in any of the reissued claims there appears or is asserted an invention different from or which is expanded beyond what was originally claimed. There is therefore no reason for pronouncing the reissue invalid.

In respect to Church's invention and its advantages, the court below declared its "distinctive characteristic" to be "that the winding and hands-setting engagements are not effected by the direct force of the push and pull upon the stem arbor;" "that Church seems to have been the first in the art to obtain the winding and setting engagements by means of springs, which were brought into action by the inward and outward movements of the stem arbor, thereby avoiding the liability to injure the wheels;" that, while Church did not invent the short stem arbor, with its latch or lock, "he has adjusted and attached [adapted] what he did invent to be used with such stem arbor, and * * * has the right to claim that his winding and hands-setting train has no positive connection with the stem arbor, as he has by means of his sliding block, N, within the movement, secured all the results which would be accomplished by a longer stem arbor."

After a careful examination of the patents exhibited in proof of the prior art, and especially in view of the Woerd patent, which, it is conceded, differs but little, mechanically, from the Church, we are not able to see that in the broad sense stated Church was the first to obtain the winding and setting engagements by means of springs, or so as to avoid liability of injury to the wheels. In the Woerd watch the winding or normal engagement is effected by the operation of a spring, *e*, and the same spring is in some measure effective, manifestly, to prevent injury to the wheels when the opposite engagement is accomplished, as it must be, by an outward pull of the stem arbor, whereby the lever, *T*, is pressed upon the arm, *f*, of the plate, *b*, pushing it inwardly, and swinging the yoke, *V*, so as to effect the setting engagement. As it is here used, the spring plays an important part in respect to both engagements, being the active force that produces one, and a resisting force which tends to

prevent undue and sudden violence to the injury of the wheels in the production of the other. Besides, there being one spring in the device, whereby one of the engagements is effected, with all the advantages of that mode of operation, it requires no invention to introduce into that device another spring to subserve the same ends in respect to the other engagement. Such a spring might be located at some point between the end of the lever, T, and the yoke, V, in connection with, or perhaps without, some of the parts shown; but, what is simpler still, the lever itself might be so reduced in thickness as to become a spring, more or less strong, but not so strong but that with the resisting force of the spring, e, the meshing of the hand-setting wheels would occur without shock or injury. Turning to Hoyt's patent No. 206,674, we find two springs in use for effecting the respective engagements, one of which acts automatically, and the other under the pressure of a lever. There is, therefore, as it seems to us, no element of invention in the mere introduction of springs into the Church device, nor was any new use or new kind of advantage in watch construction obtained thereby.

Church's invention, however, has superiority over Woerd's, Hoyt's, Carnahan's, or any other which has come under our notice, resulting, not from any particular part or element of the device, but rather from the combination and arrangement of the parts as a whole. That combination is new and useful, and its peculiar usefulness consists, as we think, not so much in the springs and consequent protection of the wheels, as in the fact that the declared object of the invention, namely, "to render watch movements and cases readily interchangeable," is better accomplished than by any preceding construction. By transferring Carnahan's lever from the works to the case, Woerd achieved a short stem arbor, and made the movements and cases interchangeable; but, to say nothing of other differences, the placing of the lever, which is one of the movement devices, in the case, is a marked disadvantage, since it requires a special form of case, and that, too, of awkward and unmechanical arrangement. One of the features of the Church patent, expressly mentioned in all the claims but the first, and implied, perhaps, in that, is that the winding and setting train is normally in engagement with the dial wheel; and it is to be observed that in the patents of Woerd, Carnahan, and others, which show the closest approximation in construction to Church's device, the normal engagement is with the winding wheel. It is, of course, easy, and does not involve invention, to change such engagements, if nothing more than the change is sought, and in some of the designs in evidence normal setting engagements are found, but they are in lever-set watches, of which the Wheeler is an example; and which, as the evidence shows, may readily be constructed with the normal engagement in one wheel or the other; but in stem-winding and stem-setting watches it is not so, and as an element in the combination shown in Church's claims the normal hands-setting engagement plays an important and indispensable part.

In respect to the question of infringement, a number of propositions are pressed upon our consideration. In the comparison made of the two devices by the court below it is asserted or assumed that of the two

springs in each the stronger produces the setting engagement, and resulting similarities of construction and operation are pointed out. It is now insisted that Church's patent does not show or describe a weaker and a stronger spring; that there is only one spring in his device; and that the restraining of the action of a stronger spring, and thereby allowing the weaker one only to act without restraint, are shown in the Hoyt and Wheeler patents, which both belong to the appellant, and are older than the appellees' patent. In this respect, the court fell into verbal inaccuracy, but not, we think, into material error. There are certainly two springs in Church's device, which are brought into action in producing the respective engagements. They are described as springs, and designated "K" and "i³," K, when unrestrained, effecting the setting engagement, and the other, when brought into action, as it must be, by the inward thrust of the stem arbor, effecting the winding engagement. They were not improperly called "opposing springs," because K resists the movement of the stem arbor, which brings i³ into operation. But, on the other hand, i³ does not resist the counter action of K when the stem arbor is drawn out. Whether or not one of these springs is stronger than the other is not stated, and need not be considered, because the normal operation of K is not resisted by the other spring. In the defendant's watch, it is true, the two springs are in constant and direct opposition, and consequently the one producing normal engagement is and must be the stronger. It would therefore be more accurate, instead of the corresponding expressions in the opinion quoted, to say that in "both watches the spring producing the setting engagement is not controlled in its action by the other spring, and, when otherwise unrestrained, puts the train into that engagement;" and that "in each watch the winding engagement is effected by restraining the action of one spring and allowing or causing the other alone to act; the spring so restrained in both watches being held out of action by force of the stem arbor, locked at its innermost position."

There is, as stated, a plain difference in the operation of the two springs which effect the winding engagements in the respective devices. In Church's watch that spring is forced into operation by the pressure of the stem arbor on an arm of the rock shaft of which the spring itself is another arm, while in the defendant's watch the corresponding spring is automatic, effecting the engagement by its own force whenever the opposing strength of the other spring is overcome by the pressure of the stem arbor. Is this an essential difference in construction or operation? We think not. Starting with the Church device, it requires only ordinary skill, and certainly not invention, to effect the change. It is necessary only to sever the spring, i³, from the rock shaft, and attach it to the plate, A, in such position as that it shall constantly press on the same end of the yoke, E, as now, in order to produce a complete correspondence between the two devices in respect to the location, character, and operation of their springs. This simple mechanical change, requiring no other alteration whatever in the Church device to make it operative, would entirely eliminate the differences, whether of construction or operation, mentioned in appellant's 2d, 3d, 4th, 5th, and 7th proposi-

tions; and with that alteration there would remain of the mechanism between the stem arbor and the winding and hands-setting train in the Church construction a three-pronged rock shaft, which, for all its functions, finds a full equivalent in the defendant's slide bar, *i*, with its projecting arm and pin, as they are shown in the Sheridan patent, under which the defendant's watch is made. Another projection or end, as it is called, of that slide bar, is a plain substitute for the movable block, *N*, of the Church combination. Instead of the three-wheeled yoke of Church, the defendant employs a yoke with two wheels, one of which meshes with either the winding or setting wheels as the yoke oscillates. It is one of "the well-known forms of intermediate mechanism," which Church said might be substituted for the mechanism shown in his patent.

But the first and chief difference insisted upon is that the normal engagement of appellant's shifting train is with the winding wheels, and not with the dial wheels, as in Church's patent. There is only a semblance of truth in this. In the defendant's stem-setting and stem-winding watch the normal engagement is really with the dial wheels. The assertion to the contrary is specious. It is based on the fact that in the Sheridan patent there is introduced a setting lever, *l*¹, so arranged that it may be put in engagement with the end of the spring, *l*, which is thereby placed under tension, and by reason of its greater strength overcomes the opposing spring, and produces the setting engagement; but when the lever, *l*¹, is thrown out of engagement, the spring, *l*, swings freely upon its pivot, without tension, and leaves the opposing spring to produce the winding engagement, which is described as normal. But when the device is placed in a stem-winding and stem-setting case, the lever, *l*¹, cannot be shifted, but is kept unchangeably in engagement with the spring, *l*, holding it firmly in the position of tension, and causing it to act exactly as does the spring, *K*, in Church's watch. Whatever, therefore, may be the uses and effect of that lever in other forms of construction, in a stem-winding and stem-setting watch it serves no purpose except to fix the spring in the position of tension, and that spring, when left to act as freely as it can act in that position, produces the stem-setting engagement. In that form of construction, therefore, that is the normal engagement, and the two devices are not different in that respect.

The necessary conclusion is that the appellant's watch, though made in conformity with the Sheridan patent, is modeled after the device of Church, and contains substantially the same combination of parts or well-known equivalents, arranged to accomplish the same result by the same mode of operation.

The decree of the circuit court is therefore affirmed.

BLAIR et al. v. LIPPINCOTT GLASS Co.

(Circuit Court, D. Indiana. September 13, 1892.)

No. 8,763.

1. **PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT BY PATENTEE AND LICENSEE.**
A joint suit for infringement of a patent cannot be maintained by the patentee and the licensee whose license conveys no exclusive monopoly.

2. **SAME—LICENSE—ESTOPPEL.**

A license to manufacture lime glass chimneys under a patent, granted by the patentee with others, does not estop the licensee from objecting that such other parties cannot be joined with the patentee in an action against the licensee for infringement by manufacturing lead glass chimneys without a license.

3. **PLEADING—DEMURRER—FACTS NOT SUFFICIENT FOR JOINT CAUSE OF ACTION.**

Where, in a joint complaint by two or more parties, the facts stated do not show a joint cause of action in them, a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, must be sustained.

In Equity. Suit by George W. Blair and said Blair associated with Paul Zimmerman, partners as Dithridge & Co., against the Lippincott Glass Company, for infringement of a patent. Heard on demurrer to bill. Demurrer sustained.

W. Bakewell & Sons and W. A. Van Buren, for complainants:

Frank O. Loveland, for defendants.

BAKER, District Judge. The demurrer of the respondent to the complainants' bill of complaint presents the sole question in this case. The sufficiency of the complaint hinges on the question whether a suit in equity for the infringement of a patent right is maintainable jointly by the patentee and a licensee, whose license confers no exclusive monopoly. An exclusive license, to the extent of the interest granted, is construed to be an equitable assignment, and clothes the licensee with an interest, *sub modo*, in the monopoly. "The only alienation which can carry the monopoly is that of an exclusive right, or of an undivided interest in the exclusive right to practice the invention, including the exclusive right to make, the exclusive right to use, and the exclusive right to sell the patented invention." Rob. Pat. § 807. The inventor of a new and useful improvement has no exclusive right to it until he obtains a patent. This right is created by the statute and secured by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued. The discoverer has a mere inchoate statutory right, which he may perfect and make absolute by proceeding in the manner which the law prescribes. *Reeves v. Corning*, 51 Fed. Rep. 774. The monopoly secured to the patentee is, for one entire thing. It is the right of making, using, and vending to others to be used, the improvement he has invented, and for which the patent is granted, to the exclusion of all others. The monopoly did not exist at common law, and the rights which may be exercised under it must be regulated by the law of its creation. It is created by the act of congress, and no rights can be acquired in it unless authorized by statute, and in the manner therein prescribed. *Gayler v. Wilder*, 10 How. 477. The stat-

ute provides that a patentee may assign the whole or any interest in the monopoly. Rev. St. U. S. 1878, § 4898. A suit may be maintained for the infringement of a patent in the name of the party interested either as patentee, assignee, or grantee. Id. § 4919. But, to enable the assignee to sue alone, the assignment must undoubtedly convey to him the exclusive monopoly which the patentee held in the territory specified, to the exclusion of the patentee and all others. To enable him to sue jointly with the patentee, the assignment must convey to him an undivided part of the monopoly in the territory where the infringement occurs. Any assignment short of this is a mere license. It has been well said that it was not the intention of congress to permit several monopolies to be made out of one, and to be divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of a patent right in the same place.

It has been uniformly held that a patentee and an exclusive licensee may join in bringing a bill to restrain an infringement of the patent right. The reason is that the exclusive licensee either owns the monopoly, or an undivided interest therein, within the territory specified, so that such license is tantamount to an assignment. It is different with a simple licensee. He has no exclusive right in any particular territory. The patentee may grant licenses at will to others. A simple license amounts merely to a waiver by the patentee of his right to the exclusive enjoyment of his monopoly in favor of such licensee. He acquires no exclusive right in the monopoly, within any specified territory. The patentee may, without infringing the rights of a simple licensee, grant licenses to others; or, if the patentee chooses, he may permit others to enjoy the patent right without license. If the patentee chooses to permit others to practice his invention without license, the simple licensee has no legal ground for complaint or interference. *Sewing-Mach. Co. v. Sloat*, 2 Fish. Pat. Cas. 112; *Wyeth v. Stone*, 1 Story, 275; *Gayler v. Wilder*, 10 How. 477; *Nelson v. McMann*, 16 Blatchf. 139; *Hill v. Whitcomb*, 1 Holmes, 317; *Ingalls v. Tice*, 22 O. G. 2160, 14 Fed. Rep. 297; *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244.

Language is used by the learned justice who delivered the opinion in the case of *Birdsell v. Shaliol*, *supra*, which might, on a casual reading, be thought broad enough to justify the maintenance of a joint bill by the patentee and a simple licensee. He says: "A suit in equity may be brought by the patentee and licensee together;" citing *Gayler v. Wilder*, *supra*, and *Littlefield v. Perry*, 21 Wall. 205. The language must be construed as applicable to the license then under consideration. The opinion shows that the judge was speaking about "an exclusive oral license." It must be deemed settled, both upon principle and author

ity, that a simple licensee has no such interest as to make him either a necessary or proper party to a bill filed to restrain the infringement of a patent right.

It is urged, if the law be as stated, that it may be gathered from the bill that the license in question was an exclusive one. It suffices to say that a careful consideration of the averments of the complaint precludes any such construction. The complaint fails to show that the parties joined as plaintiffs with the patentee have any exclusive interest in the monopoly. It is insisted, inasmuch as it is alleged in the bill that the respondent has been granted by the complainants a license to manufacture lime glass chimneys, that it is estopped to say that they may not maintain a joint bill against it for manufacturing lead glass chimneys without a license. The respondent, if estopped at all, cannot be estopped beyond its license. It may be that Dithridge & Co. have acquired such an exclusive right in the patented invention, so far as relates to the manufacture of lime glass chimneys, that the patentee could not grant to the respondent a license to manufacture that sort of glass chimneys without his licensees joining in it. This concession, however, would by no means prove that Dithridge & Co. had an exclusive license for the manufacture of lead glass chimneys. Dithridge & Co. are not shown by the bill to have acquired, either by assignment or license, any exclusive right to practice the invention in the manufacture of lead glass chimneys. I have carefully examined all the cases cited by complainants' counsel, and I find none which lend support to the complaint. The complaint being a joint one by two parties, one of whom has no interest, it follows that the demurrer must be sustained. When two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action. *Harris v. Harris*, 61 Ind. 117, on page 129. The bill may be amended, if counsel is so advised, within 20 days, upon payment of all costs, to and including the filing of the amended bill; otherwise, at the expiration of 20 days, the bill shall stand dismissed, with costs, but without prejudice.

AMERICAN HEAT INSULATING Co., Limited, *et al.* v. A. JOHNSTON & Co., Limited.

(Circuit Court of Appeals, Third Circuit. October 20, 1892.)

No. 8.

PATENTS FOR INVENTIONS—REISSUE—ENLARGEMENT OF CLAIMS.

Letters patent No. 171,425, issued December 21, 1875, to John C. Reed, for a non-conducting covering for "boilers, steam, water, and other pipes," claimed a covering composed of layers or wrappings of paper saturated with adhesive material, and compressed while being formed into tubular sections "of a thickness of one half inch or more," substantially as described. A reissue of the patent—No. 8,752, granted August 10, 1879—omitted from the claims the quoted words. *Held*, that this was an enlargement of the claim, rendering the reissue invalid, and that this effect could not be avoided on the theory that a covering of less than half an inch

would not constitute the "thorough nonconductor" of the specifications; for, while a less thickness might not be sufficient for boilers and steam pipes, it manifestly would be for "water and other pipes." 48 Fed. Rep. 446, reversed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Bill by A. Johnston & Co., Limited, against the American Heat Insulating Company, Limited, and others, for infringement of reissued letters patent No. 8,752, granted August 10, 1879, to John C. Reed, upon original patent No. 171,425, issued to him December 21, 1875. The circuit court sustained the reissue, and entered a decree in favor of complainant. 48 Fed. Rep. 446. Defendant appealed. Reversed.

William L. Pierce, for appellants.

James I. Kay, (*W. Bakewell*, on the brief,) for appellee.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The plaintiff sues as assignee of reissued letters patent No. 8,752, dated August 10, 1879, issued to John C. Reed, to recover for infringement. The invention is an improvement in nonconducting covers for steam boilers, steam, water, and other pipes. The specifications say: "The invention relates to that class of articles known as 'boiler coverings,' or 'nonconducting coverings for boilers, steam, water, and other pipes.'" After describing the coverings, and the process of manufacturing them, the claims are stated as follows:

"(1) A nonconducting covering for boilers, pipes, and other surfaces, composed of layers or wrappings of paper saturated or coated with suitable adhesive material, and compressed while being formed into tubular sections, substantially as described. (2) As a new article of manufacture, a nonconducting covering for boilers, pipes, and other surfaces, composed of layers or wrappings of paper, saturated or coated with suitable adhesive materials, and compressed while being formed into tubular sections divided longitudinally, so as to be placed around the pipes or other surfaces to be covered, substantially as set forth."

The original specifications and patent—issued December 21, 1875—state the invention as follows:

"My invention relates to that class of articles known as 'boiler coverings,' or 'nonconducting coverings for boilers, steam, water, and other pipes,' and it consists in a nonconducting covering, composed of layers or wrappings of paper, preferably roofing paper, saturated with adhesive material, and compressed while being formed into tubular sections of *one half inch or more in thickness*."

The claim was for "a new article of manufacture; a nonconducting covering, composed of layers or wrappings of paper saturated with adhesive material, and compressed while being formed into tubular sections of *a thickness of one half inch or more*, substantially as shown and described." A fuller statement of the facts is unnecessary to an understanding of our views of the case.

The validity of the reissue is attacked on the allegation that its claims are broader than that of the original. Judged in the light of its terms

alone, this allegation is certainly true. The limitation respecting thickness of the coverings, contained in the original, is omitted. The complainant contends, however, that in the light of the proofs the claims in each are, in effect, the same; because, as he asserts, a covering of less than half an inch would not constitute "a thorough nonconductor," such as the specifications describe; and consequently that the restrictive language of the original patent was inoperative, in construing its claims. This view the circuit court adopted. Is it sound? It seems clear that the patentee did not think so when he took either of the patents. When applying for the original he objected to the limitation, as the proofs show, but was required by the office to insert it; and his object in taking the reissue seems mainly to have been to get rid of it. It cannot well be doubted that if a covering below the limit had been manufactured and used, subsequently to the reissue, he would have objected to it as an infringement. If for no other purpose than to avoid uncertainty, the office acted wisely in requiring a definite statement of the thickness of coverings sought to be embraced. The language, "a thorough nonconductor," employed in the specifications, is indefinite. What is or is not such a conductor is matter of individual judgment, about which experts will disagree. If a bare half inch is such, it would be difficult to affirm that a trifle less is not. As much would depend upon the fineness and firmness of the texture and solidity of the covering as upon the difference in thickness. The terms of the original claim, as amended, left nothing to doubt. The patentee's rejection of them subsequently, seems to be an emphatic declaration that the language is important, and that he will not be so limited. His present attitude does not, therefore, commend itself very strongly to favorable consideration. The court says:

"If we were shut up to a comparison of what appears on the face of the original patent and the face of the reissue, it might seem that the omission from the latter of the words, 'of a thickness of one half inch or more,' was a material change, and one prejudicial to the public; but the proofs bring us to a different conclusion. It is shown that a covering of less thickness than half an inch would lack the necessary nonconducting property. A half inch covering is too thin to retain the heat, and prevent radiation."

We have carefully looked through the proofs, and cannot so understand them. They probably show that a less thickness would be insufficient for *boilers*, and *steam pipes*—to which doubtless the coverings are most commonly applied. The reissue, however, plainly embraces coverings for hot water, hot air, gas, and all other pipes to which their use may be beneficially applied; and we do not find any evidence to justify the conclusion that a thickness of less than half an inch is insufficient for such purposes. Manifestly, we think, the thinner coverings are sufficient for such uses. If not, the burden was on the complainant to prove it. We attach no importance to the complainant's suggestion that coverings of less than half an inch, could not be "conveniently packed for transportation," as described in the specifications. The decree of the circuit court must therefore be reversed and the case remanded with directions to dismiss the bill.

UNITED STATES v. 250 KEGS OF NAILS.

(District Court, S. D. California. September 26, 1892.)

SHIPPING—TRADE BETWEEN AMERICAN PORTS—FOREIGN VESSELS.

Act March 1, 1817, § 4, (now Rev. St. § 4347,) prohibits, under pain of forfeiture, the transportation of merchandise from one American port to another in foreign vessels. Act July 18, 1866, (now Rev. St. § 9110,) declares that, if any merchandise "shall at any port of the United States, on the northern, northeastern, or northwestern frontiers thereof," be laden on a foreign vessel, and taken to a foreign port, and thence reshipped to any other "port of the United States on said frontiers," with intent to evade the provisions of the fourth section of the act of 1817, such merchandise shall be seized and forfeited. *Held*, that while it is a palpable evasion of the act of 1817 to ship goods from New York to Antwerp in a foreign vessel, and thence reship them in another foreign vessel to San Francisco, such transshipment is not within the prohibition of either act, when the two are construed together.

Libel to Enforce a Forfeiture of Merchandise.

M. T. Allen, U. S. Atty.

Andrus & Frank, Page & Eells, and *J. H. Shankland*, for claimant.

Ross, District Judge. This is an action by the United States to enforce an alleged forfeiture of certain merchandise on the ground that it was transported from one port of the United States to another port therein, in foreign bottoms. The answer of the owner of the property proceeded against admits the bringing of it into the port of Redondo, in this judicial district, as alleged in the libel, and sets up as a defense that the merchandise was wholly of the produce and manufacture of the United States, and was shipped from New York in the Belgian ship *Waesland*, consigned to a commercial house at Antwerp; that it was there discharged and landed; that subsequently it was shipped on the British ship *Kirkcudbrightshire*, consigned to the respondent at San Francisco, Cal., and brought to San Francisco, where it was entered as a manufacture of the United States, which had been exported and returned to this country; that, prior to the departure of the ship *Waesland* from the port of New York, the respondent procured from the collector of customs and naval officer at that port a certificate of the exportation of the merchandise from that port, and that the consignees thereof at Antwerp, prior to the departure of the ship *Kirkcudbrightshire*, procured from the consul of the United States at that port a certificate that the said merchandise, bound by the said ship *Kirkcudbrightshire* to the port of Redondo, consisted of articles of the manufacture of the United States which had not been advanced in value or improved in condition by any process of manufacture or other means. The answer further avers that, at the time the merchandise in question was shipped from New York, the respondent intended to export the same to a foreign country, and thereafter to cause the same to be returned to the United States; that the merchandise was at all times the manufacture of the United States; and that it was, by the respondent and his agents, returned to the United States after having been exported, without having been advanced in value or improved in condition by any process of man-

ufacture or other means. The sufficiency of the defense thus set up is challenged by exceptions thereto filed on the part of the government. The libel is based on section 4347 of the Revised Statutes, which reads as follows:

"No merchandise shall be *imported*, [*transported*,] under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power; but this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no merchandise other than that imported in such vessel from such foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States. * * *

This section is a re-enactment of the fourth section of the act of March 1, 1817, (3 St. at Large, p. 351,) entitled "An act concerning the navigation of the United States." It was manifestly passed in the interests of American shipping, and to prevent foreign vessels from engaging in domestic commerce. In 1817, when the statute was first enacted, the coasting trade of the United States was comparatively small, and was confined to the Atlantic coast. In the course of time, however, it assumed larger proportions, and it became an easy thing for foreign vessels to take a cargo from the United States, touch and discharge at a Canadian port, then reload, and proceed to an American port, or, without herself proceeding, forward the cargo by another foreign vessel. To prevent this from being done, congress, by section 20 of the act of July 18, 1866, (14 St. at Large, p. 182,) enacted that—

"If any goods, wares, or merchandise shall at any port or place in the United States, on the northern, northeastern, or northwestern frontiers thereof, be laden upon any vessel belonging wholly or in part to a subject or subjects of a foreign country or countries, and shall be taken thence to a foreign port or place to be reladen and reshipped to any other port or place in the United States on said frontiers, either by the same or any other vessel, foreign or American, with intent to evade the provisions of the fourth section of the 'Act concerning the navigation of the United States,' approved March 1, 1817, the said goods, wares, and merchandise shall, on their arrival at such last-named port or place, be seized and forfeited to the United States, and the vessel shall pay a tonnage charge of fifty cents per ton on her admeasurement."

Section 4 of the act of March 1, 1817, was carried into the Revised Statutes as section 4347, and section 20 of the act of July 18, 1866, was therein embodied, in substance, as section 3110. These sections are *in pari materia*, and must be read together. It is entirely clear that congress thought that section 4347 could be evaded by the mode of shipment described in section 3110, and, to prevent such evasion on the northern, northeastern, and northwestern frontiers, enacted the latter section, and attached the consequences of the offenses therein defined, not only to the merchandise, but to the ship as well. If the act proscribed by section 3110 was the same as that prohibited by section 4347, it is difficult to see the necessity of enacting section 3110 at all, or any reason for inflicting a penalty on the ship in the one case, and allowing it to go unpunished in a precisely similar case. Congress evidently recognized that section 4347 could be evaded by so directing the voyage

that it would not be from one port of the United States to another port of the United States, and that the prevention sought could not be attained by existing legislation. It consequently made it an offense to evade the provisions of section 4347, under the circumstances set forth in section 3110. As congress thus made the evasion of the provisions of section 4347 an offense under certain defined conditions, the courts cannot say that any other conditions than those thus defined constitute an offense, without departing from the manifest intent of the statute, and usurping the powers of the legislative department of the government. The act of the respondent in the present case was a palpable evasion of the provisions of section 4347 of the Revised Statutes, but it was not the act thereby prohibited. Nor was there any concealment about the transaction, for the respondent disclosed to the collector of customs all that he had done, producing before him the certificates showing that he had shipped the goods from New York to Antwerp, and then back to the United States. If such evasions as are here shown should be prohibited, it is for congress to prohibit them. It is not for the courts to make the law, or to depart from the intention of the lawmaking power, as manifested by its enactments. *Merrit v. Welsh*, 104 U. S. 694; *U. S. v. Breed*, 1 Sumt 160. Exceptions overruled.

THE SARAH.

THE SARAH v. BELLAI8.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1892.)

No. 26.

1. COLLISION—VESSELS ENTERING CANAL—EVIDENCE.

The steamer Sarah lay aground next to the pier in the deepest water at the entrance of the New Basin canal leading from Lake Pontchartrain to New Orleans, waiting for high water. Afterwards the small schooner Clarke hauled up alongside of her, and made fast. Later a northwest wind blew a full sea into the mouth of the canal, and, both vessels attempting to enter, their bows came in contact, and the schooner was sunk. At the time the schooner was manned only by one seaman and a boy. *Held*, that the schooner was insufficiently manned; and, on the weight of the evidence, that her stern line was cast off, and her stern thrown round by the sea, so as to bring her bow against the steamer's side; that she was never even with the steamer's bows, and being, therefore, the overtaking vessel, was bound to keep out of the way; that it was immaterial whether the steamer was pushing slowly forward at the time, as it was plain that her motion did not contribute to the injury; and that the steamer was not liable.

2. COSTS ON APPEAL—RECORD—IRRELEVANT MATTER.

Where the record contains a vast amount of irrelevant evidence, consisting of the examination and cross-examination of witnesses, for which the court cannot apportion the responsibility, the costs of taking and embodying the same in the printed record will be taxed equally to the parties.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Auguste A. Bellais, owner of the schooner J. J. Clarke, against the steamer Sarah, (the H. Weston Lumber Company and C. D. and F. Koch, claimants,) for damages for a collision. Decree for libellant. Claimants appeal. Reversed.

Statement by LOCKE, District Judge:

This is a case of collision occurring between the steamer Sarah and the schooner J. J. Clarke, at the entrance into the New Basin canal, leading to the city of New Orleans from Lake Pontchartrain, on the 12th December, 1890. The opening of the canal from the lake is formed and protected by a row of strong piles on the northward and westward sides, starting from a short distance out in the lake, extending thence in a westerly direction, and gradually varying to a nearly south course, thus describing very nearly the arc of a quadrant before the canal proper is reached. On the opposite southward or eastward side of the canal is the lighthouse. The water, when low, is of insufficient depth to float the vessels that ordinarily trade through the canal, and it does not appear to be an unusual occurrence for them to lie aground upon the mud bank at this place. On Tuesday, the 10th of December, the steamer Sarah, of about 40 tons, 80 feet long, loaded with lumber piled on deck fore and aft, drawing 6 feet 2 inches of water, arrived at this entrance to the canal, but found so little water that it was impossible for her to get in, even alongside the pier piles, or so-called "pickets," sufficiently far to make her stern line fast to them, so she tied up by head lines, and lay hard and fast aground that night, the next day, and the next night. There were several schooners ahead of her, all aground; and after her arrival the Leander Jane, a schooner drawing five and a half feet, came in and lay alongside her. Wednesday evening the schooner afterwards injured, the J. J. Clarke, of about 20 tons, about 50 feet long, and 17 feet beam, drawing 5 feet and 6 inches, loaded with rosin and turpentine, came into the middle of the canal, and hauled alongside of the Leander Jane. There was another schooner, the Pippo, lying a little to the southward and westward of the Clarke, in shallow water, hard and fast aground. Early in the morning of Thursday, the 12th, it commenced to blow heavily from the northward and westward, driving a full sea from the lake into the canal, by means of which all of these vessels were driven more or less forward on their course. The steamer Sarah succeeded in moving about her length so as to get stern lines out to the piling. The several schooners ahead of her passed on their way into the canal. The Leander Jane, lying alongside of the Sarah, succeeded in pulling in by the Sarah's bow, and getting into the canal. The schooner Clarke attempted to follow the Leander Jane, but libellant alleges that the steamer Sarah pushed forward into and upon her, doing great damage and injury to her, and causing her to sink and become a total loss. In answer to this the claimants of the steamer allege that at the time of the collision she was lying aground, tied to the piling of the side of the canal, and, by reason of the high wind and sea, the schooner was driven and worked up against her, by which means the damage was done, without

any fault on the part of the steamboat Sarah or those in charge of her. Whichever way it was done, the schooner Clarke and steamboat Sarah came together, so that the bowsprit and stanchions of the former were broken, her knightheads and plank-sheer started and raised, and she so damaged that she sank and became a total loss. Suit was brought by the owner of the schooner, and the court below gave a decree for the libelant, from which this appeal has been taken.

R. L. Tullis, Wm. Grant, and John D. Rouse, for appellants.

John D. Grace, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, after stating the facts, delivered the opinion of the court:

There are but few questions of fact in this case and none of law; the relative positions of the vessels previous to the collision and their movements determining the rights of either the one or the other of the parties. Unquestionably, in cases of inevitable or unavoidable accident by collision or otherwise, the damage and loss must rest where it falls. In ordinary cases it is a well-known rule that steam vessels must give way and look out for sailing vessels, and the presumption in cases of collision between such vessels is that the steamer is in fault, but such presumption may be overcome by evidence of the circumstances of the individual case showing that such is not the fact. One question upon which there has been much conflicting testimony, and which is deemed of considerable importance in the case, is as to where, at the entrance of the canal, the channel was located,—whether in the middle, as alleged by libelant, or along the northerly and westerly side, as is urged by claimants. The term “channel” is properly applied to the portion of the bed of a river or canal which furnishes uninterruptedly through its course the deepest water, and the fact that the steamer Sarah, drawing eight inches more of water than the schooner, was able to get in alongside of the piling on the side at all, while the schooner, while lying with her stern in about the middle of the canal, and her bow towards the Sarah, was aground as to her stern, but afloat as to bow, shows conclusively that at that time, at least, the greatest depth of water was on the side where the steamer was lying, and that must be accepted as the channel, and it be considered that the steamer was properly in it.

Upon the arrival of the schooner Clarke at the mouth of the canal on Wednesday evening, her crew consisted of the master, one seaman, and a boy. The master came into the city, and had not returned at the time of the collision, leaving the one seaman and the boy the only ones on board to bring the schooner in,—an insufficient crew for a vessel of her size, and particularly so, considering the crowded condition of the canal. It also appears that at the commencement of the collision, when the steamer Louisiana desired to take a line to tow her out of danger, they had to unreeve one of the halliards to use as a tow line, which, being

of insufficient strength, failed to accomplish what would otherwise probably have saved her. The schooner, therefore, seems to have been insufficiently furnished with both crew and lines.

According to the uncontradicted testimony of libellant's witnesses, just before the collision occurred the steamer Sarah, which arrived first, was in the deepest water alongside the piling. The Leander Jane, drawing a little less water, had managed to pull in by the steamer's bows, and had gone on her way into the canal; and the schooner Clarke was lying alongside the Sarah, with her stern about 10 feet forward of the Sarah's stern, and her bow consequently about 20 feet abaft of the Sarah's bows, made fast with head and stern lines, the latter fast on board the Sarah. How the head lines were made fast does not appear; they had had one line made fast to the Leander Jane, but this was cast off when she got under way. From this point the testimony becomes conflicting. Fred Heidenstrom, in charge of the Clarke, in his testimony says that they had two lines ashore, one from the head and one from the stern; one line ashore on the steamboat Sarah; and they had to turn their stern line loose, "being that the Sarah wanted to come in, and that threw us across the channel alongside the Sarah, and the Sarah pushed ahead and struck our bowsprit and kept on breaking it." He says that she broke the stem open, broke the knighthead and a few stanchions, and raised the plank-sheer off, so that she began to leak. William Bellais, the boy on board, says that the Clarke's bowsprit struck the end of the lumber pile forward; that the Sarah struck the Clarke by steaming ahead; that the Clarke's stern was aground, but her bow was afloat; that the Sarah hit her a couple of times by steaming ahead.

These are the only witnesses who claim to have seen the collision, and say that it was done by the Sarah running into or against the Clarke. On the other hand, the testimony of the master, the engineer, and two seamen of the Sarah; Dyes, master of the schooner Pippo; Boyd, master of the schooner Laura L.; George Long, a witness standing on the platform at the Southern Yacht Club House, but a few yards distant from the place of collision, as well as the statement of Heidenstrom himself, in regard to the position of his vessel prior to the collision,—satisfies us, by an overwhelming preponderance, that the Sarah was holding onto the piling by lines; that she was so hard aground that she was unable to change her position with any degree of rapidity, if at all; that the schooner was never ahead of, nor up even with, the steamer; and that the damage was done by casting off the stern line of the schooner,—thus permitting the stern to be driven around by the wind and sea, bringing the bowsprit and stem against the broadside of the lumber piled upon the steamer's deck.

We do not consider it material whether or not the steamer may have been pushing along slowly forward into the canal either by force of the wind and sea, by heaving on lines, or even by her steam power, as her bow was at all times ahead of the bow of the schooner, and what slight motion she appears to have had could in no way have changed the final result. We are satisfied the damage was done by the schooner beating

herself against the steamer by the force of the wind and sea, rather than by any movement of the steamer. We do not find that there was any action on the part of those in charge of the steamer that resulted in the injury to the schooner, or that they could possibly have done anything to prevent or mitigate the loss does not appear. The steamer was the first vessel properly in the channel, and the schooner the overtaking vessel trying to get past. It will necessarily follow, therefore, that the decree of the court below must be reversed, but, in the taxation of costs, we do not consider that there should be taxed as legitimate costs in the case the taking and embodying in the record the vast amount of irrelevant and immaterial matter of examination and cross-examination of witnesses, swelling the record to nearly 200 printed pages, for which we cannot apportion the responsibility. It is therefore ordered that the case be remanded to the court below, with instructions to dismiss the libel, and tax the costs equally against the parties.

THE CITY OF ST. AUGUSTINE.

THE NORMAN.

HENDERSON *et al.* v. THE CITY OF ST. AUGUSTINE.

ST. AUGUSTINE S. S. Co. v. HENDERSON *et al.*

(District Court, S. D. New York. July 12, 1893.)

COLLISION—STEAM AND SAIL—FAILURE TO ALLOW SUFFICIENT MARGIN FOR SAFETY.

The steamer City of St. A., bound S. W. $\frac{3}{4}$ W., saw the green light of the schooner Norman a little on her starboard bow. The red light of the schooner afterwards became visible to the steamer, which thereupon altered her course to starboard so as to bring the red light on her port bow. Afterwards the schooner's green light appeared again, and the steamer starboarded further, but collided with the sailing vessel. Her excuse was that the sailing vessel had not held her course. On conflicting evidence, and regarding the schooner's narrative as better confirmed by the circumstantial proof, the court found that, with the exception of a slight change *in extremis*, the course of the schooner had not been altered, and that the fault which brought about the collision was that the steamer did not make allowance for the usual and necessary variation in the course of the schooner, or her changes of lights through leeway and the crossing of her lights, and, consequently, did not allow a sufficient margin for passing the schooner, which she was bound to avoid. *Held*, that the steamer was alone liable for the collision.

In Admiralty. Cross libels for collision.

Wing, Shoudy & Putnam, for Henderson and others.

Wilcox, Adams & Green, for the City of St. Augustine.

BROWN, District Judge. At about half past 1 o'clock in the morning of November 25, 1891, the schooner Norman of 367 tons, loaded with a cargo of lumber, bound from Savannah to Baltimore, and then heading about northeast, came in collision off the coast of North Caro-

lina with the steamer City of St. Augustine, of 390 tons, bound southward upon a course S. W. $\frac{1}{4}$ W. The stem of the City of St. Augustine first struck the end of the schooner's jibboom, or bowsprit, which being broken at the knightheads and carried away, their bows came in collision. The schooner was so damaged that she filled, but did not sink, and she was towed to Washington. The steamer sustained some injuries, and the above libel and cross libel were filed to recover the respective damages.

The night was dark but clear, with starlight; the wind was moderate, about north northwest; the lights of both vessels were properly set and burning. The steamer was going from eight to nine knots; the schooner, from four to five knots. When the vessels were from half a mile to a mile apart, the green light of each was seen by the other a little on the starboard bow of each. It is evident, therefore, that the schooner was at that time to the westward of the line of the steamer's course, which was then also directed astern of the schooner; otherwise the steamer's red light must have been visible. But the schooner was making, doubtless, a half point leeway, so that her actual course was very nearly opposite to that of the steamer. It was the duty of the steamer to keep out of the way of the sailing vessel. The excuse of the steamer for not doing so is that the schooner did not keep her course; but that after having first turned to the eastward sufficiently to show her red light to the steamer, (upon seeing which the steamer changed her course a point and a half to the westward, so as to bring the schooner's red light well upon the steamer's port bow,) the schooner again changed her course to the westward so as again to show her green light; whereupon the steamer put her course still more to the westward, until at collision she was heading about due west; and that the collision happened solely in consequence of the improper changes of course by the schooner. Such changes are denied by the schooner's witnesses.

Besides some evident mistakes by the witnesses on both sides, there is a substantial conflict in the testimony in regard to the navigation, the lights visible, and the changes of course, which cannot be wholly reconciled as the testimony stands. The apparent conflict, however, will be greatly diminished by making allowance for the following considerations: (1) A difference of from half a point to a point between the mean heading of the schooner, which, I have no doubt, was about northeast, and her actual course so much more to the eastward, through leeway; (2) the crossing of the schooner's lights probably at least a quarter of a point on each side; (3) the yawing of the schooner probably from a quarter of a point to half a point on each side of her mean course; (4) a considerable excess in the steamer's estimate of the time and distance before collision when the schooner's red light was first seen. Her witnesses estimate the distance at half a mile; probably it was not one third of that distance.

In behalf of the steamer it is sought to discredit the witnesses for the schooner, to the effect that no change was made in their course; by arguments concerning the navigation based upon the steamer's testimony

and estimates with regard to the bearing of the lights, their changes, and distance. There is really nothing to substantiate the correctness of these estimates, and without them such arguments have little force. Amid such uncertainties in the testimony and estimates, the greatest weight must be given to facts that rest upon more certain testimony, or are more satisfactorily established.

The witnesses for the steamer testify that the angle of collision was nearly a right angle, and considerable stress is laid on this testimony. If this is correct, inasmuch as the steamer changed at most but $3\frac{1}{2}$ points to the westward, it follows that the schooner, besides coming back from her previous supposed change, must have changed some $3\frac{1}{2}$ points further to the westward also. The only deviations which the witnesses for the schooner admit are, the unavoidable yawing each way of perhaps one fourth of a point from their mean course, and when the steamer was very near, an order to put the wheel hard aport, in order to avoid, as far as possible, the impending collision, which they say occurred before the wheel was hard over.

The angle of collision is often valuable in determining doubts, when the angle is agreed upon, or otherwise definitely established. *The Roanoke*, 45 Fed. Rep. 905; *The Joseph Stickney*, 50 Fed. Rep. 624, (May 14, 1892.) But where the collision is in the nighttime, and the angle is a subject of dispute, not much weight can be given to the mere estimates of either side on this point. *The Havilah*, 33 Fed. Rep. 875, 881, affirmed 1 U. S. App. 138, 1 C. C. A. 519, 50 Fed. Rep. 331; *La Champagne*, 43 Fed. Rep. 444, 447.

In the present case there are several circumstances which so strongly corroborate the schooner's witnesses as to her course, that I am persuaded that their account in this particular is substantially correct, and that the steamer's witnesses are mistaken in supposing the angle of collision to have been nearly a right angle.

1. Next to the blow upon the stem of the steamer, her chief injury was about 14 feet abaft the stem on the port side. As the steamer was going about twice the speed of the schooner, it is impossible, after the schooner's bowsprit, 15 feet long, had been broken off near her stem by the running of its end against the stem of the steamer, that any part of the schooner could have reached the steamer in time to inflict such a blow as the steamer shows only 14 feet abaft the stem, had the steamer been crossing the course of the schooner at nearly a right angle, or at a greater angle than about three points. The schooner's heading must have been much checked by the first blow.

2. The injuries to the schooner consisted in the driving over of her port bow, her port cathead timber, and her deck, from port to starboard, showing a heavy blow on the port bow at some little distance abaft her stem. Had the collision been nearly at right angles, the direction of the damage to the schooner, considering the steamer's great comparative speed, would have been from starboard to port.

3. The damage to the steamer some 14 feet abaft her stem on the port side is such as would naturally have been received from the port cathead

of the schooner upon a collision of the bows at an angle of two or three points. The cathead, about 12 feet from the stem, projected about 18 inches, and by the blow of collision it was driven in, with the deck, two feet to starboard, and the inboard end of the cathead beam was split. These circumstances cannot be accounted for upon the steamer's theory of a right-angled blow. They accord entirely with the story of the schooner, and show that at collision the difference from opposite courses did not probably exceed two or three points. As the steamer changed her course at most only about $3\frac{1}{2}$ points to the westward, the schooner's change must have been less than a point to the eastward, and this agrees with the schooner's testimony that her wheel was ordered hard aport when the steamer was very near.

4. The schooner could not have changed two or three points to the westward without her sails shaking in the wind, whereas at collision they were full.

5. The evidence shows that the schooner scraped along the port side of the steamer, carrying away the mizzen lanyard and a spar rigged out there, her quarter being 30 or 40 feet away.

All those circumstances are consistent and are incompatible with any material change of course, and confirm, therefore, the testimony of the schooner's witnesses. I credit this narrative rather than that of the steamer, because it is better sustained by the circumstantial proof.

The schooner's slight change under a port wheel in *extremis* a few moments before collision, was not a fault, nor did it contribute to the collision. Without attempting to determine precisely the minute points concerning the steamer's navigation, I am satisfied the real fault that brought about the collision was, that having the schooner's green light nearly straight ahead as reported by the lookout, and being herself all the time to the eastward of the schooner's actual course, the steamer did not in her maneuvers allow a sufficient margin for passing the schooner, nor for the usual and necessary variation in her course, or changes of lights, through yawing, leeway, and the crossing of lights; and that consequently she did not at first keep away sufficiently to port; nor afterwards, when the schooner's red light appeared, which, in my judgment, was when the vessels were less than 1,000 feet apart, did she seasonably or sufficiently go to starboard. *The Beta*, 40 Fed. Rep. 899. *The Roanoke*, 45 Fed. Rep. 905. The red light probably came in view at the extreme swing of the schooner to starboard in yawing, whereupon she resumed the opposite swing to port. It is quite possible, also, that the steamer's heading west was not reached until after collision, aided, as it must have been, by the blow from the schooner upon the stem and bow of the steamer. It is evident from the testimony that the order to go west was almost at the moment of collision; and the previous changes of $2\frac{1}{2}$ points could have been easily made by this small steamer in going a distance of 400 feet, with but a small offing to the westward, not sufficient to clear the schooner.

Decrees may be entered in favor of the schooner as against the steamer, with costs.

TOD *et al.* v. KENTUCKY UNION RY. CO. *et al.*, (ROSSER *et al.*,
Intervenors.)

(Circuit Court of Appeals, Sixth Circuit. October 4, 1892.)

Nos. 22, 29.

1. MECHANICS' LIENS—LABOR CONTRACTORS—KENTUCKY STATUTES.

Contractors supplying laborers and teams for the construction and repair of a railroad, being paid for the same by the day, and either party having the right to stop work at the end of any day, are not "laborers" or "employees" within the terms of Act Ky. March 20, 1876, which, among other things, gives a lien for work done and materials furnished in keeping the road a going concern, but must rely on the contractors' act of March 27, 1888, which gives a lien in favor of persons "furnishing labor or materials for the construction or improvement" of any railroad, canal, or other public improvement.

2. SAME—MATERIAL MEN.

Where supplies, suitable either for the construction of the unfinished part of a railroad or the carrying on of the finished part, are furnished without any contract as to how they shall be used, the material man has a lien under the act of 1876 for the part actually used in operating the railroad, and another lien under the contractors' act for the part actually used for construction and repairs; but where he has lost the lien under the latter act because of a failure to file his statement within 60 days, the burden of proof is on him to show what part of the supplies was actually used for the operation of the road.

3. MORTGAGES—FORECLOSURE—INTERVENERS—PERSONAL JUDGMENTS.

Where the mortgagees of an insolvent railway apply for the appointment of a receiver and the sale of the property, and material men intervene by petition, claiming a superior lien, the failure to give the claimants personal judgments for their respective debts against the railway is not erroneous.

Appeals from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by J. Kennedy Tod & Co., the Central Trust Company of New York, and the Columbia Finance & Trust Company against the Kentucky Union Railway Company and others for the appointment of a receiver, foreclosure of mortgages, and sale of the property. Rosser & Coleman intervened by petition, claiming a superior lien as laborers and material men. A demurrer to the petition was sustained. Thereupon the petitioners appealed, their cause being numbered 22. W. & A. C. Semple, Fairbank, Morse & Co., and Andrew Cowan & Co. appeal from a decree confirming the master's report, which disallowed most of the appellants' claims, and overruling exceptions thereto, their cause being numbered 29. Affirmed in both cases.

Stone & Sudduth, Dodd & Dodd, A. Barnett, and Thos. C. Bell, for appellants.

Humphrey & Davie and St. John Boyle, for appellees.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

JACKSON, Circuit Judge. The questions presented for decision in these cases relate to the respective rights and priorities of different lien claimants upon the property of the Kentucky Union Railway Company, which was chartered under the laws of Kentucky to construct, own, and operate a designated line of railway in said state, about 100 miles in

length. Prior to 1883 about 15 miles of its road was completed and in operation. In order to raise funds with which to extend its line eastwardly and westwardly from the completed portion, said railway company, on July 2, 1888, executed a mortgage or trust deed upon its property then owned and thereafter to be acquired to the Central Trust Company of New York, to secure an issue of \$3,000,000 first mortgage bonds. Said mortgage was executed under authority duly conferred, and was properly recorded. The bonds secured thereby were issued and used for the purposes of the company. Thereafter, on July 1, 1890, said railway company executed a second mortgage on the same properties to the Columbia Finance & Trust Company to secure a further issue of \$1,300,000 of its bonds. This mortgage was also duly executed and recorded, and the bonds thereby secured were issued and used by the company. J. Kennedy Tod & Co. subsequently advanced the company \$72,500, under an agreement that said sum should be secured by \$140,000 of said second mortgage bonds, which were to be delivered to said firm as collateral security for said advance, with interest from January 6, 1891. The company failed to comply with its promise to deliver said collateral security, and in February, 1891, said J. Kennedy Tod & Co., in connection with said mortgagees, the Central Trust Company of New York and Columbia Finance & Trust Company, filed their bill in the circuit court for the district of Kentucky against said railway company, alleging that it had become and was entirely insolvent; that divers persons, whose names were unknown to complainants, claimed mechanics' liens upon all or a portion of the company's property, which they threatened to enforce, and which, if enforced in separate proceedings, would cause a severance and disintegration of the railroad line, etc.; and praying that the court would appoint a receiver of said company's railway, property, assets, etc.; that it would foreclose said mortgages, and sell said railway, with its properties and franchises, as an entirety, and apply the proceeds to the satisfaction of the debt due complainants, J. Kennedy Tod & Co., and the debts secured by said mortgages, together with other lien debts, according to their respective priorities. A receiver was appointed, and a reference was directed to a special master to take proof and report upon "claims against said railway company incurred for materials and supplies furnished it for its ordinary operation." There was also a general order made in relation to intervening petitions.

The appellants Rosser & Coleman intervened by petition, and asserted claims as laborers and employes of said company to the amount of \$2,806.86, which they contended constituted a lien upon the company's property prior and superior to that of the debts due to and represented by the complainants. They allege in their original petition and the amendments thereto that from about March 5, 1890, until about April 14, 1890, they performed work and labor in construction and repair of the railway company's road, on sections 74, 75, and 76 thereof, in Lee county, Ky., under a contract which was in substance as follows: That, having in their employ certain laborers, and owning carts, teams, and

tools suitable for the purpose, the railway company agreed to employ them, with their said laborers, tools, and teams, by the day, to do work on the aforesaid sections of its road, under the direction and control of its engineer; that they were to be paid certain sums per day for foremen, for laborers, and for teams, consisting of carts and mules, and 10 per cent. additional on the amount of said daily sums for the use of their tools, and for their superintendence of the work and hands, and be reimbursed the cost of powder necessary to be used in the work; that either party had the right to stop said work at the end of any day; that while the employment continued petitioners paid their said hands or laborers. It is then alleged that under this contract the railway company became indebted to petitioners in the sum of \$2,806.66, for which it on October 15, 1890, executed to them its promissory note due at four months, which petitioners thereafter indorsed and negotiated to the Clay City National Bank, and at its maturity were required to take up, the maker having failed to pay the same. Petitioners claimed that under said contract they were laborers and employes of the railway company, and as such were entitled to a lien upon its property and the proceeds thereof for the amount due them, which was prior and superior to complainants'. Their petition was demurred to on the ground that it presented no case entitling them to the lien claimed. This demurrer was sustained, and the petition dismissed. From this judgment said petitioners have appealed.

Their contention for a lien is based on an act of the legislature of Kentucky approved March 20, 1876, entitled "An act to provide for liens for laboring men and supply men," which provided (section 1) that "when the property or effects of any railroad company, or of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, or shall come into the hands of any executor, administrator, commissioners, receiver of a court, trustee, assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of said company, owner, or operator, the employes of said company, owner, or operator in such business, and the persons who shall have supplied material or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been embarked in such business, and all the accessories connected therewith, including the interest of said company, owner, or operator in the real estate used in carrying on said business." By section 2 it is declared that "the said lien shall be superior to the lien of any mortgage or other incumbrance heretofore or hereafter created, and shall be for the whole amount due such employes as such, or due for such materials or supplies," etc. The third section provides for the *pro rata* distribution of the net earnings at the end of each calendar month among lien holders, when the trustees or other persons having the administration of such property "shall continue the operation of the business." The fourth section provides that when the company, owner, or operator shall suspend, sell, or transfer such business,

or when the property or effects engaged in such business shall be taken in attachment or execution, so that the business shall be stopped or suspended; the said lien shall attach as fully as is provided by section 1, and in such case may be enforced by proceedings in equity. The fifth section directs how the suit shall be brought, and provides "that such suit shall be begun within sixty days after the right of action shall accrue."

When this act was passed there was in force the prior statute of 1858, now chapter 70, Gen. St. Ky., which gives a person who performs labor or furnishes material in the erection, altering, or repairing a house, building, or other structure, or for the improvement in any manner of real estate by contract with or by the written consent of the owner, a lien thereon and upon the land on which such improvement may have been made: provided, the claimant, within 60 days after he ceases to labor or furnish material, files in the office of the clerk of the county court of the county in which such building or improvement is situated, a statement of the amount due him, with a description of the property intended to be covered by the lien, sufficiently accurate to identify it, and the name of the owner, and stating whether the materials were furnished or the labor performed by contract with the owner: and provided, further, that action shall have been brought to enforce the lien claimed within six months from the day of filing the account in the clerk's office as aforesaid.

By an act of the Kentucky legislature approved March 27, 1888, entitled "An act to create a lien on canals, railroads, and other public improvements in favor of persons furnishing labor or materials for the construction or improvement thereof," called the "Contractors' Act," it is provided (section 1) "that all persons who perform labor, or who furnish labor, materials, or teams for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth by contract, express or implied, with the owner or owners thereof, shall have a lien thereon and upon the property and franchises of the owner or owners thereof for the full contract price of such labor, material, and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon." The third section declares that no lien provided for by the act shall attach unless the person who performs the labor or furnishes the material or teams shall, within 60 days after the last day of the last month in which the labor was performed or materials or teams were furnished, file in the county clerk's office a statement in writing, verified by affidavit, of his account or claim, substantially as required under the act of 1858; and by section 4 it is provided that proceedings for the enforcement of such liens "must be begun within one year from the filing of the claims in the county clerk's office, as required by the third section of this act." These three acts comprise the legislation of the state upon the subject of statutory liens in favor of persons performing labor or furnishing material and supplies, and, under well-settled rules, should be construed together in their proper interpretation and application. When thus considered

it seems clear that they were intended to provide for three distinct classes; the act of 1858 covering the ordinary case of labor performed or material furnished in the erection, alteration, or repair of houses or buildings, or other improvement of real estate; the act of 1876 applying to the case of services rendered or supplies furnished in or for the carrying on of certain designated business occupations, when they suspend, or their property or effects pass by assignment, by operation of law, or by order of court into the hands of some trustee, commissioners, or receiver for administration and distribution among the creditors of the owner or owners thereof; and the act of 1888 embracing the case of labor performed, or materials or teams furnished, in the construction or improvement of certain works of a public or *quasi* public character. This latter act may properly be regarded as a legislative declaration that the prior statutes did not cover the case of labor performed or materials furnished in the construction or improvement of railroads. It was indeed decided by the supreme court of Kentucky, after the passage of the act of 1876, that neither under that statute, nor the general mechanic's lien law of 1858, was there any lien against or upon a railroad for work performed thereon or materials furnished. *Graham v. Coal Road Co.*, 14 Bush, 425. This denial of a lien upon railroads under the then existing statutes created the necessity for and led to the passage of said act of 1888.

It admits of little or no doubt that appellants' petition presents a case within the purview of this latter act; their labor or that of the hands in their employ having been performed, and their teams having been furnished, in the construction and improvement of certain sections of the defendants' railroad, which would have entitled them to a lien if they had complied with the requirements of said act in filing a statement of their claim in the proper clerk's office for record, and bringing suit for the enforcement of the same within the time provided. They failed to allege any such compliance, and are clearly not entitled to any lien under either said act or that of 1858. Having lost their lien under said act of 1888, they now claim that they should be regarded as employes and laborers of the railway company, within the provision of section 1 of the act of 1876, and as such be given a priority of lien for the amount of their debts. This position cannot be sustained. If the act of 1876 has any application to labor performed in the construction or improvement of a railway, such as that set forth in the appellants' petition, the lien would exist, not in their favor, but in favor of the laborers in their employ, who actually performed the service. But we think it very manifest that said act of 1876 has no reference to construction work such as appellants performed with their hands and teams. It has relation alone to certain specified industries or enterprises as existing and established concerns engaged in carrying on business, and the lien therein provided for is given, not to the contractor who constructs the road or erects the plant, but to those persons, other than president, chief officer, director, or stockholder, who furnish materials or supplies, or render service in "the carrying on of such business." The lien given such employes or furnishers of materials and supplies, in the contingency des-

ignated, is to be "on the property and effects embarked in the business." The persons in whose favor it is created are not required to file any notice or claim of lien, or take any preliminary steps as a prerequisite to the enforcement of such lien, which is more extensive in its operation than that conferred by either the act of 1858 or 1888. As well stated by the learned judge who decided the case in the lower court, "it is clear that no lien is created at the time the labor is performed or the material furnished, but it only arises upon the stoppage or suspension of the business, either by the act of the party [owner] or by operation of law, and is given as a statutory preference in the distribution of the effects and assets of the business." In other words, the act in its legal effect and operation provides that those who furnish material or render service as employes in carrying on the business of certain designated industries and enterprises shall, upon the stoppage or suspension of such concerns by operation of law, or act of the owner, have a prior lien upon all the owner's property and effects embarked in such business for the amounts due them. The lien thus created by the act of 1876 is essentially different from that provided for by the general mechanic's lien law of 1858, or by the contractors' act of 1888. It arises or comes into existence upon the contingency of the insolvency, embarrassment, or discontinuance of the business which the employe or furnisher of supplies has assisted in carrying on, and attaches upon all the property and effects of the owner embarked therein, and applicable for distribution among creditors. Under the other acts the lien arises upon the commencement of the work, or relates back to that time, if the requirement as to filing notices or statement thereof is complied with by the claimant. The acts of 1858 and 1888 apply respectively to cases of labor performed and material furnished in the erection or repair of houses, buildings, and other improvements on real estate, and in the construction or improvement of public or *quasi* public works, such as railroads, turnpikes, canals, etc.; while the act of 1876 applies to labor performed and material furnished in the operation of companies or concerns already built or constructed. The act of 1888 gives a lien for labor performed or material furnished in the construction of certain works of a public or *quasi* public character,—that is, in the establishment of such concern. The act of 1876 confers a lien for labor performed and supplies furnished in keeping such designated establishment a going concern. The manifest purpose of this act of 1876 was to provide such security to laborers and supply men as would induce them to continue established and going concerns in operation as long as possible. This construction harmonizes said acts, and presents a consistent system of legislation on the subject of statutory liens. It would be most anomalous to provide a double lien. It cannot be assumed that the legislature intended that a contractor, who had failed or neglected to comply with the requirements of the act of 1888 in perfecting his lien, should nevertheless still have and be allowed to assert a more extended lien, under the act of 1876, upon all the property and effects of the owner embarked in the business. We think it clear that the appellants Rosser & Coleman should be re-

garded as "contractors" under the act of 1888, and not as "employees," under and entitled to the benefit of the act of 1876. Neither the fact that their employment was a daily one, nor that their compensation was to be ascertained and settled by the method agreed upon, in any way affected or changed the character of their services, which were rendered as contractors. They cannot properly be regarded as "employees" and "laborers," within the purview of the act of 1876.

In *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. Rep. 60, the plaintiff having contracted with the company to erect certain telegraph wires on the company's poles, and furnished the labor of himself and others in doing the work, claimed a priority lien, under a statute of Indiana which gave a lien to employees of corporations. The supreme court said: "It seems clear to us that Vane was a contractor with the company, and not an employe, within the meaning of the statute. We think the distinction pointed out by the circuit court is a sound one, namely, that to be an employe, within the meaning of the statute, Vane must have been a servant, bound in some degree, at least, to the duties of a servant, and not, as he was, a mere contractor, bound only to produce or cause to be produced a certain result,—a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party." The lien was accordingly denied; and in *Railroad v. Wilson*, 138 U. S. 501, 11 Sup. Ct. Rep. 405, it was said that an employe implies continuity of service, and excludes those employed for a special or single transaction. In construing the New Jersey statute, which gave laborers of corporations in case of an insolvency a lien upon corporate assets for the amount of wages due them, the supreme court of that state held that the right conferred was strictly personal, inhering alone in the person who actually performs the labor or service, and that he who furnishes the labor or services of others under a contract to do the whole business of a corporation, or a particular branch of it, was neither within the letter nor spirit of the act. It was further held by said court that the wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it became insolvent; that only those in the employ of the corporation at the time of its insolvency were within either the words or policy of the statute. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 196. We think the first of said propositions is the proper view to be taken of the act of 1876. Whether the last proposition of the New Jersey decision is correct, it is not necessary in this case to decide, as said appellants do not bring themselves within the provisions of said act. Our conclusion, therefore, is that the petition of Rosser & Coleman was properly dismissed.

The appeals of the supply claimants, W. & A. C. Semple, Fairbank, Morse & Co., and Andrew Cowan & Co., involved in record No. 29, heard with the case No. 22, depend upon the construction of the acts of 1876 and 1888 already considered. Said claimants severally furnished supplies and material to the railway company, suitable for either the construction of its unfinished line, or for carrying on the operations of

its finished portion. There was no contract, agreement, or understanding, express or implied, between the parties as to how the supplies furnished should be applied. A portion of them were used and employed in the construction of the unfinished parts of the company's road, and a portion were used in carrying on the company's business, or in operating the finished part of its line. For such portion of the supplies so furnished as were used and applied in and towards the construction of the road, the claimants would undoubtedly have had a lien under the act of 1888 if they had filed the proper notice of their claim. They did not, however, comply with the requirements of said act, and now insist that they have a lien, under the provisions of the act of 1876, for the whole amount of their claims, without regard to how the supplies were apportioned as between construction and the carrying on of the business of the company. So far as anything appears from the testimony, there was no breach of duty or bad faith on the part of the company or its officers in applying portions of the supplies and materials furnished to the construction of unfinished portions of the road. It was in fact left to the discretion of the company and its officers what disposition should be made of the supplies and materials furnished by the claimants, who made no inquiry and gave no directions as to how they were or should be used or applied. It was affirmatively shown by complainants that certain portions of the said supplies and material had actually been used in construction. The court below allowed a lien for such portion of the claims as were for supplies furnished and used for the operation of the railway or in carrying on its business upon and over its completed line, and denied the lien for such portion of the supplies or material as were used and applied in its construction, and for which a lien could have been maintained under the act of 1888. This action of the court is claimed to have been erroneous. No question is raised as to the correctness of the supply claimants' debts as against the railway company. The controversy presented is between such supply men and the mortgagees, whose contract lien antedates the creation of the former's claims. In this contest for priority we consider it well settled that the burden of proof is upon the claimants to establish whatever is necessary to confer a preference on their part. In *Davis v. Alvord*, 94 U. S. 545, it is said that those who assert a statutory lien upon real property, and claim priority over mortgagees and others who have acquired rights and interests in the property, must furnish strict proof of all that is essential to the creation of the lien. It is further said in that case that the court cannot presume, in the absence of proof, that the requirements of the statute have been complied with. Under no fair construction of the act of 1876 can it be asserted that the mere fact of furnishing articles or supplies, suitable or capable of being used in carrying on a designated business, without any understanding or agreement that they should be so applied, will of itself give the furnisher a lien upon all the property and effects embarked in such business, without reference to their actual application. The object and purpose of the act, as already explained, as well as the language employed in conferring the

lien, require that the supplies should be furnished,—at any rate, be used,—“for the carrying on of such business.” If the complainants had not shown affirmatively that the rejected portions of the several claims were used and applied in and towards the construction of unfinished parts of the road, the burden would have still rested upon the claimants of establishing the fact, as against prior mortgages, that the supplies furnished were either purchased for or were actually used in carrying on the business of the railway company, so far as it was an established and going concern. We are not called upon in this case to determine the question whether, if supplies should be furnished for the express and understood purpose of carrying on the business of any of the designated companies, and should thereafter be diverted to other use by the purchasers, the furnishers would have a lien under the statute, for there was no agreement or understanding, express or implied, as to the specific purpose for which these supplies were furnished, or as to where they were to be used. Under such circumstances the furnisher claiming priority of lien has devolved upon him, at least, the duty of showing that the supplies were actually used for carrying on the business, in order to bring himself within the meaning and intent of the act. The several claimants have failed to do this, so far as the rejected portions of their respective claims are concerned. The rejected items were used in construction. They were covered by the act of 1888, especially in the absence of any agreement or understanding that they should be applied in carrying on the business of the company. The furnishers could have asserted a lien for the same if they had complied with the provisions of that act. This they failed to do. The act of 1876 was not designed to give the same party a double lien, or an election as to which statute he would claim under. We think there was no error in the special master's apportionment of the several claims, as between construction and operation. Nor was there any error in the lower court's failure to give the claimants judgment for their respective debts against the railway company. No such personal judgment was sought, nor properly involved in the proceeding. On the question of interest on such portion of these claims as were allowed, there has been no action on the part of the lower court in either allowing or disallowing such interest; hence there is nothing in this question for review in this court. Our conclusion on the appeals presented by record No. 29 is that there were no errors in the action of the lower court upon the claims of the several appellants, and the judgments of the lower court thereon are affirmed. Said cause No. 29 will be remanded to the circuit court for the district of Kentucky for further proceedings in the administration and distribution of the property, franchises, and effects of said railway company in conformity with the opinion of this court in respect to the aforesaid claims.

BILLINGS et al. v. ASPEN MIN. & SMELTING Co. et al.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 30.

1. MINING CLAIMS—CAPACITY OF ALIEN TO HOLD.

One who asserts title to a mining claim under a location made by an alien and two citizens cannot defeat the claims of the alien's heirs on the ground that, under Rev. St. § 2319, an alien cannot be a locator; for mining rights constitute no exception to the general rule that the right to defeat a title on the ground of alienage is reserved to the government alone: *O'Reilly v. Campbell*, 6 Sup. Ct. Rep. 421, 116 U. S. 418, distinguished. 51 Fed. Rep. 338, affirmed.

2. EQUITY—NECESSARY PARTIES.

Where persons claiming an interest in a mine execute conveyances to a trustee for the purpose of bringing suit in their behalf, and the trustee delays unreasonably to institute proceedings, whereupon the claimants bring a bill in equity in their own names, the trustee should be made a party defendant, and it is not a fatal objection thereto that a controversy may arise between the claimants and the trustee, growing out of the deed made to him. 51 Fed. Rep. 338, affirmed.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Bill by Margaret Billings and others against the Aspen Mining & Smelting Company, asserting the rights of complainants in a mine as the heirs at law of William James Wood, one of the original locators. The circuit court dismissed the bill on the merits, and complainants appealed. The circuit court of appeals reversed this decree, (see 51 Fed. Rep. 338,) and the defendants now petition for a rehearing. Denied.

George J. Boal, Aaron Heims, C. W. Bunn, and Wolcott & Vaile, (Lusk, Bunn & Hadley, on the brief,) for the petition.

T. A. Green, (Nix & Nolan, on the brief,) opposed.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. Upon the filing of the opinion in this cause, counsel for appellees submitted a petition for rehearing, supported by briefs, in which it is strenuously contended that the court erred in holding that it was not open to the appellees to aver that William J. Wood was an alien, and therefore could not acquire any right or title in the mining claim located by him in conjunction with Fisk and Fitzpatrick.

It is urged that mining interests and rights form an exception to the general rule that the right to defeat a title to realty on the ground of alienage is reserved only to the sovereign, and reliance is placed upon a class of authorities of which *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421, is a fair representative. In that case the defendants, claiming to be the owners of the Omaha lode, filed a survey and plat thereof in the proper land office, and applied for a patent thereto under section 2325 of the Revised Statutes. The plaintiffs, who were the owners of an adjacent mining property, known as the "Highland Boy Lode," filed

an adverse claim for a patent to a portion of the land covered by the survey of defendants. The suit was to determine the right to this disputed portion, the judgment below being in favor of the plaintiffs. In the supreme court a reversal was sought on the ground that the findings of fact did not show that the plaintiffs were citizens of the United States. Upon this point the supreme court ruled that—

“It is true that the mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such; and, had the objection been taken in the court below that such citizenship of the plaintiffs had not been shown, it might, if not obviated, have been fatal. There is, however, nothing in the record to show that it was raised below.”

There can be no question, under the provisions of section 2319 of the Revised Statutes, that, when application is made for the issuance of evidence of title to mining property, it is necessary to show that the applicant is a citizen of the United States, or has declared his intention to become such, before a conveyance of title can be properly issued; and therefore, as was held by the supreme court in the case just cited, if a party is seeking to procure the title to mining property from the United States, if taken at the proper time, the objection of alienage would prevent the acquirement of title, and such objection may be made by any one adversely interested. In such cases the sovereign is a party in fact to the proceeding, which is a direct one, for the procurement of title, and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. If, however, the grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party. Thus in *Gouverneur v. Robertson*, 11 Wheat. 332, it is said:

“That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression.”

The fact that when a party is seeking to procure a title to mining property from the United States it is open to any third party who asserts an adverse claim thereto to suggest the objection of the alienage of the first claimant does not meet the question arising on the facts of the case at bar. In this case Wheeler and his grantees are claiming the benefit of the location made by Wood, Fisk, and Fitzpatrick, and are claiming the right to the mine, not through some adverse location, but through what was done by the original locators. Wheeler and his grantees are now claiming title to the mine through deeds procured from the heirs of Wood, and it is certainly not open to them to rely upon the deeds as the means whereby they have procured the title to an undivided interest in the mine, and yet, when called to account for the wrongful procurement of the deeds, to deny the validity of the location made by Wood, on the ground of alienage. It was upon this view of the case

that we held that if Wood were living, and had brought suit against the present defendants for the protection of his rights, the latter could not rely upon the plea of alienage to defeat a recovery. If Wood were living, and should, by proceedings in the proper land office or in a court of competent jurisdiction, seek to procure the issuance of a patent as evidence of title, it would be open to any one claiming an adverse right to the property to show that Wood was an alien, and therefore not competent to take the title; but it would not be open to one whose title is derived from Wood to claim, on the one hand, the benefit of the conveyance from him, and, on the other, to assert its invalidity. If Wood, during his lifetime, had expended time, labor, and money in the working of the mine, resulting in the accumulation of a sum of money which should be placed in a bank or in the hands of his colocators, could it be possible that to an action for the recovery thereof a plea of alienage could be successfully interposed, on the ground that the money was the product of the mining right, and that as an alien Wood could not procure a title thereto?

As we viewed the case, it appeared that Wheeler and his grantees were claiming title under the location made by Wood and others, and therefore, in our judgment, the case was one wherein it must be assumed that the filing the location and the possession held thereunder must be deemed to have created an interest in the property in Wood and his colocators, and this interest, thus vested, could not be collaterally attacked by parties whose rights were dependent upon the validity of the location in question. If Wood had applied for the issuance of a patent or other evidence of title, it would have been the duty of the officers of the land department to have demanded evidence of his citizenship, or of his declaration to become such, and a failure to furnish the same might have been fatal to his claim; and, if there had been an adverse claimant to the property, holding under an interfering location, the latter could insist on the objection of alienage. Such objection, if sustained, however, would only defeat the claim of the alien. It would not in any sense sustain the title of the objector. Herein lies the inequity of the position assumed by the appellees in this cause. They claim title under the location made by Wood and others, and as to them it must be held that in fact there was vested in Wood an interest in the mining property, defeasible by the United States, but not liable to be questioned collaterally in a proceeding of the nature of that now before the court.

If, however, we are in error in this view of the law, it does not follow that a rehearing should be granted, for the reason that it is the unanimous opinion of the court that the evidence in the case shows that in fact Wood, before locating the mine in question, had declared his intention to become a citizen of the United States. The evidence shows that when Wood left Canada, in 1870, he went to Kansas, and while there he entered certain of the public lands. There is put in evidence a copy of a declaration signed by James Wood, under date of June 27, 1870, and duly recorded in Allen county, Kan., and the

evidence satisfies us that the declarant, James Wood, was the William James Wood who was one of the locators of the Emma mine in 1880. Having thus declared his intention to become a citizen of the United States, he was legally entitled to locate a mine upon the public lands, and his title thereto is not open to attack on the ground of alienage. Under the facts established by the evidence in the case, it therefore appears that William J. Wood, at the date of his death, was the legal owner of an undivided one-third interest in the Emma mine, and this interest passed to such persons as, under the laws of Colorado, were entitled to share in the distribution of his estate. These distributees were his widow and children, several of whom were then residents of the United States. We find nothing in the record that would justify the holding that Wood's interest had become forfeited to his colocators, and therefore the title to the interest vested in Wood at the time of his death passed to his widow and children. It is not claimed that Matilda, William H., Thomas E., or Hiram A. Wood have conveyed or released their interests to any one, and there is no ground upon which Wheeler or his grantees can assert a right to the interests belonging to the parties just named. The interests of the widow, Mrs. Billings, James O. and Charles E. Wood, are claimed by appellees by reason of the execution of the deeds executed by these parties under the circumstances detailed in the opinion originally filed, and which were held to be voidable for the reasons therein stated. We have reviewed the evidence in the light of the arguments contained in the briefs of counsel, submitted with the petition for rehearing, but we find no sufficient ground for doubting the correctness of the conclusion reached in the first instance. We cannot agree with counsel that the representations made to Mrs. Billings and her sons were purely the expression of opinions upon questions of law. They embraced also statements of fact, intermingled, it is true, with statements of law, but the ultimate effect of which was to misrepresent the facts material to be understood and considered by these parties in determining whether they would execute the releases sought from them. Upon the whole, we find no reason to believe that a rehearing would result in a different conclusion upon either the law or facts, and the petition for a rehearing is therefore denied.

In the brief submitted on behalf of counsel for appellants it is suggested that the order heretofore made requiring Richard J. Doyle to be made a party to this suit should be rescinded, mainly on the ground that making him a party may lead to disputes between the appellants and Doyle touching his rights. We remain of the opinion that Doyle should be made a party. It is due to the appellees that all parties who may be in position to assert rights to any portion of Wood's share in this mining property should be made parties to this action, so that the one proceeding may adjudicate such rights, and the one accounting be all that is necessary. If, as suggested, any question arises between Doyle and appellants, growing out of the deeds of trust executed by Mrs. Billings and her two sons to Doyle, the issues presented thereby need not interfere with the progress of the accounting in the main cause. The

trial court has full power to deal with the situation as it may arise, and to so conduct the further proceedings as to reach a final conclusion with the greatest speed and at the least cost.

We see no necessity for modifying the order already made in the case in any particular, and therefore the entry now made is simply that the petition for rehearing is denied.

In re APPOINTMENT OF SUPERVISORS.

(Circuit Court, S. D. Georgia, W. D. November, 1892.)

1. CONGRESSIONAL ELECTIONS — FEDERAL SUPERVISORS — APPLICATIONS FOR APPOINTMENT.

Rev. St. §§ 2011, 2012, providing for the appointment of supervisors of congressional elections on proper application to the circuit judge, declares that "the judge, within not less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit," and "when so opened shall proceed to appoint and commission from day to day and from time to time," etc. *Held*, that registration, where necessary, is not such an integral part of the election as to require an application for the appointment of a supervisor of the election to be made within 10 days prior to the registration, rather than 10 days prior to the election.

2. CONSTITUTIONAL LAW—LOCAL LEGISLATION—ELECTIONS—REGISTRATION LAWS.

The local registration laws of Georgia for the various counties of the state, which differ in material features as to the time, place, methods, and necessary qualifications for registration, do not affect the appointment of federal supervisors of a general election, because they are unconstitutional and void, under Const. Ga. 1877, art. 2, § 2, providing that "the general assembly may provide from time to time for the registration of all electors," and article 1, § 4, providing that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law;" since provision was already made by a prior general law, (Code, § 1278,) which empowers "any qualified voter for members of the general assembly to vote for any candidate or upon any question which is submitted to all the voters of the state, in any county in the state, and for any candidate or question which is submitted to all the voters in any district or circuit, in any county of the district or circuit in which is embraced the county of the voter's residence."

3. SAME—FEDERAL STATUTES.

Such local registration laws are also void in that they are in conflict with Rev. St. U. S. § 2005, which requires that all officers charged with the duty of furnishing to citizens an opportunity to qualify as voters under state laws shall give equal opportunity therefor to all citizens of the United States.

At Law. Applications for the appointment of supervisors of the election for presidential electors and representatives in congress for Wilkinson and Richmond counties, in the southern district of Georgia. Applications granted.

SPEER, District Judge. Under certain provisions of title 26 of the Revised Statutes, the circuit judge, upon proper application, is empowered to appoint and commission supervisors to guard and scrutinize elections. Under section 2014 of the Revised Statutes, whenever the

circuit judge is unable to perform this duty, he is required "to select and assign to the performance thereof, in his place, such one of the district courts within his circuit as he deems best; and, upon such selection and assignment being made, the district judge so designated shall perform and discharge, in the place of the circuit judge, all the duties, powers, and obligations imposed and conferred upon the circuit court by the provisions hereof." In pursuance of the powers above stated, the presiding judge of the district court of this the southern district of Georgia has been selected and assigned by the Honorable DON A. PARDEE, circuit judge of this circuit, to appoint and commission supervisors for the southern district of Georgia, in localities where applications have been properly presented, to guard and scrutinize the election for representatives in congress, to be held on November 8, 1892. Among others, applications have been presented for the counties of Richmond and Wilkinson, in the southern district of Georgia and in the tenth congressional district of the state.

Having been apprised that applications for the appointment of supervisors, for the counties of Richmond and Wilkinson, would be presented, and that the court would be opened by the presiding judge of this district for election purposes, in obedience to the directions of the statute, the Young Men's Democratic League of Richmond county, by its president and by a committee, have made application to be heard in opposition to the appointment of supervisors for the two counties specified. The court having, in pursuance of their request, indicated that it would consider such suggestions in writing against the appointment as the representatives of that body might be pleased to submit, the objections following have been submitted:

"As a committee, we very carefully examined the United States Revised Statutes, and have arrived at the conclusion that the petitions for supervisors in Richmond county and Wilkinson county were too late, and did not comply with the law as laid down in sections 2011-2020. Supervisors are appointed (1) for elections alone; or (2) for registration and election. In the first case they are not only to see ballots cast, they must also see them counted; but supervisors would not be appointed to count ballots if they had not previously been required to see them cast. In like manner we think that in those cases where registration precedes voting, as voting precedes counting, the registration must be supervised as an integral part of the election, or, at least, that without which an election could not be had. Illegal registration so infects the result that, if supervisors are to be appointed, it must be done in time for them to view that which is essential to the deposit of the legal ballots. Hence the law makes it the duty of supervisors, where registration is necessary, to attend at all times and places appointed for registration, to challenge persons offering to register, to attend at all times and places where names of registered voters may be marked for challenge, to personally inspect and scrutinize such registry for purposes of identification, to affix their signature to each page of the original list. It seems to contemplate that thereby they have acquired some knowledge of the qualifications of voters, and makes it their duty to challenge persons whose qualifications they doubt. They are directed on the day of registration to post themselves in such manner as will best conduce to their scrutinizing the manner in which registration is being done. All the way through the statute seems to treat registration as

part of the election, as much requiring supervision as the mere act of voting itself. We think this is very clearly shown in § 2011, which provides: 'The judge, within not less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court.' By the act of 1877 a registration is required for Richmond county. By the acts of 1885 one is required for Wilkinson county, and our position is that, the registration books being now closed, and no application having been made ten days prior to the registration, it is now too late for supervisors to be appointed."

After the careful consideration of the views of the committee which the high character of its members, all of whom are distinguished members of the bar of this court, would naturally occasion, we find it impossible to assent to their conclusions. Section 2011 of the Revised Statutes provides that "whenever, in any city or town having upward of twenty thousand inhabitants, there are two citizens thereof, or whenever, in any county or parish in any congressional district, there are ten citizens thereof, of good standing, who, prior to any registration of voters for an election for representatives or delegates in the congress of the United States, or prior to any election at which a representative or delegate in congress is to be voted for, may make known in writing to the judge of the circuit court of the United States * * * their desire to have such registration or such election, or both, guarded and scrutinized, the judge, within not less than ten days prior to the registration, if one there be, or if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit." Section 2012 provides: "The court, when so opened by the judge, shall proceed to appoint and commission, from day to day and from time to time," etc. It will be perceived at a glance that, by the statute, the appointment of supervisors is authorized to guard and scrutinize the registration, if there be a registration, or the election, or both, as the applicants may desire. The language of the statute must bear the construction which its words clearly import. If the application is to have the registration scrutinized, the court must be open 10 days before the registration; if it is intended to guard and scrutinize the election, 10 days before the election. The statute does not, in our opinion, make it obligatory upon the supervisors to scrutinize the registration, unless the application is for that purpose. The opposite construction would nullify the option given the applicants, to make known to the court their desire "to have such registration or such election, or both, guarded and scrutinized."

The representatives of the Young Men's Democratic League, of course, rely naturally upon the concluding clause of the statute, to wit: "The judge, within not less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit." But this clause is merely directory of the time in which the court shall be open for election purposes, and neither confers nor denies nor limits the power to appoint supervisors. Indeed, section 2013 of the Revised Statutes, in the same title, provides that the powers and

jurisdiction conferred by the several sections in point shall be exercised as well in vacation as in term time, and the judge sitting at chambers shall have the same powers and jurisdiction. In other words, the jurisdiction of the court to appoint is in no sense modified by the direction to open the court for 10 days, at a convenient place in the circuit; a direction, of course, merely intended to further the convenience of applicants. If, however, the construction of this statute, as above expressed, is erroneous, is it, even then, true that the supervisors must be denied because of the registration enactments cited? It will be, of course, conceded on all hands that in general the valid laws of the state determine the qualifications of the voter whether at a local election or for presidential electors or representatives in congress; provided, always, that the state laws do not prescribe qualifications which are inhibited by the federal constitution and the statutes made in pursuance thereof. *Minor v. Happersett*, 21 Wall. 163. It is important to inquire, in this connection, what are the qualifications of voters, as defined by the constitution of the state? The constitution of 1877, art. 2, § 1, provides: "Every male citizen of the United States, (except as hereinafter provided,) 21 years of age, who shall have resided in this state one year next preceding the election, and shall have resided six months in the county in which he offers to vote, and shall have paid all taxes which may hereafter be required of him, and which he may have had an opportunity of paying, agreeably to law, except for the year of the election, shall be deemed an elector." The exceptions referred to in this clause enumerate soldiers and sailors of the United States, residing temporarily in the state on duty, and persons convicted of treason against the state, embezzlement of public money, malfeasance in office, bribery or larceny, or any crime involving moral turpitude, punishable by the laws of the state with imprisonment in the penitentiary, unless such person shall have been pardoned, and idiots and insane persons. The provisions of the constitution of Georgia define the qualifications of voters at elections for presidential electors and for representatives in congress.

It is important next to consider the provisions of the state constitution with relation to the registration of voters. Article 2, § 2, of the same constitution provides that "the general assembly may provide from time to time for the registration of all electors." It follows, then, that it is within the power of the general assembly of Georgia to "require" (to use the word of section 2011 of the Revised Statutes) a registration of voters for an election for representative in the congress of the United States or for presidential electors. This registration would be, of course, operative upon all the voters in the state at such elections. This is not only the right of the state, but it is expressly recognized by the federal law. The grave matter for consideration is, has the state of Georgia required a registration of all voters at elections for presidential electors and representatives in congress? Are the local registration enactments prescribed for the various counties of the state, which are practically as varying as they are numerous, such a registration law as will relate to such elections? Are such registration laws for particular counties, and

differing among themselves in a multitude of material features, in consonance with the constitution of Georgia, and the constitution and laws of the United States?

Article 1, § 4, of the Georgia constitution of 1877, provides: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." Now, the existing general law at that time empowered "any qualified voter for members of the general assembly to vote for any candidate, or upon any question which is submitted to all the voters of the state, in any county in the state, and for any candidate or question which is submitted to all the voters of any district or circuit, in any county of the circuit or district in which is embraced the county of the voter's residence." Code, § 1278. If this provision, which was enacted under the constitution of 1868, then of force, is applied to registration, does it not follow that the legislature is inhibited, by article 1, § 4, above quoted, from enacting registration laws for one county in a congressional district differing from the registration laws in the other counties of the same district? Does it not further inhibit the legislature from enacting registration laws, to affect a general election like that for presidential electors or representatives in congress, for particular counties in a congressional district, when it fails or refuses to enact a uniform law for the same territory; and, moreover, does it not inhibit the enactment of any registration law affecting the qualification of voters at the general elections, unless the law is of uniform operation throughout the state? The provision of the constitution that "the general assembly may provide from time for the registration of all electors" does not afford any foundation for a statute which denies to the voter at a general election in one county the privileges and immunities which a voter at the same election in another county enjoys. There is nothing in the clause which authorizes the enactment of registration laws, with different requirements for different divisions of the state, to affect voters at a general election, in which the people of the whole state are equally interested. Of course, those views would have no application to a municipal election. In the case of *McMahon v. Mayor, etc.*, 66 Ga. 217, the supreme court of the state, while holding that an ordinance of the city of Savannah prescribing registration of voters in municipal elections for that city was not contrary to the constitution, used the following language: "We cannot see how the registration acts of the city may not be consistent with the power granted the legislature to pass a general law on the subject of registration, as contained in the constitution." It will be observed that the court was construing a municipal registration act, and to this its language was of course restricted; but the sentence quoted may also be regarded as a judicial declaration that the power granted the legislature by the constitution to pass a registration law for all voters imported a general law. The words "registration law for all voters" make this conclusion irresistible.

It will require but a cursory examination of the registration enactments made by the general assembly of Georgia, since the adoption of

the constitution of 1877, for various counties of the state, to perceive how totally wanting in uniformity they are, and how irregular and unfair would be their application to an election in which all the people were equally interested.

The act of December 27, 1890, for Pierce county, makes the tax receiver the registrar, and requires him to close his registration on August 5th of each year. He must require the voters seeking registration to make oath as to the payment of their taxes, etc. The act expressly provides that no person can vote in any election for governor, members of the general assembly, or members of congress or presidential electors, who has not registered. It will be observed that, under the construction placed by the objectors on section 2011, in order to have supervisors in Pierce county, the United States court must be opened 10 days before the 5th of August.

The acts of December 27, 1890, and August 31, 1891, for Appling county, make the tax receiver the registrar, and require that he shall register the voters while making his regular rounds as tax receiver, from April 1st to July 1st of each year. Appling and Pierce are in the same federal judicial district, and the objections filed, if applicable at all, will open the court for election purposes 10 days before the 1st of April, and as, by the succeeding section, the court must remain open until the election in November.

The act of September 1, 1891, makes the justices of the peace registrars for Chattooga county. The registration books must be kept open from the 1st Monday in July until three days previous to the election. No person whose name is absent from this list will be permitted to vote. There is no requirement in this act for the oath as to the payment of taxes, and, if the justice of the peace is of the opinion (upon what evidence the statute is not specific) that the person is a qualified voter, he can register him, even though he be not present.

The registration act of Floyd county is even more complicated. It prescribes different regulations for different districts in the same county. It allows no one to vote who is not on the registration list. It provides that where a person has been registered, another may make affidavit charging the registry to have been improper, have a copy left at the usual place of abode of the person whose registration is attacked, and, even though that person be absent from home, unless he appear and answer the charges, or some one appears for him, he is stricken from the registration list.

The act of August 11, 1891, for Baldwin county, makes the tax collector registrar. The registration books must be opened on the same day when the books for the collection of state and county taxes are opened, and closed on the day when they are closed, and the citizen must make oath that he has paid his taxes. No person is permitted to vote whose name is not on the registry.

The act of November 7, 1889, for Wilkinson county, makes the justices of the peace registrars. All voters in the county are required to be registered under the act. Registration is to be made only every other year,

beginning in 1890. The registration books are to be open during the three months ending fifteen days before the election for members of the general assembly. On five days' notice, left at the place of abode of any person who has registered, the commissioners of roads and revenues, who, it will be observed, are not the registrars, may strike such person's name from the registry list if he fails to appear and make satisfactory answer. Only voters who are qualified at the time of the registry, under the constitution and laws of Georgia, can be registered. No provision is made for allowing the citizen to make oath as to his qualifications, but he is required by the act to produce receipts or other satisfactory proof of the payment of all taxes chargeable against him, that he has had an opportunity of paying. No provision is made for persons arriving at the voting age after the closing of the books for registry and before the election, or for persons residing in the county for six months, but who have removed into the county from other sections of the state, after the registration books are closed. And yet the act provides that no person not registered on the list for the county shall vote. Penalties are prescribed for any person registering unlawfully, but the act imposes no penalty for a person voting, or attempting to vote, who has not registered, and yet in other counties this is punishable by indictment.

The registration act for Warren county provides that any person who has lived in the county for six months, and who has moved into the county since the closing of the registration, and who is otherwise qualified, may register up to the day of the election.

The act of December 27, 1890, for Bibb county, provides for the registration of voters up to within 15 days before the election, who were providentially hindered from registering, who have since moved into the county, or reached their majority. This act has been declared unconstitutional, on other grounds, by a superior court of the state.

It is, perhaps, unnecessary to call further attention to the varying and inconsistent provisions of other registration enactments. The illustrations given above will be sufficient to show that the registration is not only not uniform, but that it has the most far-reaching, irregular, and generally unfair results upon the exercise of the elective franchise in the different portions of the state. It may be added, however, that in some counties, a minor who will attain his majority by the time of the election is required to register while he is a minor to entitle him to vote at the election. In other counties there are no such requirements, and he can vote without registering, and in still other counties his case is not provided for at all. The same diversity of regulation is found in various counties in regard to the case of a citizen who has moved into a county after the registration, but who is otherwise entitled to vote; and it will often happen that there will be two contiguous counties in the same congressional district, and in one the citizens will have the privilege of registering up to the day before the election, while in the other, voters possessing all the qualifications required by the constitution, are denied the right of voting by a registration which closed from six months to a year before the election. This wide-spread inequality is intensified in its gen-

eral effect because in a multitude of counties in the state there are no registration laws whatever. The penalties of the various acts are as various as the methods and the requirements for registration. It will often happen that persons in adjoining counties, voting, or attempting to vote, for the same congressman, will be punished differently for the same act; or the one will be punished and the other will be guiltless of any violation of law. The inequality and illegality of the conditions thus enumerated are obvious. It is announced by eminent authority that, while registration laws are constitutional, their requirements must be reasonable and uniform, and equal facilities must be afforded to all the citizens of the state to comply with their requirements; otherwise, they are void. Cooley, Const. Lim. p. 601. This declaration is especially pertinent where the organic law of the state requires, as we have seen to be the case in Georgia, the enactment of uniform and not special legislation, and where the registration clause of the constitution provides, not for the registration of a portion of those otherwise qualified to vote, but for the registration of "all electors."

For the reasons stated, the court is of the opinion that, as constituting an abstacle to the appointment of supervisors to supervise a general election, the registration enactments of the general assembly of Georgia are inoperative and void, because in conflict with the constitution of the state. But, if this were not true, it would be none the less our duty to disregard them. They are plainly in conflict with section 2005 of the Revised Statutes, which provides:

"When, under the authority of the constitution or laws of any state, any act is required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are charged with the duty of furnishing to citizens an opportunity to perform such prerequisites, or to become qualified to vote, every such person and officer shall give to all citizens of the United States the same and equal opportunity to perform such prerequisite and to become qualified to vote."

Now, it is not enough that all the citizens of the same county shall have an equal opportunity, but all the electors of the state, voting, or desiring to vote, at the same general election, must have the equal opportunity to perform the prerequisites, and to become qualified to vote. And it is a necessary implication of the language of this statute of the United States that the prerequisites for voting at the same general election must be equal to each elector. Indeed, it is true, if a state of the American Union prescribes for a portion of its citizens, otherwise entitled to vote, prerequisites for voting from which other citizens are relieved, to that extent the state ceases to maintain a republican form of government, and enactments with such effect are contrary to the constitution of the common country. It will be easy to understand how, with such a system, or want of system, of registration laws, as hereinbefore described, the most injurious and unfair political results might be attained. If a congressional district be "gerrymandered" with unequal registration laws, according to the political complexion of certain localities, the fundamental laws of the United States, guarantying equal political

rights, could be set at naught. The power of congress over national elections is no longer in question. This being a national election of general character, it is well to remember that it is clearly within the scope of the national laws. The supreme court of the United States has held that congress can by law protect the act of voting for members of congress, and the persons voting at such election from violence or intimidation, and the election itself from fraud and corruption. *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Siabold*, 100 U. S. 371. In the latter case, the court declares "the exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the state."

It follows, therefore, that since the federal law requires uniformity in the prerequisites of the right to vote as affecting the citizen, otherwise entitled to vote, at the national election, and further requires that each citizen shall have an equal opportunity to do the act made a prerequisite to the right of voting, varying and inconsistent registration enactments making different prerequisites, and denying equal opportunities to perform them, are contrary to the federal statute, and nugatory. The power of the state of Georgia to enact a general and uniform registration law is not questioned. The power is undoubted, and its exercise might well lead to the most salutary results, to the fairness and regularity of elections. To conform, however, both to the state constitution and the national laws, it must have a uniform effect upon all electors, and we hold that such a registration law has not yet been enacted.

For the reasons above enumerated, the court feels obliged to disregard the objections presented by the representatives of the Young Men's League, and will proceed with the performance of the duties assigned, in accordance with the statutes of the United States.

LEMON v. PULLMAN PALACE CAR CO.

(Circuit Court, S. D. Mississippi. May 6, 1887.)

1. SLEEPING CAR COMPANY—NOT COMMON CARRIER.

A sleeping car company is not a common carrier. Its cars are under the control of the railroad company, except as to furnishing lodging to those who may pay for it, and the agents of the railroad company are entitled to determine who shall occupy the sleeping cars, as part of the train.

2. SAME—LIABILITY FOR REFUSING BERTH—AGENTS.

A passenger agent who was engaged in selling tickets, both for railroad fare and for sleeping car berths, refused to sell a sleeping car berth to a passenger, on the ground that the latter had not a first-class ticket. *Held* that, in determining that the ticket was not first class, the agent acted as the agent of the railroad company, and the car company was not responsible therefor; and that, having so determined, he was justified in refusing to sell a berth ticket.

3. SAME—PUNITIVE DAMAGES.

Conceding, however, that he acted as the agent of the sleeping car company, the latter would not be liable for punitive damages, unless the passenger was treated insultingly or with malice.

At Law. Action by George Lemon against the Pullman Palace Car Company to recover damages for refusal to sell him a sleeping car berth. Verdict for defendant.

E. E. Baldwin, for plaintiff.

Percy Roberts, for defendant.

HILL, District Judge, (*orally charging jury.*) This is an action for damages alleged to have been sustained by reason of the refusal of the defendant car company to sell the plaintiff a berth in their sleeping car from Chicago, Ill., to Jackson, Miss. The plaintiff also alleges that the agent of the defendant was very rough and rude to him. To these charges the defendant pleaded not guilty, which makes it incumbent upon the plaintiff to sustain the allegations contained in his declaration. Whether they have done that or not is for you to determine from the evidence. I will instruct you that the Pullman Palace Car Company is not a common carrier. The Illinois Central Railroad is a common carrier, and receives, as a part of its train, the cars belonging to the Pullman Palace Car Company, the same forming part of its train, and being under its control, except so far as providing lodging in the Pullman car for the accommodation of those who may pay for it. Its agents also have the right to determine who shall occupy the Pullman car as part of its train. It is to keep and provide cars sufficient for the accommodation of its passengers. The providing of lodging for the passengers belongs alone to the Pullman Car Company as a mere lodger.

The charge here is that the agent of the Palace Car Company was also the agent of the Illinois Central Railroad Company, and sold sleeping car tickets as well as tickets for transportation. It was the privilege of the railroad company, by its agents, to determine who should occupy seats on its trains, and that included the Pullman car, and to determine whether a party had paid the proper amount, and was entitled to travel on the train to which it was attached. Thus the agent was then in a dual capacity, as acting for the railroad and for the car company at the same time. It was not the privilege of the agent of the car company to sell a berth to any party unless he had a first-class ticket on the railroad, or a ticket which entitled him to travel in the Pullman car or in a first-class car. The agent who sold the tickets had to determine whether or not he had such a railroad ticket as would entitle him to ride in the first-class car. In deciding that question, I am of the opinion that he acted as the agent of the railroad company, because that question had to be passed upon before he could sell him a sleeping berth. It is difficult, however, to divide these two duties, but I am of opinion, under the proof, that he acted as the agent of the railroad company. When the agent decided that the plaintiff here did not have such a ticket as entitled him to ride in a first-class car, then he was justified in not selling him a sleeping car ticket. He was then the agent for the Illinois Central Railroad Company, and the defendant here is not responsible for his acts. Admitting, however, that he was the agent of the Pullman Palace Car Company, and he acted in good faith

in passing upon the question as to whether the party was entitled to it, the plaintiff would only be entitled to actual, and not to punitive, damages, unless he was rudely treated by the agent; that is, if he was treated insultingly, or with malice, or something of the kind; willful, wanton conduct on his part. If the plaintiff did not have a transferable ticket, the agent had a right to so determine. A nontransferable ticket is sold at a reduced rate, and the party to whom it is given is alone permitted to travel on it, and, if he then sell it, it would deprive the railroad company of their additional profit.

Now, I do not know that I can say much more to you. You have the case before you, and, unless you are satisfied that the defendant was the agent who passed upon the railroad ticket that was presented, —and as I have instructed you that he was not the agent in passing upon that,—then the plaintiff would not be entitled to recover, unless it was for the conduct of the conductor of the train in refusing plaintiff a berth, and I believe there is no complaint upon that score. You can retire.

Verdict returned and judgment rendered for the defendant company.

WILCOX v. RICHMOND & D. R. Co.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 16.

1. DAMAGES—BREACH OF CONTRACT—MENTAL SUFFERING.

In an action against a railroad company for breach of contract for special train, damages cannot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent.

2. TENDER—COSTS—INTEREST.

The hirer of a special train, who declined to take it because of the refusal of the railroad company to guaranty arrival in time to connect with another train, cannot recover interest and costs on the sum paid for such train, where the company tendered such sum at the time of refusal, before suit and in court.

In Error to the Circuit Court of the United States for the District of South Carolina. Affirmed.

Statement by HUGHES, District Judge:

This action was commenced in 1890 by the service of a complaint and summons on the defendant in the court of common pleas for Laurens county, state of South Carolina. The complaint alleges that plaintiff in error was a physician, attending the sittings of the State Medical Association at Laurens on the 24th of April, 1890; that at 3:45 P. M. of that day he was informed by telegraph of the dangerous illness of his father at Marion Court House, S. C.; that at that hour he contracted with the defendant railroad corporation to convey him to Columbia, S. C., by 10:20 of the night of said day, for which service he then

paid defendant the sum of \$195; that he was anxious to see his stricken father at the earliest practicable moment, and to do so it was necessary to reach Columbia at the moment stated, or be delayed a considerable time, in view of which circumstances he entered into the contract stated; that the defendant was fully informed of the peculiar circumstances influencing him to make the contract; that the defendant failed and refused to perform its agreement; that the plaintiff, as a consequence of this breach of contract, suffered "great distress of mind, anxiety, mortification, and suspense," by reason of which he sustained damages in the sum of \$5,000. As a second cause of action, plaintiff demanded the recovery of \$195 and interest from the 24th day of April, 1890, and costs. His suit was for these latter sums, and for \$5,000 damages for the first cause of action alleged. The defendant, in its answer, admits that the plaintiff wished to get a special train from Laurens to Columbia, and paid defendant \$195 for such train. Defendant agreed to run the train for such sum, but notified the plaintiff that it could not guaranty that the train would reach Columbia in time to make connection with the Coast Line, though it had every reason to believe that it could make such connection, but the plaintiff refused to take the train unless the guaranty was made. This the defendant declined to do, and tendered the plaintiff the money back at once, which the plaintiff refused. The defendant furthermore alleges that it made every effort in its power to accommodate plaintiff, and, while it informed him that it believed the train would reach Columbia in time for the connection, it did not and could not reasonably be expected to guaranty the same. The defendant also alleges that it has heretofore offered the plaintiff the \$195, now offers the same to him, and brings the said \$195 into court, and again tenders it to the plaintiff. The cause was removed to the United States circuit court for the district of South Carolina. It came on for trial before a jury at Columbia, 2d December, 1890. The defendant, through its counsel, under the statute of South Carolina, interposed an oral demurrer to the first cause of action, to wit, that the complaint did not state facts sufficient to constitute a cause of action, in that damages could not be recovered on a breach of contract for mental suffering, unaccompanied with physical suffering or pecuniary loss. The court sustained the demurrer, and directed the jury to find a verdict on the second cause of action for plaintiff for \$195, without interest or costs. Whereupon the plaintiff excepted, and now appeals, alleging for error: (1) That the court erred in not overruling the demurrer; (2) in instructing the jury not to find interest and costs for the plaintiff.

B. W. Ball and C. A. Woods, for plaintiff in error.

J. S. Cothran, for defendant in error.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and HUGHES, District Judge.

HUGHES, District Judge, (*after stating the facts as above.*) The complaint, in setting out the first cause of action, omits several material facts in the case. It alleges only the contract to be conveyed by a certain time, to

a certain place, for a certain sum of money paid; the motive of plaintiff for wishing to be conveyed; and the refusal of defendant to convey as desired. The defendant's refusal to guaranty arrival by the required time; the plaintiff's refusal to be conveyed except with such guaranty; the defendant's proffer of the money in return, after the plaintiff's refusal to be conveyed,—these latter facts cannot be considered in passing upon this demurrer, material as they are as elements in the transaction. The case presented by the demurrer, which admits only a part of the material facts, is not the one shown by the record, and is therefore little other than a moot case brought here for decision. The moot question is whether an action can be maintained which claims damages merely for an alleged "distress of mind, anxiety, mortification, and suspense," resulting from the nonperformance of a contract, no personal injury and no pecuniary loss having been sustained or being pretended; the anxiety and suspense of mind being the result solely of a delay in starting on a visit to a dangerously ill relative. As was said by the court in *Griffin v. Colver*, 16 N. Y. 489, the damages recoverable in actions of this character "must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed." To the same effect was the decision in *Masterton v. Mayor, etc.*, 7 Hill, 61; and in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577.

The complaint under consideration does not allege any pecuniary injury, such as the loss of an expected legacy, or of some advantage or thing of material value, as having resulted from plaintiff's failure to start on his visit to the sick person as promptly as he desired. He claims the damages incident to the mental distress and discomfort merely from delay in his departure, not for the anxiety naturally felt for the condition of the sick relative. He was the subject of two mental pains,—one for the condition of the sick person; the other from delay at the railroad station,—the latter only being the subject of this action. It cannot be pretended that damages from the latter cause of "anxiety" and "suspense"—uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay—was in the contemplation of the defendant when it entered into the alleged contract. It cannot be pretended that the defendant had in contemplation, in making the contract, the distinction between the plaintiff's natural anxiety for the sick father and his nervous impatience and worry of mind from detention at the place of departure. Eagerness to start on a journey, impatience of delay, and trouble of mind wrought by detention at a railroad station, have never before now been made the sole ground of an action for damages, and are the sole ground of plaintiff's claim for \$5,000 damages in this suit.

The authorities are substantially agreed on the proposition that pain of mind, as distinct from bodily suffering, can be considered in actions for damages from injuries to the person, and for pecuniary loss and ex-

pense or like causes, incident to such injuries. But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action. It was said in *Lynch v. Knight*, 9 H. L. 598, that "mental pain and anxiety the law cannot value and does not pretend to redress when the unlawful act complained of caused that alone." We think there was no error in the court below in sustaining the demurrer in this case, and in holding that, "in an action for the breach of a contract, damages cannot be recovered for disappointment and mental suffering only, there being no allegation of any other damage."

The complaint claims, as a second cause of action, the sum of \$195, with interest from the 24th of April, 1890, till paid, and costs; the principal sum being the amount paid by plaintiff for the hire of a special train from Laurens Court House to Columbia, for the purpose of making close connection with the train from Columbia to Marion Court House. The record shows that defendant was ready to perform the service which it had engaged to perform, but that plaintiff refused to take the special train that had been hired; the ground of declining to take it being the refusal of defendant to guaranty his arrival at Columbia by the required time. The defendant had the right to refuse to run a special train at an irregular hour, at a speed to insure its arrival at a specified time. Its right to withhold a guaranty to that effect being such as legally and necessarily belongs to every railroad management, it followed that, when the plaintiff refused to take the special train proffered by the defendant, without such guaranty, the latter was exonerated from the performance of its obligation, and the plaintiff was without right in the premises, except to a return of the money which he had paid for the train.

The answer admits that the defendant declined to guaranty a connection in time; alleges the plaintiff's refusal to take the train; sets up a tender of the money in return, made at the time and before suit; and renews the tender in court, and proffers judgment for the principal sum; all in accordance with the practice in the state courts of South Carolina. The tender having been admitted, there was no error in the instruction of the court below to the jury to find for the plaintiff the sum of \$195, without interest or costs.

The judgment of the court below, therefore, is affirmed.

HACKETT *et al.* v. MARMET Co.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 11.

1. **EJECTMENT—TITLE TO SUPPORT—ADVERSE POSSESSION AND PAYMENT OF TAXES.**
In ejectment, in West Virginia, it is immaterial whether the paper title of the plaintiff is good or not, when he has proved adverse possession and payment of taxes for 10 years, for this gives a perfect title under the state statute of limitation.
2. **LANDLORD AND TENANT—ESTOPPEL—DENIAL OF LANDLORD'S TITLE.**
Where a person admits that he stands in the relation of a tenant to another, he is estopped to deny the validity of his landlord's title.
3. **SAME—LEASE—NOTICE TO QUIT.**
Where a lease provides that the tenant shall deliver possession on voluntarily ceasing to work for the lessor or on receipt of notice to quit, the lessor can maintain an action of ejectment when the lessee voluntarily ceases to work for him, whether valid notice to quit is given or not.
4. **SAME—MISNOMER—EJECTMENT.**
The Marmet Company was incorporated under the laws of Ohio, and permitted to do business in West Virginia under that name, according to the laws of the state. It customarily used in West Virginia the name of the Marmet Mining Company, and executed a lease under this misnomer. Its identity, however, appeared both by proof and admissions. *Held*, that the Marmet Company could maintain an action of ejectment under the lease.

In Error to the Circuit Court of the United States for the District of West Virginia.

At Law. Action of ejectment by the Marmet Company against P. J. Hackett and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Statement by HUGHES, District Judge:

This was an action in ejectment, instituted and conducted under the practice in such cases observed in West Virginia. The action was brought for the recovery of lots of ground and houses upon them, contained in a tract of land in Putnam county, in that state, embracing 4,500 acres, described in the declaration. At the trial of the cause, the defendants below elected to sever, and pleaded not guilty, severally. It was afterwards agreed upon the record that the case against P. J. Hackett should be tried singly, and that the final judgment in that action should be entered in each of the other cases,—about 120 in all. The defendants below had been miners in the employment of the plaintiff company, as such occupying houses on its property, under leases the same as that under which Hackett held. That lease contained the following stipulations:

"This lease shall terminate and close whenever the said lessee, from any cause, ceases to work for said company. The said company may terminate this lease at any time by giving the said lessee ten days' notice in writing that the same shall end and terminate upon some day named in such notice, and upon the day so named in said notice this lease shall terminate and end, and the said lessor may re-enter and take possession of said leased premises without further notice or proceeding. The said lessee hereby agrees and promises to pay to the said Marmet Mining Company the rent, as aforesaid, monthly, and also agrees that such rent may be withheld by said company

out of any wages accruing to him from said company; and he also agrees to deliver possession to said company of said tenement building and appurtenances upon the termination of this lease, whether the same is terminated by notice or by his ceasing to work for said company, as hereinbefore provided, or in any other manner whatever; and under no circumstances and in no event shall this lease be construed to be a renting from year to year. It being the purpose of this lease to secure the said company the use of said tenement building and appurtenances for the persons in its employ, the said P. J. Hackett enters into this lease with a full understanding of this purpose, and admits its justice and propriety, and also recognizes and admits the right and power of the said company to terminate this lease in the manner hereinbefore provided, at any time and for any purpose it may choose, and hereby agrees to all provisions of the foregoing lease."

The lease was dated June 22, 1886. It was made in the name of the Marmet Mining Company. Prior to the month of June, 1885, the Marmet Company, the plaintiff in this cause, leased of its subsequent vendors the premises mentioned and described in the declaration in this cause, and as such lessee, and under the name of the Marmet Mining Company, operated said property as a coal property, and continued said operations in said name until the deeds aforesaid were executed to it, and thereafter continued said business in said name, as owner of said property, and still does so.

The Marmet Company derived title through Henry J. Raymond and Elisha Riggs, and through the Averill Coal & Oil Company. Henry J. Raymond and Elisha Riggs, at the date of their deed to the Averill Coal & Oil Company of October 20, 1866, had good title to the premises therein described. Said premises are of value greater than \$2,000. The plaintiff, and those under whom it claims under the deeds aforesaid, are and have been, by its agents and tenants, in the actual possession of said premises ever since the date of said deed of October 22, 1866, and have paid all the taxes charged or chargeable thereon since that date, to wit, the taxes for the year 1866 and each year since. They have had possession and paid taxes for more than 10 years preceding the institution of this suit. Since the date of the deed of December 22, 1866, the plaintiff, under the name of the Marmet Mining Company, has been largely engaged in mining and shipping coal from said premises, and has had on said premises, for the use of its miners and employes, many houses, one of which houses, to wit, house 52, is now, and was at the commencement of this suit, occupied by the defendant P. J. Hackett. The plaintiff, under the name of the Marmet Mining Company, using said name to distinguish its transactions and business in West Virginia from its transactions and business elsewhere, leased to its miners these houses, and, among them, leased to the defendant P. J. Hackett, as one of its miners, the house 52 and premises set out in the written lease aforesaid, dated June 22, 1886. Hackett signed said lease at its date, and delivered the same to the plaintiff, and has ever since occupied said house, and paid to the plaintiff, under the name of the Marmet Mining Company, under said lease, the rents therein provided for up to the 1st

day of January, 1891. About the 1st day of January, 1891, the miners, including the defendant Hackett, struck, and ceased to work for the plaintiff, doing business as aforesaid, because of the plaintiff's refusal to increase its prices of and for mining coal from 2 cents per bushel to 2½ cents per bushel, whereupon the plaintiff, by the name of the Marmet Mining Company, gave to the defendant Hackett more than 10 days' notice to terminate the lease and tenancy, and to quit the premises, which notice was in writing, but the said defendant refused to vacate said house and premises, and still occupies the same. Said notice was given in January, 1891, and no rent has been paid by said defendant for said premises since January, 1891. The plaintiff has complied with all the requirements of the laws of West Virginia authorizing foreign corporations to hold property and do business and prosecute suits in that state.

On the part of the defendant below it was proved affirmatively that he had entered into the possession of the house and premises in question in this suit in June, 1885, as the tenant of the plaintiff, the Marmet Company, and that he held and occupied the same as such tenant, and paid the rent thereof to the said company as such tenant prior to the date of said lease given in evidence in this case by the plaintiff, during all of which time he was mining coal for the plaintiff; that after the date of the lease he continued to mine coal for the Marmet Company, and paid his rent for the house and premises to that company up to the time he quit work for said company; that the plaintiff's agent informed him at the time he executed the lease that he should not work for the plaintiff unless he executed the same, and thereupon he did execute said lease, and thereafter paid the rent thereof to the plaintiff, as aforesaid, up to January 1, 1891; that he did not, in terms, refuse to work for the plaintiff, but did voluntarily cease to so work about January 1, 1891, because the plaintiff refused to increase its miners' wages for mining coal from 2 cents per bushel to 2½ cents per bushel, and that he never received any notice to quit and surrender the premises in question from any one, except the notice in writing given in evidence in this cause by the plaintiff; that the plaintiff paid him for all the coal mined by him up to January 1, 1891, and that he had not worked for the plaintiff in any way since that date. And, the plaintiff not objecting to the evidence and proof so offered, the same was given to the jury in the words and figures stated in said offer. The defendant further proved that in a suit in the circuit court of Putnam county, W. Va., brought by R. N. Lilly against the Marmet Mining Company, the plaintiff here, the Marmet Mining Company, filed a plea in bar of said suit, duly verified, that there was no such corporation as the Marmet Mining Company, and that said suit was thereupon dismissed without trial. In the descent of the property embracing the leased premises one Elisha Riggs was a holder of some of the bonds secured by mortgage upon it at one stage of the descent. Riggs died. The mortgage was foreclosed. Riggs' executors were among those who purchased at the sale in foreclosure. Deed was made to them, as executors, among other grantees; and these executors, as

such, united with other grantors, afterwards, in conveying the property to the Marmet Company. It is objected on behalf of Hackett that no power by will to sell real estate is shown by the Marmet Company to have been given the executors of Riggs, and therefore that no title passed to that company as to the undivided portion of the property which represented the bonds belonging to the estate of Riggs.

Other objections to the right of the plaintiff company to recover in this suit, based on other facts in the case, are stated as follows in behalf of the plaintiff in error:

"The court erred in overruling the objection of the plaintiff in error to the reading in evidence to the jury of the lease dated June 22, 1886, executed by the Marmet Mining Company, by W. W. Adams, cashier, to the plaintiff in error, by the defendant in error, and in permitting said lease to be so read in evidence to the jury, notwithstanding said objections. This lease was not the lease of the defendant in error, the Marmet Company, the plaintiff below, but it was the lease of an entirely different company. The plaintiff in error was not, therefore, the tenant of the defendant in error, but of the Marmet Mining Company. And the oral evidence improperly permitted by the court to be given in connection with said lease against the objections of the plaintiff in error did not make the said lease proper evidence in this cause. The defendant in error, the plaintiff below, is an Ohio corporation, which, but for the statutes of the state of West Virginia granting the privilege to nonresident corporations, could not do business in that state. The corporate name of the defendant in error, as shown by its articles of incorporation, was and is the The Marmet Company. The several papers and certificates filed by it for the purpose of acquiring the right under the provisions of said statute to transact its corporate business in West Virginia all show its corporate name to be the Marmet Company. And conceding, for the purpose of argument only, that the misnomer of a resident corporation in pleading might not be fatal to the pleader, it does not follow that a foreign corporation can obtain authority to transact its corporate business in the state of West Virginia in its proper corporate name, and then, instead of doing so, as matter of convenience, assume another and different name, and transact its corporate business in that name, which the defendant in error in this case, by its own showing, did.

"The court erred also in overruling the objections of the plaintiff in error to the reading in evidence to the jury by the defendant in error of the notice to the plaintiff in error to quit and surrender the possession of the premises occupied by him, signed, 'Marmet Mining Company. By Geo. W. Guyst, Superintendent,' and of the return of the service thereof, and in permitting said notice and the return of the service thereof to be read in evidence to the jury, notwithstanding the objections. If the theory of the defendant in error in this case is correct, the notice to quit should have been in the name of the Marmet Company, and not in the name of the Marmet Mining Company. And the service of this notice did not entitle the defendant in error to a verdict for the recovery of the possession of the leased premises. And the return of the service of the notice was not sufficient in law, (1) because it did not show that the notice was served on the plaintiff in error in the county of Putnam; (2) it did not show that Goff, whose name is signed to said return, was either sheriff, deputy sheriff, or constable of Putnam county; (3) and said return is not verified by affidavit."

C. C. Watts, for plaintiff in error.

Malcolm Jackson, for defendant in error.

Before BOND, Circuit Judge, and HUGHES and SIMONTON, District Judges.

HUGHES, District Judge, (*after stating the facts.*) It thus appears that the plaintiff in error excepts to the judgment of the court below on three grounds, viz.: *First*, a failure of the defendant in error to prove power to convey real estate in the executors who united with other grantors in conveying the land embracing house and lot 52 to the Marmet Company; *second*, irregularities in the notice to quit given to the defendant below; and, *third*, and chiefly, the variance in name between the Marmet Company, the nominal plaintiff below, and the Marmet Mining Company, of whom the defendant below was an employe and tenant, and the tenant in possession of house and lot No. 52. Doubtless the first two objections are based really and chiefly upon the variance between the name of the plaintiff company shown by the record and that of the company which made the lease, and of whom Hackett held as lessee after June, 1886. The two objections would not probably have been made if this misnomer had not been used. But they will be dealt with as if no such variance appeared.

1. The first exception cannot be sustained. It is immaterial to this case whether the executors of Elisha Riggs had or had not power to unite in a conveyance of real estate; for, independently of the paper title, the Marmet Company proved a title by possession, and the payment of taxes for more than 10 years next preceding the institution of this suit, a tenure which constitutes a perfect title under the laws of limitation in force in West Virginia. "Uninterrupted, honest, and adverse possession for the period prescribed by the statute not only gives a right of possession (in Virginia and West Virginia) which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of a title, which, independently of such continued adversary possession, would be a better title." 2 Minor, Inst.; *Middleton v. Johns*, 4 Grat. 129. This exception cannot be entertained, moreover, for another reason. The defendant below is in this case estopped from bringing in question the title of the plaintiff company to the premises which he holds from it. The relation of landlord and tenant between the plaintiff and the defendant below having been not only established by the plaintiff, but unqualifiedly admitted and affirmatively proved by the defendant below, objection from this tenant to this landlord's title cannot be entertained by the court. In such a case "the title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. It is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to contradict the title of his lessor without dis-

paraging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation." *Blight v. Rochester*, 7 Wheat. 547.

2. The exception of the plaintiff in error to the service and the return of the notice to quit given him by the mining company cannot avail to invalidate the judgment below, for, without regard to any notice in writing at all, the plaintiff below had full right to maintain its action. He admits in his defense that he voluntarily ceased to work for the company, and the lease provides in express terms that the lessee shall deliver possession, "whether the same is terminated by notice or by his ceasing to work for said company, as hereinbefore provided." In the face of an admission that he had voluntarily ceased to work for the company, thereby violating the express stipulation of the lease, it is immaterial whether any notice to quit was given at all, and whether its service and return were regular or not. This objection to the judgment of the court below must therefore be overruled.

3. We come now to the point which is the chief reliance of the plaintiff in error, to wit, that whereas the evidence produced at the trial went to establish title in the Marmet Company, the plaintiff of record in the court below, yet the lease on which the action is founded was made by the Marmet Mining Company, the defendant below being tenant of and holding from the Marmet Mining Company, "an entirely different company;" and therefore, that proofs of the title of the Marmet Company were improperly admitted in evidence at the trial of a suit for possession founded on a contract between the Marmet Mining Company and its lessee, the defendant below. The question presented by this exception is, therefore, whether a corporation is limited in its transactions strictly to the use of the name under which it was incorporated, and whether the use of such a variation in name as that of the Marmet Mining Company instead of the Marmet Company *ipso facto* vitiates its contract as to the company of the corporate name, and makes it in law necessarily a different and distinct corporation from the chartered one. A long line of authorities negatives such a contention, and establishes the proposition concurred in by courts and text writers, that a misnomer of the corporation does not invalidate a deed if it can be collected from the face of the deed, aided by extrinsic evidence, what corporation is intended; the real test being not identity of name, but identity of the corporation itself, or capability of identification. Mr. Dillon, in his work on Municipal Corporations, expresses the law of the subject as accepted by the courts:

"A misnomer or variation from the precise name of the corporation in a grant or obligation by or to it is not material if the identity of the corporation is unmistakable either from the face of the instrument or from the averment and proof."

Identity of name, therefore, being unnecessary, the only question in the case under consideration is as to the identity of the Marmet Mining

Company with the Marmet Company. This identity is established by the plaintiff in error himself. He proved affirmatively at the trial "that he had entered into the possession of the house and premises in question in this suit in June, 1885, as the tenant of the plaintiff, the Marmet Company, and that he held and occupied the same as such tenant, and paid the rent thereof to the said company as such tenant, prior to the date of the lease [June 22, 1886] given in evidence in this case by the plaintiff; * * * that after the date of said lease [which was from the Marmet Mining Company] he continued to mine coal for the said Marmet Company, and paid his rent for said house and premises to said company, [his lessor being now the Marmet Mining Company,] up to the time he quit work for said company, * * * January 1, 1891; * * * and that he never received any notice to quit and surrender the premises in question from any one except the notice in writing given in evidence in this cause by the plaintiff;" the notice, be it observed, having been given by the Marmet Mining Company, and the plaintiff of record of which he speaks being the Marmet Company. Throughout his evidence given in his defense he speaks of and treats the plaintiff Marmet Company as identical with his lessor and employer under the lease of June, 1886, the Marmet Mining Company, as one and the same corporation. It was both proven by the plaintiff company and admitted by the plaintiff in error that the company was in possession of the premises embracing house and lot 52, and extensively operated them as a coal property from as early a date as 1866; that the plaintiff in error was in its employment as well before the lease of June, 1886, as afterwards down to 1891, receiving wages from and paying rent to the Marmet Company before and the Marmet Mining Company after June, 1886, as one and the same corporation. Not only is this identity of the corporation recognized throughout by Hackett himself, but it is apparent also from the written evidence in the case. For instance, the first clause of Hackett's lease from the company of June 22, 1886, uses these words:

"The Marmet Mining company doth hereby lease to P. J. Hackett, now [that is to say, before the lease was entered into] in its employ, the tenement building marked and known as '52,' upon the premises and coal property of the Raymond City coal property, now in the possession and under the control of said Marmet Mining Company."

The identity of the Marmet Company with the Marmet Mining Company being thus established beyond all doubt, the objection of the plaintiff in error to the judgment of the court below, founded upon this variation in the use of the name of the corporation, cannot be sustained.

The judgment of the court below must therefore be affirmed.

UNITED STATES v. NEWTON.

(District Court, S. D. Iowa. May 26, 1892.)

1. CONSPIRACY TO FRAUD UNITED STATES—FRAUDULENT INCREASE OF MAILS DURING WEIGHING PERIOD.

On separate trial of one defendant, on an indictment against two for conspiring to defraud the United States by mailing a large quantity of old newspapers for the purpose of fraudulently increasing the weight of mail matter, (transported over a railway post route during a period fixed by the postal authorities for weighing such mail matter, as a basis for ascertaining the additional compensation to be paid the railway company,) thereby offending against Rev. St. § 5440, which provides that if two or more persons conspire to commit any offense against, or to defraud, the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties thereto shall be liable, etc., before the jury can convict they must find the defendant guilty beyond any reasonable doubt; and this includes finding from the evidence (1) that the conspiracy charged existed, (2) that the overt act charged was committed in furtherance of the conspiracy, and (3) that defendant was one of the conspirators.

2. SAME—BENEFIT TO CONSPIRATORS.

To constitute such conspiracy it is not essential that defendant, or any other of the alleged conspirators, should have derived any pecuniary benefit therefrom; but any benefit so accruing therefrom may be considered by the jury as a circumstance in determining defendant's relation to the acts committed.

3. SAME—SUCCESS OF CONSPIRACY.

To constitute the statutory offense, it is not necessary that the alleged conspiracy should have been successful.

4. SAME—KNOWLEDGE OF ACTS OF OTHER CONSPIRATOR.

Mere suspicion or bare knowledge by an alleged co-conspirator that defendant was attempting to defraud the United States is not sufficient to make such person a party to the attempt to defraud, and to sustain the charge of conspiracy. To constitute a conspiracy the evidence must also show intentional participancy in the attempt to defraud; and if the evidence shows that such alleged co-conspirator had knowledge that defendant was mailing over said post route such newspapers with intent to defraud the United States, and such alleged co-conspirator, with a view to assist defendant therein, remailed such newspapers over said post route, a conspiracy to defraud the United States is thereby proven, and by such remailing such alleged co-conspirator becomes an active party to such conspiracy.

5. SAME—PLACE OF CONSPIRACY.

If the fraudulent mailing was committed within the judicial district charged in the indictment, it is immaterial where the alleged conspiracy was formed, or whether or not the parties thereto, or either of them, were ever within such district.

6. SAME—TIME OF CONSPIRACY.

It is not necessary, to justify a verdict of guilty, that the conspiracy should have been formed and in full existence prior to the weighing of such fraudulent mail matter. It is sufficient if the defendant and any other person at any time during the weighing formed a common design to defraud the government in connection with such weighing, and that then the defendant or such other person committed an overt act in connection therewith.

7. SAME—PREVIOUS ACTS OF CONSPIRATOR.

If, prior to the formation of such common design, defendant or any other person had been doing the very act which afterwards, by being committed to effect the conspiracy, ripened into the statutory offense, a verdict of guilty would be warranted.

8. SAME—ACTS OUT OF DISTRICT CHARGED IN INDICTMENT.

Evidence that the newspapers, the fraudulent mailing of which within the district constituted the overt act charged in the indictment, were rewrapped and remailed over the post route in question, from a place without the district, by an alleged co-conspirator, is not competent as proof of such overt act, but may be considered as showing the nature, extent, plan, and operations of the conspiracy, if one existed.

9. SAME—ACTS OF EMPLOYEES OR AGENTS.

If such mailing was done by defendant's employees, servants, or agents, as such, and not as parties to, or members or abettors of, the common design, they will not be deemed co-conspirators, nor will such mailing amount to an overt act.

10. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt of the guilt of a defendant charged with the statutory offense of conspiring against the United States is a doubt based on reason, and which is reasonable in view of all the evidence. It is an honest, substantial misgiving generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him.

At Law. Trial of an indictment against John C. Newton for conspiracy to defraud the United States. Verdict, "Not guilty."

For decision on demurrer to the indictment, see 48 Fed. Rep. 218.

Lewis Miles, Dist. Atty., (*C. C. Nourse*, Special Counsel,) for plaintiff.

Chas. A. Clark and *Kauffman & Guernsey*, for defendant.

WOOLSON, District Judge, (*orally charging jury*.) In the indictment presented in the case now on trial John C. Newton and Millard F. Oxford are jointly indicted, but the court has ordered a separate trial as to these defendants. In the case now under consideration, John C. Newton alone is on trial. Your verdict will establish the guilt or innocence of the defendant, Newton, leaving the guilt or innocence of Mr. Oxford to be established in another trial, wherein another jury shall determine his—that is, Oxford's—guilt or innocence. To the indictment herein John C. Newton pleads not guilty. This plea puts in issue every point necessary to be proven in order to convict; and before the government is entitled to a verdict of guilty, every point necessary to convict must be satisfactorily proven. The defendant is presumed by the law to be innocent. The case starts with this presumption in defendant's favor; and to overthrow this presumption, and justify a verdict of guilty at your hands, the guilt of defendant must be established beyond a reasonable doubt. The indictment in this case contains two counts. The court instructs you that the second count is now withdrawn from your consideration, and you will confine your deliberations to the first count of the indictment, and the verdict which you will return into court will be confined to the first count; and the evidence submitted, and instructions given you, will be applied by you to the first count of the indictment, and your finding relate only to the question of guilt or innocence of defendant under said first count. The charge in the first count of the indictment is that of conspiracy to defraud the United States, and that one of the parties to the conspiracy committed an act which is stated in the indictment, and which was so committed in furtherance, or to effect the object, of such conspiracy. Briefly stated, the conspiracy so charged may be said to be that the defendant, John C. Newton, entered into a conspiracy with Millard F. Oxford, and other persons to the grand jurors unknown, to defraud the United States; and that such defrauding was to be accomplished by, and had for its object, the unlawful and fraudulent procuring from the United States of money on the unlawful and fraudulent pretense and claim that under the statutes and arrangements then existing between the United States and the Des Moines & Kansas City Railway Company (of which company said Newton was at said date the vice president and general manager) said company was car-

rying over the post route extending over its line of road (which said line was a post route of the United States) an average daily weight of mail matter greatly in excess of the average mail matter actually carried over said post route; that the means to be used in carrying such conspiracy into effect was to load down the mails on said post route, during a period when the government was weighing the mails carried thereon, with old and substantially valueless newspapers, which were during said weighing period to be mailed over said post route, but not mailed for any legitimate purpose, nor with any intent to use the said mails legitimately therefor, but with the unlawful and fraudulent intent thereby to create a fictitious and fraudulent average, on which the compensation to be paid by the United States to the said railway company for carrying the mail over said post route was to be based, and thus and thereby the government be induced to pay out and should pay out for carrying said mails, and said railway company should thereby receive, an amount greatly in excess of the amount which in fact and of right, under the statutes with reference to carrying said mail, would be paid by the government, if, instead of such paying therefor on the basis of said fictitious and fraudulent average of mail matter carried, the payment therefor by the United States had been based on the average weight carried over said line of the legitimate mail matter,—that is to say, the weight of mail matter other than said newspapers so mailed by the said Newton. And the overt act performed to carry out the purpose of this alleged conspiracy is stated in the indictment to be that at the southern district of Iowa there was mailed and caused to be transported over the said post route on sundry dates on and after April 1, 1891, and during the mail-weighing period thereon, large and extraordinary quantities of old newspapers, the same not being placed in the mail for any legitimate purpose, but with the sole intent and purpose of fraudulently increasing the weight of the mail so transported over said line during said weighing period.

The general facts introduced in evidence are largely undisputed, and the controversy in this trial is largely as to whether the facts proven constitute a conspiracy, and whether defendant, Newton, was connected with such a conspiracy, to defraud the government. The evidence shows without dispute that in the winter of 1890 and the early months of 1891 the Des Moines & Kansas City Railway Company was operating a line of railway between Des Moines, Iowa, and Cainesville, Mo., and that said line of railway was a post route, and known as "No. 143,084," and the mails were being carried over the entire length of that line; that some time about the month of November, 1890, the superintendent of said railway company applied to the post-office authorities for a reweighing of the mails, with a view to an increase in the compensation then being paid to the company for carrying the mails; that this application was based on the ground that an increase had actually occurred in mail matter so carried, and thereby an increase in compensation was rightfully due to the company. From a subsequent letter from said superintendent to the post-office authorities who had charge of the adjustment of such compensation it appears that the reweighing was refused by the

said authorities; that thereupon the said superintendent urged more largely in detail his reasons for the claim for increased compensation. The uncontradicted testimony of the superintendent is that this correspondence was submitted to defendant, Newton, and was a subject of consultation between said defendant and the superintendent. At this time, and for some time previous thereto, as well as subsequently, and up to the finding of the indictment in this case, the defendant, Newton, was the general manager of said Des Moines & Kansas City Railway Company. That about January 10, 1891, the post-office authorities,—and I use the term “post-office authorities” as meaning the proper officials at the post-office department at Washington,—the post-office authorities forwarded to defendant, Newton, as general manager of the said railway company, a circular letter, and inclosed therewith a blank, which has been spoken of as the “Railroad Distance Circular,” and which you will have before you in your deliberations in the case. On this blank the distances between stations on this line of railway were to be entered, with certain other information, for the purpose, as stated therein, of being used in adjustment of compensation to said railway company for carrying the mails. It is shown that this circular, after being filled out and signed by the superintendent of the railway company, was returned to the post-office authorities, with a letter from the president of the said railway company, and that about January 16, 1891, the post-office authorities forwarded notice to defendant, Newton, as general manager of the said railway company, that for 30 successive working days the mail service of the government would weigh the mail carried over the line of said railway, for the purpose of adjusting the compensation to be paid to the said railway company from July 1, 1891, and this notification invites the co-operation of said company in taking such weights.

At this point I may properly call your attention to the law with reference to the method in which the compensation to be paid for carrying the mails is determined. The statute provides that at dates to be fixed by the postmaster general, and not less frequently than once in every four years, there shall take place on each of the mail routes, such as that of said railway company, an actual weighing of the mails for not less than 30 successive working days, and the average weight of the mails actually carried on the route as thus ascertained during such weighing period should thereupon constitute the basis upon which was to be computed, at the prices fixed by law, the compensation to be received by the company for carrying the mails. The testimony shows without contradiction that the weighing of the mails provided for in said letter of notification was entered upon and proceeded with during such weighing period, and the results of the said weighing for each of the said weighing days were daily forwarded to the post-office authorities, and to the officials of the said railway company. One complete set of these daily reports is in evidence before you, and shows that said weighing extended over the entire line of said railway from Des Moines to Cainesville. The undisputed evidence further shows that, during at least a large portion of this

weighing period, there was mailed by or under the direction of the defendant, Newton, large quantities of newspaper matter, the same being addressed to post offices which caused said mail in the ordinary method of carrying same to be carried over this said line of railway, some of such mailed matter being carried over the entire line of said railway, and other portions being carried over parts of said line. Evidence has been introduced touching the method in which the mail matter was prepared for mailing, and was actually mailed; that large amounts of newspaper wrappers were bought from the government and used in preparing such newspapers for mailing, and that the amount of newspapers so mailed amounted to a large quantity, some two bales, in weight approaching a couple of tons; and the character of these newspapers is also in evidence as to their dates and the languages in which they were printed, and the method in which they were prepared for mailing; and the evidence is also undisputed that during said mailing period Mr. Oxford caused to be rewrapped and remailed over said line of railway, or some parts thereof, large portions of said newspaper mail, the wrappers, with the address written or stamped thereon for such remailing, having been forwarded to Mr. Oxford by defendant, Newton, or under his directions. And the evidence further shows without contradiction that the newspaper mail matter thus mailed and remailed over said line of railway was weighed with the other mail matter carried over said line, and was included in said daily reports of weighing, and constituted a large part of the mail matter carried over said line during said weighing period. You have heard these weights as they have been given in evidence before you, and it is unnecessary for me to repeat the same at this time.

The main questions presented for your consideration herein may be placed under three points: *First*. Did a conspiracy, as charged in the indictment, exist? *Second*. If such conspiracy existed, was the overt act charged in the indictment committed in furtherance of such conspiracy? *Third*. If you find the conspiracy and overt act as charged, was defendant, Newton, a member of it; that is, was he one of the conspirators? The duty of the government, before it can properly demand a verdict of guilty at your hands, must be fulfilled in satisfactorily proving to you, as hereafter stated, each of these three propositions. If it fails in satisfactorily proving any one of these three propositions, then you cannot convict; that is, if the proof is found by you to establish the existence of the conspiracy, and not of the overt act charged, or if such proof shall establish the conspiracy, and the committal, in furtherance thereof, of the overt act charged, but does not satisfactorily prove to you that defendant, Newton, was a member of such conspiracy, then the government has not fulfilled the requirements of the law as to proving the guilt of defendant, Newton; and in either such a case your verdict must be for the defendant. But if you find under the evidence and the law as I shall presently state it to you that the conspiracy charged did exist, and that in furtherance thereof the overt act charged in the indictment was committed, and that defendant, Newton, was one of the conspirators, then the government has met all the points it is compelled to prove;

and thereby, if the guilt of defendant is found by you beyond a reasonable doubt, in such a case it would be your duty under your oaths as jurors to return a verdict of guilty against the defendant, Newton.

What is a conspiracy, as the statute uses that term? and how is it formed? *First.* Two or more persons must enter into it. One person cannot constitute a conspiracy. If every part of the acts charged in the indictment had been done by defendant, Newton, alone, and without any other person having combined with him in any arrangement or agreement with reference thereto, or with reference to any result to be arrived at, through or by means of said act, then there would be, in law, no conspiracy. And this would be true even though the result to be attained or the act committed towards effecting that result was criminal, and wholly criminal. No conspiracy can exist without at least two persons being conspirators therein. *Second.* It is not necessary, in order to constitute a conspiracy, that two or more persons should actually meet together,—that is, personally be together,—and then enter into an explicit or formal agreement for an unlawful or criminal scheme; nor is it necessary, before a conspiracy can be formed, that two or more persons shall directly—that is, expressly, by a writing or by spoken words—state or agree as to what that unlawful or criminal scheme is to be, or the particulars of the plan, or the means to be applied in carrying out such a conspiracy. Persons agreeing upon or entering upon a scheme to defraud the government are most likely to confer together in secret with reference to such a scheme, and secretly to develop any plans they may agree upon; and such secret agreement, and the scheme thus concocted, and the plans to be used therein, can rarely, in such cases, be proven by direct testimony. Conspiracies are seldom, indeed, formed in a manner open to direct proof. A conspiracy is rather a thing of darkness. Instead of coming out into the light of a written or completely expressed agreement, it lurks in secret. It loves darkness rather than light, for its deeds are evil. And accordingly it is sufficient to constitute a conspiracy that two or more persons in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of such conspiracy, irrespective of whether the part he takes is a superior or subordinate part, and irrespective of whether he performs his part in the presence of his co-conspirators, or at a remote distance from them, and from the place where they are performing their parts in the conspiracy. A combination formed of two or more persons to effect an unlawful end, said persons acting under a common purpose to accomplish the unlawful end designed, is a conspiracy. Such connection with or relation to a conspiracy as the law takes notice of and punishes is not dependent upon personal, pecuniary interest in the result of the unlawful adventure. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by

a common design of accomplishing that unlawful end, and who in any way, and from any motive, work together in furtherance of the unlawful scheme, each one of such persons becomes a member of a conspiracy. It is not necessary, in order to constitute the conspiracy charged in the indictment, that every one of the parties to such conspiracy should reap a pecuniary advantage therefrom. The statute does not so require. The statute is aimed expressly against "conspiracy to defraud the United States," and this is irrespective of any pecuniary advantage accruing to any of the conspirators. Were it otherwise, the statute would have made the crime of such conspiracy to defraud the United States depend on the conspirators reaping benefit therefrom. The gist of the crime is conspiring to defraud the government. It is true that ordinarily such a conspiracy is attended with expectations in the minds of the conspirators of some advantage, pecuniary or otherwise, to arise to them therefrom; but this is not essential. A conspirator may be actuated by a desire to help some other person through the result of the conspiracy. He may actively assist in the conspiracy through friendship for some one whom he believes will be benefited thereby. Or he may instigate or co-operate in the conspiracy with a purpose to revenge some wrong or injustice which he feels the government has committed towards him, or his property or his interests in any manner. Yet if there appears in the evidence any pecuniary or other advantage which was expected, or might be expected, to arise from the carrying out of the conspiracy, that fact may properly be considered by the jury as a circumstance in the case. It is therefore obviously proper and important, in determining whether the person charged is one of the alleged conspirators, that the jury inquire whether there existed any interest or motive, pecuniary or of any other character, and whether accruing to him personally or to any enterprise or business with which he is connected, or to any person in whose success or advance he is interested, or whether any such motive or interest existed for the participation of such defendant in the unlawful enterprise. This may oftentimes materially aid in determining the relation of the party accused towards the acts committed, and whether or not such person was connected with the alleged conspiracy.

The indictment in this case is found under section 5440 of the Revised Statutes of the United States. That section provides that—

"If two or more persons conspire, either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of said parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

You will notice that the provisions of this section are very broad,— "conspire to defraud the United States in any manner or for any purpose." It is not necessary that the conspiracy be successful. It may fall short of the actual commission of the fraud intended. The government may not have been actually defrauded. The conspirators may have been arrested, or the conspiracy discovered, and its purpose thwarted before the conspiracy has resulted in defrauding the government, and

before the conspirators have reaped any pecuniary or other advantages from their conspiracy. Yet, if a conspiracy actually existed, and any party to the conspiracy does any act towards effecting the object of the conspiracy,—that is, towards effecting the fraud,—the offense, under this statute, is complete. So that you will see, that merely agreeing or combining together to commit the fraud is sufficient to constitute the offense, providing any one of the parties has taken a step towards its execution. The section I have quoted, you will notice, is very sweeping in its terms, and was doubtless intended to meet the parties to the fraud against the government on the very threshold of the perpetration of the crime, and to render them liable to its penalties before the consummation of the fraud.

Before you can find that the conspiracy charged in the indictment actually existed, you must find from the evidence that one or more persons were acting in concert or combination with the defendant, Newton, towards effecting or causing the result or end claimed in the indictment, viz., to defraud the United States. If the evidence does not satisfactorily prove to you that some person or persons acted in concert with defendant, Newton,—that is, were knowingly assisting said Newton, or participating with him, in the conspiracy charged, or in carrying out the same,—then you cannot find that a conspiracy existed. You will thus see that the assistance or participation in the alleged unlawful acts must be intentional. It follows, therefore, that proof of mere suspicion, or bare knowledge, that the act is being done by others, without such intentional participancy in it or connection with it, is not sufficient. While knowledge of the commission of the unlawful acts may properly be taken into consideration by the jury in connection with whatever facts or circumstances may be proven, to aid in determining whether or not any other person was connected with the defendant, Newton, as a participant in or a party to the alleged unlawful acts, if any such acts are proven, yet such mere knowledge, without more, by another person,—that is, knowledge that defendant, Newton, was attempting to defraud the United States, (if you find the evidence shows he was so attempting to defraud,)—would not make such other person a party to the acts. The proof must go further. Knowledge of the attempt must combine with an intent to defraud. If Mr. Oxford or any other person knew that defendant, Newton, was doing any act with intent to defraud the United States, and having such knowledge aided in doing those acts, assisted defendant, Newton, in the commission of the acts, if any such were being committed, (the intent wherein was to defraud the United States,) and in so assisting intended to aid the defendant in carrying out such intent, then I say to you, that Mr. Oxford, or such other person as the proof may show, by thus participating while having such knowledge, becomes and is in law a party to a conspiracy to so defraud. It is not essential, however, to the existence of a conspiracy that each conspirator shall have knowledge of all the details of the conspiracy. The conspiracies, from the nature of the case, must be very few in which all the details that enter into the con-

spiracy or into the methods of its operation are known to all the members of that conspiracy. Where the conspiracy includes many members it is practically impossible that each member shall be advised of all such details. And it is sufficient to render the person liable as a conspirator that he has knowledge of the common design or purpose of the conspiracy, and actively assents thereto, and assists in carrying said common purpose and design into execution by the common means agreed upon or practiced for so executing the conspiracy.

I may say to you at this point that it is possible that an act which may not be unlawful when performed by one person may become unlawful when performed by two or more persons. There are crimes which cannot be committed—as, for instance, a riot—by one person. This is also true, as I have heretofore stated, of the crime of conspiracy. And in this case your verdict will not be for or against the defendant, Newton, on the ground that what he did, if done by himself, would or would not have been a criminal act; that is, an act made criminal by the statute. You cannot acquit or convict the defendant, Newton, on such grounds. He does not stand here charged with committing by himself alone any crime, but he is charged with having, in conspiracy or unlawful combination with Mr. Oxford and others to the grand jurors unknown, committed the crime charged. And therefore, if the act charged to have been committed by the defendant, Newton, when done by himself alone, would not be a criminal act, but when committed by said defendant in connection with others would under the instructions given you become criminal, and if the evidence shall satisfy you that such act was committed by defendant, Newton, and such other person or persons, and they were acting in concert to a common end in commission of such unlawful act, then such evidence would properly be taken against defendant, Newton, as showing the existence of a conspiracy. Let me recall the test to be applied in this connection. I have already said, in substance, that, in order to establish a conspiracy, it is not necessary that there shall be any explicit or formal agreement for an unlawful scheme between the parties. Nor is it necessary to prove that the parties to the conspiracy were ever in this district wherein this case is being tried. Their personal presence in Iowa is not necessary to constitute the crime under the indictment. The criminal conspiracy charged in the indictment may have been in existence, and yet none of the conspirators ever have been within this state, or ever have personally met together. Upon this point the court charges you that, if the overt act, as it is frequently called,—that is, the act charged in the indictment as having been committed in furtherance of the conspiracy,—was committed within this district, and as charged in the indictment, then it does not matter where the conspiracy was formed, or the unlawful agreement was entered into; for in contemplation of law such conspiracy is held to be renewed, or as it is sometimes, and perhaps more properly, said, it is continued, in the district where such overt act is performed; and such act gives to the court in that district jurisdiction of the case. Therefore it becomes immaterial where the conspiracy, if it

ever existed, was formed or entered upon. If it existed, and the overt act charged in the indictment was committed in this district by any party to the conspiracy, to effect the object of the conspiracy, then whoever was a party to said conspiracy or unlawful agreement is guilty of the crime charged in the indictment.

One word as to the time or date. The indictment states the date of the formation of this conspiracy as having been the 10th of March, 1891. Now, the government is not restricted to that date. The only restriction is the statute of limitations. For the purpose of this trial it is sufficient as to the date of this conspiracy, if one is found by you, that the same existed within three years prior to the finding of the indictment herein, which finding was upon May 12, 1891.

I have suggested that direct and positive proof is not required to be made of any express agreement to do the act forbidden by law. It is frequently impossible to produce such proof. Persons planning or arranging a conspiracy do not usually meditate or plan their conspiracy in the presence of witnesses not parties to it, nor in the terms of express agreement. All concerted action to commit a fraud is secretly originated, and is ordinarily shown by separate and independent acts, tending to exhibit a common design. The common design is the essence of the charge, and it is not necessary to prove that the parties came together and actually agreed in terms to have that design, and to pursue it by common means. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination, or agreement between the parties in the given case to effect the unlawful purpose charged in the indictment must be proved, because without the unlawful, or, as it is sometimes called, the corrupt, agreement or understanding, there is no conspiracy. (And in this connection I may say that the term "corrupt," as applied to a conspiracy, means an "unlawful" agreement.) The acts of the parties, the nature of those acts, with the accompanying circumstances, the character of the transactions or series of transactions, as the evidence may disclose them, should be investigated and considered, and are sometimes the only source from which to derive the evidence of an agreement, which may be express or may be implied, to do the act which the law condemns. If, in this case, the evidence shall satisfy and prove to you that the defendant, Newton, and Mr. Oxford, or said defendant, Newton, and other persons, did actually concur in a common purpose and common design to defraud the United States as charged in the indictment, then it is not necessary that the government should prove any other agreement to concur.

It has been claimed by counsel in argument, that, in order to justify a verdict of guilty under the indictment, the government must show a conspiracy to have been formed and in full existence before the weighing of the mails, as alleged in the indictment, was entered upon. In this view the court cannot concur. If the jury find from the evidence that at any time during the period of the said weighing of the mails, as shown in the evidence, the defendant, Newton, and Mr. Oxford, or the defendant and any other person or persons, formed or came together in a common design of

defrauding the government in connection with said mail weighing, as charged in the indictment, and then defendant, Newton, or Mr. Oxford, or any other person who had entered into this common design or understanding; committed the act charged in the indictment, for the purpose of carrying into effect this common design or understanding, then, immediately on the commission of such act, defendant, Newton, and Mr. Oxford, and any and all other person or persons who were parties to the common design or understanding, would be guilty of this crime of conspiracy. And this is equally true even if previous to this forming of their unlawful common design or understanding, if one was ever formed, defendant, Newton, or any other person, had been doing the very act which afterwards, by being committed to effect the conspiracy, ripened the statutory crime of conspiracy; for, as I have heretofore said, whether defendant, Newton, or any one else, acting by himself, was or was not guilty of crime, does not fix the guilt of defendant. Newton, or his innocence, in the matter of any conspiracy thereafter formed, or put into effect. If you find from the evidence that defendant, Newton, and Mr. Oxford, or defendant, Newton, and any other persons, came to a common understanding or design to defraud the government in the manner charged in the indictment, and, for the purpose of carrying out the object of said common design, one of them did the overt act charged in the indictment, at whatever period in the mail weighing in evidence the same was done, then this would justify a verdict of guilty against defendant, Newton.

Evidence has been permitted to be introduced in reference to certain alleged rewrapping and remailing at Cainesville, Mo., by Mr. Oxford, or under his express direction, of certain portions of the newspaper matter which had been mailed over this post route; that is, the line of railway from Des Moines to Cainesville. This evidence cannot be taken as proving the overt act, or act performed to carry out the object of the conspiracy, as stated in the second point submitted in these instructions. Such overt act must be proven as laid in the indictment; that is, that within this district there was mailed from Des Moines, during said weighing period, over said post route, the mail matter described, and as described in the indictment; and unless such overt act is proven as it is laid in the indictment, and as I have stated it to you, the crime charged cannot be found by you to have been proven. But this evidence as to said rewrapping and remailing by said Oxford at Cainesville, Mo., has been admitted before you, and is to be considered by you, for the purpose of bringing before you the nature, the extent, the plan, and operations of the conspiracy, if such conspiracy existed. There has been laid before you evidence tending to show conversations when defendant, Newton, was not present, and acts done by others than said defendant in his absence. These conversations and these acts in defendant's (Newton's) absence are not evidence to show his connection with the conspiracy unless they are brought home to him. These conversations and acts by others than defendant, Newton, and in his absence, were admitted to show the nature and purpose, the plans and operations, of a conspiracy if one

existed. Guilt cannot be fastened upon any person by the declarations or statements, oral or written, of others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct, or admissions. It must be understood that under the established rules of law the various acts and admissions of others than the defendant, and made in his absence, are not evidence to show that the defendant was a member of the conspiracy; for no man's connection with a conspiracy can be legally established by what others did in his absence, and without his knowledge or concurrence. The conspiracy charged in the indictment is a conspiracy to defraud the United States. The question becomes material in this trial whether the conspiracy, if one has been proven, is such a conspiracy; that is, one whose purpose was to defraud the United States. And you may properly inquire, looking at the facts proven, whether such was the intent and purpose and natural effect of the conspiracy. It may assist you, in such consideration, to inquire what would have been the natural effect, had the conspiracy, if one existed, proceeded to its complete working out. If it had not been discovered by the government, and if the weights obtained during the weighing period heretofore described had been acted upon or used by the government as a basis for fixing the compensation for carrying the mails over the line of which defendant, Newton, was the general manager, would the United States have been defrauded by said carrying out of such conspiracy, if one has been proven? For defendant, Newton, cannot justly complain if said conspiracy, if one is proven to have existed, is viewed and tested from the standpoint of its natural effect. Nor can he justly complain if the natural effect of such conspiracy is held to be the object intended to be carried out by it. And, unless the evidence satisfies you that defendant, Newton, did not intend his acts, proved in the evidence, should have their natural effect, you are authorized to give to such acts that natural effect, as being the effect he designed the acts should have.

You will have observed in the trial of this cause that one of the theories upon which is based the claim of defendant's (Newton's) innocence is that defendant, Newton, was not acting in concert or agreement with any other person in whatever acts he did, as shown in the evidence; that is, that no agreement or combination with reference to such acts had been entered into between him and any other parties, and that they were not acting together in the matter with any common design or purpose to effect a common end. I have already with considerable detail stated the law applicable to this claim. I will now only add, if you find from the evidence that the acts claimed by the government to have been committed in the conspiracy charged were by the parties committing them performed simply as employes, servants, or agents of defendant, Newton, and were not performed by them as parties to or members or abettors of such conspiracy, then your verdict must be for the defendant. But if any of the parties performing any of said acts performed the same with a common design, purpose, and understanding on their part and that of defendant, Newton, as I have heretofore charged

you, thereby to assist defendant, Newton, in carrying out any design of defrauding the government, then they are no longer, as to such matters, in contemplation of law, his employes, servants, or agents, but thereby they become co-conspirators, and their acts become his acts, so far as they are performed in carrying out such common design or purpose; for it is an unvarying rule of law that the act of any conspirator, as well as the statement of any conspirator, in carrying forward or effecting the purpose of such conspiracy, becomes the act and statement of every co-conspirator, and the law charges every co-conspirator therewith, and holds him responsible therefor.

It is contended on behalf of defendant, Newton, and thus argued by his counsel before you, that said defendant had the lawful right to mail the said newspaper mail matter, which the undisputed evidence shows he did mail; and that such mail matter was, under the law, mailable; and that defendant, Newton, having prepaid thereon the postage prescribed therefor by law, he was guilty of no crime in mailing the same; and that the law contains no limit for the amount of such mailable matter he could lawfully thus mail; and that said defendant thereby violated the law in no particular. On the other hand, it is admitted by the government that the act of defendant, Newton, in mailing any amount of mailable matter, so long as he alone was a party to such mailing, did not violate the statute prohibiting conspiracies. But the government contends that as soon as he and any other person or persons combined together, or by a common design and understanding, and for a common purpose, mailed the matter of the nature of that introduced in evidence, and in the quantities proven, and under the circumstances shown in evidence, that thereby there is shown an attempt to defraud the United States, which, because of the common design and purpose, had become and was a violation of the statute with reference to conspiracies to defraud the government. The position of the government, as stated by counsel in argument before you, does not concede that the mailing proven, if performed by defendant alone, would not, under the circumstances attending same, have been performed by him with intent to defraud the United States, but it is claimed that such concert of action between defendant, Newton, and Mr. Oxford has been shown as to render the parties thereto amenable to the statute punishing conspiracies to defraud the United States. And counsel for defendant, Newton, while denying any such conspiracy existed, contend that the acts of any person other than the defendant in mailing said mail matter was the act of an employe, servant, or agent of defendant, and was performed in such capacity, and by said defendant's express directions. I will not here attempt an elaboration on this point. The contention is substantially covered by a former portion of these instructions. But I may here repeat that, if there is proven an intent to defraud the United States, and that defendant, Newton, and Mr. Oxford, or defendant, Newton, and others, worked together with a common purpose and design to effect that end, one performing one part and another another part in the working out by common means of such common design, then a conspiracy is

proven. And if Mr. Oxford or any others had been or were in the employ of defendant, Newton, they would become, and by reason of such common purpose, and by its working out by the common means at their hands, the law would regard them, not as employes, servants, or agents of defendant, Newton, but as principals with him in a conspiracy having this common design or purpose.

Reference has been made in the argument before you, by counsel upon either side, as to the effect to be given, upon the question of guilt, to the knowledge or the lack of knowledge on the part of defendant, Newton, and Mr. Oxford, and of others, if others were associated with them therein, that the acts by them performed were a violation of the law; that is to say, as to whether you could rightfully find that a conspiracy existed, as charged, if the parties performing the acts, which it is claimed were a part of, or were performed in carrying out, the conspiracy, did not at the time know that such acts were a violation of law. On this point I have to say to you, gentlemen, that a conspiracy cannot exist without a guilty intent being then present in the minds of the conspirators; but this does not mean that the parties must know that they are violating the statutes of the United States. The government is not required to prove, in order to sustain a verdict of guilty, that the parties knew that some statute forbade the acts they were performing. If these acts, in the manner and under the circumstances surrounding their performance, were in fact violations of law, the parties are held guilty accordingly; and the question of their knowledge or of their ignorance of such acts being contrary to law is a matter which the court would be authorized to consider in passing sentence if a verdict of guilty should be found by you. It is the fact of violation of law, and not the knowledge by the violator that he is violating the law, which you are to pass upon. Accordingly, if you find from the evidence that a conspiracy, as I have defined the same in these instructions, did exist to defraud the United States, as charged in the indictment, and that some one or more of the parties connected therewith, in carrying out the object of said conspiracy, committed the overt act charged in the indictment, and that defendant, Newton, was connected with such conspiracy, then you are authorized to render a verdict of guilty herein. And it would not avoid the guilt if you were further to find that defendant, Newton, or Mr. Oxford, or any other person charged in this indictment or connected by the evidence, was ignorant of the fact that such acts made them liable to punishment. Indeed, if such conspiracy existed, and every person connected therewith was ignorant that there was a statute making such conspiracy criminal, yet such ignorance could not, of itself, prevent a verdict of guilty. It would be a most serious impediment to the administration of justice if a verdict of guilty in trials like the present could not be found without first proving that the parties had knowledge at the time of the guilty act that there was a statute punishing such act. No person has a right to defraud the United States. And whether or not an attempt to defraud the government is punishable by law is determined by the application of the statutes to the act proven. And if a

conspiracy to defraud the United States existed, as charged in the indictment, and some one of the parties to the conspiracy did the act charged to carry out the object of such conspiracy, and defendant, Newton, was connected with the conspiracy, these facts, if found by you from the evidence, will justify at your hands a verdict of guilty, even though the defendant and every other party to the conspiracy had no knowledge that congress had enacted a statute applicable thereto.

In considering the acts proven by the evidence herein, and determining to whom the responsibility therefor attaches, you will apply the general rule of law that that person is responsible for an act who either performs it himself, or causes another to perform it at his request or by his direction; that is to say, that it was not necessary, before the defendant, Newton, or any other person can be held responsible for whatever may legally attach thereto, that he should in person have wrapped up the newspapers, and he himself have written or stamped the address thereon, and in person have deposited them in the mails. If he procured or caused others to perform these acts, or any of them, for him, and by his order, the law regards his relation thereto the same as though he had himself and in person performed the acts. Your verdict, gentlemen, must be found upon the evidence introduced before you and considered by you, under the law as given by the court. The indictment in this case has not been introduced in evidence, nor can its allegations be taken, by you as proof of what it states. The office of the indictment has been fully performed in this case, when, having been presented by the grand jury, the defendant is placed upon trial, and the trial proceeds within the lines marked out by said indictment. The fact that such indictment has been found by the grand jury affords no presumption of the guilt of defendant. As I have heretofore said to you, this trial commences before you with the presumption of innocence in favor of defendant, and your verdict must be for defendant, unless you find that the evidence overthrows this presumption, and brings your minds beyond a reasonable doubt to a verdict of guilty. The evidence introduced shows that the route agents, post-office inspectors, and certain other employes or officials in the post-office service knew, at the time of the mailing complained of in the indictment, that it was being done, and that they suspected that it was being done with a fraudulent intent. Whether they did or did not know these facts or suspect this intent is not important as affecting the guilt or innocence of the defendant herein, and cannot change such guilt or innocence as the same may be proven by the other evidence introduced. If the defendant is otherwise proven guilty of the crime charged, the knowledge of such post-office officials or employes cannot shield him. But the jury are authorized to consider whatever publicity or secrecy attended the acts proven, as circumstances in the case, to be taken in connection with all the other facts proven by evidence.

Defendant, Newton, has produced witnesses who have testified to the reputation of defendant in the vicinity of his residence for honesty and personal integrity. This is competent evidence, and the good character

of defendant in this respect is a fact to be weighed and considered by you in the light of all the evidence bearing upon the question of his innocence or guilt of the crime charged against him in the indictment. But good character is no defense against crime actually committed, and the jury are charged that, if the guilt of defendant is plainly proven to the satisfaction of the jury, notwithstanding the evidence of his good character, then it is the duty of the jury to convict, irrespective of such evidence of character. If, however, the jury find the evidence conflicting and doubtful as to defendant's guilt, the importance which the jury are authorized to give to the evidence of good character is thereby increased.

I have to say to you further, gentlemen, and this statement is to be understood as affecting the entire charge given you, that if you can reconcile the evidence before you upon any reasonable hypothesis of the defendant's innocence, it is your duty so to do; and before you can find the defendant guilty of the crime charged in the indictment you must find such guilt beyond a reasonable doubt. This does not mean that upon every proposition of fact under the evidence you must find that proposition proven beyond a reasonable doubt. This reasonable doubt relates to the question of defendant's guilt under all the evidence. You will take up the evidence bearing on each proposition of fact, and from that evidence determine whether such fact proposition is by the evidence satisfactorily proven to you; and then, when applying the fact propositions proven to the question of defendant's guilt, you will act upon the rule I have stated, and must find him guilty beyond a reasonable doubt, before you can return a verdict of guilty. And after considering all the evidence, if you have a reasonable doubt of the guilt of defendant, you must acquit him; but if, upon such consideration, you do not have a reasonable doubt of his guilt, it is your duty to return a verdict of guilty. A reasonable doubt, as I have used that term, is what the term indicates. It is a doubt based on reason, and which is reasonable in view of all the evidence. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him. But if, after an impartial comparison and consideration of the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt. If, however, on an impartial comparison and consideration of all the evidence, you have an abiding conviction of the guilt of defendant, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

Gentlemen, you are the sole judges of the testimony. Under the oaths you have taken you are to receive as the law applicable to the case the instructions given you by the court, and you are to be governed by them. But it is your sole province to determine the weight to be given to the testimony which has been introduced. Consider the demeanor of the

witnesses on the witness stand, their relation to the defendant in any way, business or otherwise; their interest or lack of interest in the case; any bias or prejudice exhibited by them; the consistency or inconsistency of their statements; whether their testimony is contradicted or corroborated by other testimony regarded by you as credible and worthy of belief; and, having considered the testimony in the light of all the circumstances proven in the case, give to the testimony of each witness that weight to which you may find it is justly entitled. Wherever you can consistently reconcile conflicting testimony, it is your duty to do so; but where you find any conflict of testimony which you cannot reconcile, hesitate not to cast aside that which you deem incorrect and untrue, and accept and hold fast to the truth as you find it established in the evidence. Gentlemen, take this case, determined to do justice both to the government and to the defendant. The government is in no wise entitled to, nor does it ask at your hands, the conviction of any man who is not proven guilty of the crime of which he stands charged; nor should your verdict declare the guilt of such a one. But if the defendant is proven guilty within the terms of the instructions I have given you, it is your duty to say so by your verdict. Thus innocence is protected by our courts, and guilt is brought to its just punishment.

ADDITIONAL INSTRUCTIONS.

The jury having sent to the court the following interrogatory, "*Hon. Judge Woolson: Have we the right to consider the remailing at Cainesville, Mo., as evidence of a conspiracy? L. L. COLLINS, Foreman,*"—the jury were called into court, and the following additional instructions given them:

Gentlemen of the Jury: I am in receipt of your inquiry this morning, as to whether you have the right to consider the remailing at Cainesville, Mo., as evidence of a conspiracy. The instructions given you upon yesterday were intended to cover this point. You were instructed that three things must be found by you to justify a verdict of guilty: *First*, that a conspiracy such as charged in the indictment existed; *second*, that one of the parties in the conspiracy committed the overt act charged in the indictment; *third*, that defendant, Newton, was a party to such conspiracy. I expressly instructed you, and your present inquiry indicates that you so understood the court, that the remailing at Cainesville, Mo., would not prove, or tend to prove, the overt act, because that act is by the indictment charged to have been done in the southern district of Iowa; and that this remailing by Oxford could not be considered as proving or tending to prove that the defendant, Newton, was a member of a conspiracy, unless such remailing was brought home to and connected with him; and that his connection with a conspiracy must be proven by his own acts or declarations; and that, while any letters or telegrams in evidence from Newton to Oxford might be considered upon the question of defendant's (Newton's) connection with a conspiracy, the act of the remailing by Oxford would not, and could not, be proof

that defendant, Newton, was a member of a conspiracy, unless that remailing is brought home to and connected with defendant, Newton, or shown to have been done with his assent, direction, or approval. You were further instructed that the remailing at Cainesville by Oxford was to be considered by you as bearing on the nature, extent, plans, and operations of any conspiracy of which you might find them a part. You will recognize as being contained in the instructions given you upon yesterday that, ordinarily, a conspiracy can only be proven by circumstantial evidence; that is, the conspirators do not say to others, nor write letters to others saying, "There is a conspiracy, and we are the conspirators." And so the law permits the existence of a conspiracy to be proven in all cases by circumstantial evidence; that is, the government proves what it claims to be the circumstances showing the existence of a conspiracy and the operations under its plan. It may show the acquaintance of the parties charged one with another, any business relations existing between them, any communications passing between them, and the more or less close relationship they sustain to each other. Then it may show the interest they may have in doing what is charged to be the object of the conspiracy, and the interest each one has, and the desire or willingness shown by the others to assist, in accomplishing that end; and it may also show what was done, as it claims, in carrying out the conspiracy to effect the common design or purpose charged; and the several parts performed, and wherever performed, towards reaching the common end; and any other like circumstances which may throw light upon the question whether the conspiracy existed. And from all the circumstances proven the jury are authorized to find that a conspiracy did or did not actually exist, as the result shall be found by them under all the evidence. So, in this case, you will take the evidence bearing on any personal or business relations between defendant, Newton, and Mr. Oxford; on the telegrams and letters and any other communications proven to have passed between them; on whatever desire of the one you find apparent to aid or assist the other; on any acts performed by either or by both, or by others under the direction of either or both, with reference to any part of what is alleged to be a conspiracy, or to any matters which are claimed to have been the carrying out of the conspiracy, whether in Iowa, Missouri, or elsewhere, and including the mailing and remailing of the mail matter in Iowa or Missouri. You will consider all the evidence, circumstantial or direct, which may throw light upon the question whether the conspiracy charged actually existed; and, having so considered all the evidence, and governed by the instructions given you by the court, you will find your verdict according to the fact, as your judgments and consciences shall enlighten you.

The jury found a verdict of acquittal.

In re LIFIERI et al.

(District Court, S. D. New York. July 29, 1892.)

IMMIGRATION—CONTRACT LABORER ONCE PASSED—POWER TO ARREST AND RETURN.

Under due authority from the secretary of the treasury, granted either by general regulations or by special instructions in individual cases, pursuant to the act of October 19, 1888, the superintendent or inspector of immigration may, at any time within one year after his landing, take into custody, and return to the country from which he came, an alien emigrant arriving in violation of law, even though he may have been previously passed and allowed to land.

At Law. On return of writ of *habeas corpus*.

Henry Humphreys, for petitioners.

John O. Mott, Asst. U. S. Dist. Atty.

BROWN, District Judge. By the petition and return upon the writ of *habeas corpus* in the above matter, it appears that four of the petitioners arrived at this port as immigrants on the 14th of June, 1892; and seven others on the 14th of July. Upon the customary examination, no objection to their landing appearing, they were allowed by the immigration inspectors to land at New York. On the 17th of July they returned to Ellis island for the purpose of procuring immigrant tickets for transportation to North Hector, N. Y., at the reduced rates allowed to immigrants; and it being then learned that they had come to this country under a contract to labor on a railroad at North Hector at \$1.25 per day, they were arrested by the inspectors of immigration, and their affidavits being taken in proof of the above fact, they were held in custody to be returned upon the vessels by which they came. A writ of *habeas corpus* was applied for on the ground that having been allowed to land unconditionally, they were no longer subject to the jurisdiction of the superintendent or inspectors of immigration, and were unlawfully detained by them.

By section 11, Act March 3, 1891, (26 St. at Large, p. 1084; 1 Supp. Rev. St., 2d Ed., 937,) it is provided that "any alien who shall come into the United States in violation of law may be returned as by law provided at any time within one year thereafter." Nothing else in this act states by whom, or how, or by what proceeding such return is to be effected. The phrase "as provided by law" undoubtedly refers, therefore, to the provisions of the act of October 19, 1888, on the same subject, (25 St. at Large, p. 565; 1 Supp. Rev. St., 2d Ed., 633.) The first section of this act authorizes the secretary of the treasury, in case he "shall be satisfied that an immigrant has been allowed to land contrary to the prohibition" of the act of February 23, 1887, "to cause such immigrant within a period of one year after landing or entry to be taken into custody and returned to the country from whence he came." The act of October 19, 1888, is declared to be an amendment to the act of February 23, 1887, (24 St. at Large, p. 414; 1 Supp. Rev. St., 2d Ed., 541;) and the latter act amends the act of February 26, 1885, (23 St. at Large, p. 332; 1 Supp. Rev. St., 2d Ed., 479,) "to prohibit the

importation and immigration of foreigners and aliens under contract or agreement to perform labor." In the act of 1887, above cited, it is made the duty of the officers designated by the secretary of the treasury to examine immigrants, "and if in such examination there shall be found among such passengers any person included in the prohibition of this act * * * such person shall not be permitted to land." By the same act the secretary of the treasury was authorized to establish regulations, rules, and instructions carrying out the provisions of the act "for the return of the aforesaid persons to the country from whence they came."

All the acts prior to that of October 19, 1888, had reference to proceedings before the immigrants were finally landed and passed. The act of 1888 first authorized the secretary of the treasury, within a year after the immigrant had been allowed to land, to cause him to be taken into custody and returned, in case the secretary should be satisfied that he had been allowed to land contrary to the provision of the act of 1887. The act of March 3, 1891, does not create any new authority, either to arrest or to return immigrants, but provides by section 11 additional means for the expense thereof. Section 1 of the act of 1891 has no application, in my judgment, to the class of contract laborers, but only to assisted immigrants, and to the classes previously named; but the assisted immigrant is not within the prohibition of section 1, if it appears satisfactorily on special inquiry that he does not belong to either of those foregoing classes, or to the class of contract laborers. Section 8 of the act of 1891 has reference to proceedings taken before immigrants are allowed to land, and not to any proceedings for the recapture of such as have once been passed and landed.

The authority, therefore, to cause the arrest for deportation of immigrants who have once been passed and landed, on the ground that they have come here in violation of law, must be found in the act of October 19, 1888, above cited. This act, being an amendment to the act of February 23, 1887, must be construed in connection therewith, and as a part of the act of 1887. The general authority of the secretary of the treasury to establish regulations and rules for the return of immigrants, coming here unlawfully, to the countries from which they came, as provided by sections 7 and 8 of the act of 1887, are, therefore, applicable to the execution of the authority given to the secretary of the treasury by the act of 1888. It is not necessary that he should act personally in the one class of cases more than in the other. But in order to authorize either the superintendent or the inspectors of immigration to take into custody immigrants who have been previously passed and allowed to land, and who may be anywhere within the country, it is necessary that the secretary of the treasury should give those officers due authority to act, either by general regulations, or else by special instructions in individual cases; for there is nothing in the statutes authorizing those officers to proceed to arrest immigrants once passed and landed, except through some such direction or authority from the secretary of the treasury.

In the present case the general regulations and instructions have been recalled for revision by the secretary of the treasury, and copies thereof were not at hand to be produced at the hearing of this matter, in order to ascertain whether they contained sufficient authority or not. But a special letter of instructions has been issued to the superintendent of immigration during the pendency of these proceedings, "approving the course" pursued by him in the arrest of the petitioners, and directing him "to proceed to effect the return of the immigrants to the country from which they came." This direct instruction is a sufficient authority. The affidavit signed by the petitioners voluntarily, after the contents thereof had been carefully interpreted to them, shows clearly that they came here under a contract or promise of labor at \$1.25 per day, and therefore, in violation of the act of 1885, and unlawfully. By the amendment of 1887, therefore, they became liable to be returned without being permitted to land, and under the act of 1888 they were liable, within one year after being permitted to land, to be arrested and returned. The proof of the facts being clear, and the personal direction of the secretary of the treasury that they be returned, and his ratification of the previous proceeding, being explicit, I am compelled to dismiss the writ, and to remand the petitioners accordingly.

WAITE v. ROBINSON *et al.*

(*Circuit Court, D. Massachusetts. September 15, 1892.*)

No. 2855.

PATENTS FOR INVENTIONS—INVENTION—CONVERTIBLE CHAIRS.

Letters patent No. 329,805, issued November 3, 1885, to William Boscawen, for an improvement in chairs that may be converted from a high to a low chair and carriage, are void for want of invention.

In Equity. Bill by Gilman Waite against Charles H. Robinson and others for infringement of letters patent No. 329,805, issued November 3, 1885, to William Boscawen, assignor to Daniel L. Thompson, Charles A. Perley, and Gilman Waite, for an improvement in chairs. Bill dismissed.

In his specifications the patentee describes his invention as follows:

"This invention has for its object an improvement in convertible chairs,—that is, chairs that may be converted from a high chair to a low chair and carriage; and the invention consists in a convertible chair so constructed that its back posts form slideways, whereon the seat of the chair may slide up and down, and form also the push-handle and front legs or support of the chair; and the invention still further consists in a convertible chair having a sliding chair seat in combination with guideways, whereon the seat may slide up and down; and the invention also consists in slideways formed by the back posts of a chair and a sliding seat, in combination with wheels or rollers, whereon the seat is directly or indirectly supported in its lowest position,—all of which is with greater particularity hereinafter shown, described, and claimed."

The claims of the patent are as follows:

"(1) The combination, with the slides, A, and wheels, D, connected therewith, of the seat, E, its bracket, F, and attached wheels, H, substantially as specified. (2) The combination, with the slides and their attached wheels, of the seat provided with a pair of wheels, and adapted to slide on, and be secured in different positions upon, said slides, substantially as described. (3) The combination, with the slides, A, having the grooves, B, and stops or catches, of the seat and its supporting bracket, having studs engaging said grooved slides, and adapted to engage said stops or catches, and wheels upon the said slides and brackets, substantially as described. (4) The inclined slides, A, combined with the seat adapted to move up or down said slides, means to lock said seat in different altitudes on said slides, and wheels connected with the seat, substantially as described. (5) The slides, A, forming the front legs and back support for the seat, and the attached rear legs, C, and wheels, D, combined with the chair seat, its supporting bracket engaging and movable up and down said slides, and means to retain it in given position thereon, substantially as described. (6) The slides, A, having the rear legs, C, and wheels, D, combined with the seat, E, its bracket, F, engaging and movable up and down said slides, and means to retain it in position, and the spring, G, connecting the seat and bracket, substantially as described. (7) The slides, A, having the rear legs, C, and wheels, D, and extended to form push-handles, combined with the seat, E, its bracket, F, engaging and movable up and down said slides, and means to retain it in position, and the spring, G, connecting the seat and bracket, substantially as described. (8) The slides, A, having the rear legs, C, and wheels, D, combined with the seat, E, its bracket, F, engaging and movable up and down said slides, and means to retain it in position, the stops, h, wheels, H, and the spring, G, connecting the seat and bracket, substantially as described."

Maynadier & Beach, for complainant.

Hey & Wilkinson and *William A. Morse*, for defendants.

PUTNAM, Circuit Judge. That the complainant had difficulty when he applied for his patent, in understanding the spirit and essence of his alleged invention, is inferable from the fact that, on an improvement of so low a grade as his must be admitted to be, he stated his claim in eight different ways. This inference is strengthened because he does not now inform the court whether he relies on all his claims, which is hardly possible, or on which of them he relies; but he leaves the court to look through them all, compare their phraseology, and endeavor thus to ascertain what he has failed to point out.

In his direct examination his expert testified as follows:

"The main novelty is that the seat slides up and down on the frame, and has feet of its own, which, when it is held in its lowest position, extend below the adjacent part of the frame, and hold them up from the floor."

At that stage of his testimony, the expert expressed himself as though there was a double novelty,—one in the sliding up and down of the seat, and the other in the capability of extending the feet below the adjacent part of the frame. The former he properly abandoned at the close of his cross-examination, in connection with what he had to say as to the Cross patent, under which the defendants claim to be manufacturing. The court is unable to appreciate that what was thus left, whether in

combination or otherwise, is sufficient to put in operation the power vested in congress by the constitution to promote the progress of science and useful arts by securing to inventors exclusive rights.

We refer to the topic of the utility of complainant's chair only as it bears on the point of invention. One of the defendants testified that a chair made in accordance with the patent in suit would not be a practical commercial article; and it appears by the evidence of the plaintiff that, although at the time he testified he had owned this patent for seven years, he never had put on the market a chair constructed to conform to it. To fill an order he had commenced some 15 dozen, which were not completed at the date of his deposition.

This is not an instance where a valuable invention lies dormant for want of means of developing it; because the complainant also testified that he manufactures nothing but patent chairs of various kinds, and sells these to the extent of 70,000, more or less, annually. A novelty which remains unused so many years in the hands of an extensive manufacturer, exclusively engaged in the special trade to which it relates, must be presumed to involve, at the best, a very low degree of that useful invention which the patent code of the United States requires. Indeed, the entire field shown by the exhibits in this case seems a dreary one, nowhere enlivened by a single exhibition of the genius of invention, or of the "happy thought" which, under the patent laws, frequently answers in the place of the former.

We think the sum of all that can be said is that the complainant's novelty shows somewhat more mechanical skill, experience, and aptitude than those which preceded it, but not enough to rise above the conditions described in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 73, 5 Sup. Ct. Rep. 717.

Bill dismissed, with costs for the defendants.

CALIFORNIA ARTIFICIAL STONE PAV. CO. v. STARR *et al.*

(Circuit Court, N. D. California. August 29, 1892.)

No. 11,449.

PATENTS FOR INVENTIONS—INFRINGEMENTS—CONCRETE PAVEMENTS.

Reissued letters patent No. 4,364, granted May 2, 1871, to John Schillinger for an improvement in concrete pavements, consisting in dividing the pavement into blocks by the interposition of strips of tarred paper or equivalent material, so that each block may be removed and repaired separately, is infringed by a sidewalk laid in two layers, the bottom one of coarse cement, separated into blocks by scantling joints, and the top one of fine cement, divided while plastic by a trowel or other cutting instrument, on lines coincident with the scantling joints, so as to induce the cracking to follow such joints, rather than the body of the block. *Hurlbut v. Schillinger*, 9 Sup. Ct. Rep. 584, 130 U. S. 456, followed. *Paving Co. v. Schallick*, 7 Sup. Ct. Rep. 391, 119 U. S. 401, distinguished.

At Law.

Action by the California Artificial Stone Paving Company against Mary A. Starr and others for infringement of reissued letters patent No. 4,364, granted May 2, 1871, to John Schillinger, on the surrender of original patent No. 105,599, granted to him July 19, 1870, for an improvement in concrete pavements. Judgment for plaintiff. The claims of the patent are as follows:

"(1) A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described. (2) The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth."

The advantage of the invention is stated to be that this arrangement "allows the blocks to heave separately from the effects of the frost, or to be raised or moved separately, whenever occasion may arise, without injury to the adjacent blocks."

Edmund Tauszky and Wheaton, Kalloch & Kierce, for plaintiff.

Parker & Eells, for defendants.

McKENNA, Circuit Judge, (*orally*.) I am constrained to render judgment for plaintiff. The action is for the infringement of the Schillinger patent for artificial stone pavements. It has been interpreted so often as to leave nothing new to be decided or announced about it, and it has been extended and indulged very far. In *Hurlbut v. Schillinger*, 130 U. S. 456-465, 9 Sup. Ct. Rep. 584, the supreme court say:

"The invention consists in dividing the pavement into blocks, so that one block can be removed and repaired without injury to the rest of the pavement; the division being effected by either a permanent or temporary interposition of something between the blocks."

A pavement laid in two layers, a bottom one of coarse cement and a top one of fine cement, and the division of the upper one, while plastic, by a trowel or other cutting instrument, on a line coincident with the line between the sections in the lower layer, so as control the cracking, and induce it to follow the joints of the divisions, rather than the body of the block, "accomplishes the substantial result of Schillinger's invention in substantially the way devised by him, and is within the patent as it stands after the disclaimer." 130 U. S. 465, 9 Sup. Ct. Rep. 584. The defendant's pavement was so laid. The marking it on the sections formed by the scantling joints, so called, produces this result, hence must be held an infringement. The markings into blocks within such sections do not do this, hence are no infringement.

It is urged that in *Paving Co. v. Schalicke*, 119 U. S. 401, 7 Sup. Ct. Rep. 391, it was held that marking the upper course with a cutting instrument to the depth of about one sixteenth of an inch, for ornamental purposes, was not an infringement, and it is further urged that the testimony in the case at bar shows the marking only to have been done for ornamental purposes. But in *Paving Co. v. Schalicke*, the court say that it was not shown that the marking in that case produced any such division in blocks as the patent speaks of, even in degree:

"There were no blocks produced, and of course there was nothing interposed between the blocks. * * * The marking was only for ornamentation, and produced no free points between the blocks, and the evidence as to the condition of the defendants' pavements after they were laid shows that they did not have the characteristic features above mentioned as belonging to the patented pavement."

In the case at bar the defendants' pavements have the characteristic features belonging to the patented pavement. Its object was attained. To clear up what was doubtful in the oral testimony, I inspected the pavement. The cut in the upper layer was directly over the line of the two sections formed by the scantling joints, and the cracking followed the cut, and not the body of the section. A section was selected by counsel for plaintiff and defendants, to see if one section could be removed without injury to the other; that is, would come up separately. The trial was successful. The sections easily separated on the line of the crack between them. All the objects of the patent, as interpreted by the decisions, *supra*, were shown to be attained.

It is further claimed by defendants that marking on the line of the scantling joints is not marking into blocks, within the meaning of the patent. In *Paving Co. v. Schalicke*, *supra*, the defendants laid their pavement in strips from the curb of the sidewalk inward to the fence in one mass, and then marked the strip crosswise with a blunt marker to the depth of about one sixteenth of an inch, and it was held no infringement. It does not appear from the opinion how wide the "strips" were, but in *Hurlbut v. Schillinger* the sections were 7 or 8 feet by 4 feet. These were held to be blocks, within the meaning of the patent. In the case at bar the sections are 6 by 10, some 6 by 11 feet; but from the appearance of the pavement some were smaller,—maybe 3 by 6. These sections, by virtue of the authority of *Hurlbut v. Schillinger*, must therefore be held to be within the definitions of the patent.

It may also be observed that the defendant Perine could have marked his pavement for ornamental purposes, and have avoided coincidence with the line between the sections. He did not avoid this coincidence, but selected it, and attained thereby the objects of the patent, and he must be held to have infringed it. The defendants laid ——— feet of pavement, and it is agreed that the charge therefor shall be 4 cents per foot, amounting to \$———. Let judgment be entered accordingly.

EDISON ELECTRIC LIGHT CO. v. UNITED STATES ELECTRIC LIGHTING CO.

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

1. PATENTS FOR INVENTIONS—INVENTION—INCANDESCENT ELECTRIC LAMPS.

The second claim of letters patent No. 223,898, issued to Thomas A. Edison, January 27, 1880, for an incandescent electric lamp, consisting of a combination of carbon filaments with a receiver made entirely of glass, from which the air is exhausted, and conductors passing through the glass, is valid, since, in view of the prior state of the art, it required invention to substitute a carbon filament for the platinum wire of his prior French patent, (No. 130,910, May 28, 1879,) and so combine it with a vacuum vessel as to prevent the disintegration of the carbon by "air washing."

2. SAME—SUFFICIENCY OF DESCRIPTION.

The word "filament," used as descriptive of the size of the burner, is sufficiently definite, in view of illustrations in the specification, and it is not necessary that its maximum and minimum dimensions should be specified, especially since defendant's burners indisputably lie wholly on one side of the dividing line between rods and filaments.

3. SAME.

The fact that the patent did not detail the method always used by the patentee, of passing a current through the filament during the process of exhausting the bulb, does not render the patent void for want of a sufficient description to enable a person skilled in the art to construct a successful lamp; for the patent called for a nearly perfect vacuum, and this process of obtaining it had been described in Edison's French platinum patent, and the necessity for it, in order to obtain a perfect vacuum, had been pointed out by Sawyer and Man, and would therefore naturally be resorted to by one familiar with these publications.

4. SAME—RESULTS NOT FULLY UNDERSTOOD.

The fact that this process produces a carbonization of the filament, and is now used as part of the process of carbonization, whereas the patent merely directs that the filament be "properly carbonized," does not show a suppression of a necessary element of the invention, or a want of sufficient description; for, it being apparent that one skilled in the art would use this method, it is immaterial that its full beneficial effect was not understood at the time of the application.

5. SAME—LIMITATION BY FOREIGN PATENT.

A prior Canadian patent, issued for 5 years, and extended for the further period of 10 years, should be regarded as having a continuous term for the entire period, and as not limiting the United States patent to any shorter term. *Refrigerating Co. v. Hammond*, 9 Sup. Ct. Rep. 225, 129 U. S. 164, followed.

6. SAME.

The Canadian patent act, which provides that "when a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires," refers only to foreign patents which exist before the issue of the relevant Canadian patent.

7. SAME—LIMITATION ON FACE OF PATENT.

The failure to limit the patent on its face to a shorter term than 17 years, so as to expire at the same time with the prior foreign patent having the shortest term, does not affect its validity. *Refrigerating Co. v. Hammond*, 9 Sup. Ct. Rep. 225, 129 U. S. 164, followed.

8. SAME—CERTIFICATE OF CORRECTION BY COMMISSIONER.

The commissioner of patents has no jurisdiction to alter a patent by a certificate of correction. Such a certificate is wholly void, and the patentee's request to have the same made cannot be considered as a surrender of the original patent.

9. SAME—ABATEMENT BY DISSOLUTION OF COMPLAINANT.

Notwithstanding the merger of the complainant with another company into a new corporation, the law of the state of New York, providing that pending suits shall not be deemed to have been abated or discontinued by reason of any such consolidation, is effective to prevent such abatement in a federal court.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by the Edison Electric Light Company against the United States Electric Lighting Company. The suit was originally

brought on the three following patents: No. 223,898, issued January 27, 1880; No. 227,229, issued May 4, 1880; and No. 265,777, issued October 10, 1882. But by stipulation the bill was amended by withdrawing the last two patents. As to the other the circuit court found infringement of the second claim, and accordingly rendered a decree for injunction and an accounting. 47 Fed. Rep. 454. Defendant appeals. Affirmed.

For opinions rendered in the circuit court on questions relating to the production of documents, see 44 Fed. Rep. 294 and 45 Fed. Rep. 55.

Kerr & Curtis, Edward Wetmore, Samuel A. Duncan, and Frederic H. Betts, for appellant.

Eaton & Lewis, C. A. Seward, Grosvenor P. Lowrey, S. B. Eaton, Albert H. Walker, and Richard N. Dyer, for respondent.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On January 27, 1880, under an application filed November 4, 1879, letters patent No. 223,898 were issued to Thomas A. Edison, and by subsequent assignments passed to the complainant. The four claims of the patent are as follows:

"(1) An electric lamp for giving light by incandescence, consisting of a filament of carbon of high resistance, made as described, and secured to metallic wires, as set forth. (2) The combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth. (3) A carbon filament or strip coiled and connected to electric conductors so that only a portion of the surface of such carbon conductors shall be exposed for radiating light, as set forth. (4) The method herein described of securing the platina contact wires to the carbon filament, and carbonizing of the whole in a closed chamber, substantially as set forth."

In the lamp made by defendant the carbon conductor is not coiled as indicated in the third claim, nor is it secured as indicated in the fourth, nor does complainant contend that either of these claims is infringed. The circuit court held that the first claim was by its phraseology limited to lamps in which (among other things) the leading-in wires are "secured to the filament according to the method of the patent, that is, by cement carbonized *in situ*," and that as defendant uses clamps for this purpose it does not infringe. This construction of the first claim has been acquiesced in by the complainant, which has not appealed from the decision. There remains for consideration only the second claim.

The defendant's burner is of carbon, so small in cross section that, by the ordinary usage of common speech, it may be fairly called a "filament." The receiver, which contains the burner, is made entirely of glass. The conductors, which connect with the burner, pass through the glass, and from the receiver the air is exhausted. Defendant contends, however, that the specifications of the patent and the prior state of the art require that this second claim be so limited in construction that defendant's apparatus will not fall within its terms, and that, unless so limited, such claim is directly anticipated, or untenable as not involving patentable novelty.

Lamps devised to give light by means of the electric current are broadly divided into two groups, the arc and the incandescent. In the former two conductors or electrodes are so arranged that, when in operation, they are slightly separated, with their axes in the same vertical line. The current leaps across the intervening space, tearing off and partially vaporizing particles from the opposed ends of the electrodes, and developing heat and light in the ends of the electrodes and in the flying particles between them. In order to provide a current which shall be as effective as possible at the place where it develops light, not only the conductors, which bring it from the source of supply, but also the electrodes themselves, forming part of the conducting circuit, are devised to present but small resistance to the passage of the current. The effective resistance begins when the break in the circuit is reached. In an incandescent lamp there is no break in the circuit, but there is introduced into it a piece of poorly conducting material, which is so arranged that its resistance to the passage of the current will develop heat sufficient to bring it to a state of incandescence. The wires which conduct the current to the place where it is thus developed by resistance are so devised as to present but small resistance to its passage. The effective resistance begins where the piece of poorly conducting material (the burner or illuminant) is placed, and the lamp expires when the burner is consumed, breaks or wears away. The longer the life of the burner the longer the life of the lamp, and the more available it becomes for practical electric lighting. The selection of materials for the various parts of the circuit thus formed, their manipulation, arrangement, and operation, have for many years occupied the attention of experimenters, and the results of their labors, made public from time to time, constitute the state of the art of incandescent electric lighting.

The patent sets forth that "the object of the invention is to produce electric lamps giving light by incandescence, which lamps shall have high resistance, so as to allow of the practical subdivision of the electric light." By the phrase "subdivision of the electric light" is meant such a subdivision of the electric current that at several illuminating *foci*, supplied from the same source of electricity, there shall be developed lights of moderate intensity,—comparable to those given out by ordinary gas jets,—and the problem to be solved required a system and apparatus which would admit of the development of these moderate lights in sufficient number, and at so low a cost, as to be commercially useful.

Prior to 1879 experimenters seemed to have reached the conclusion that success was to be attained, if at all, by modifications of the arc lamp, but up to that time no lamp, arc or incandescent, had been given to the public, which, with the means then existing for generating and distributing the electric current, accomplished this result. Since the date of the patent in suit electric lighting by lights of moderate intensity has become a commercial success. Subsequent improvements in the lamps and in other parts of the system have undoubtedly contributed materially to its development, but the record abundantly shows that with lamps such as the patent describes, constructed with the skill then known to the art,

and operated under the conditions admitted by the generating and conducting apparatus then existing, it became practical for one generator to operate a considerable number of lamps, located at reasonable distances from it, and which at the same time were economical, durable, and cheap enough to be commercially useful, and so simple and reliable that they could be manipulated by the public. In view of the utter failure of the prior art to produce any such subdivision of the electric light, a lamp of this kind, which was capable of economical use in factories, large buildings, and in smaller buildings contiguous to each other,—in other words, available for isolated lighting,—should be considered commercially successful, though further development were needed to enable it to compete with gas for domestic lighting on even approximately equal terms. What, then, was the contribution to this solution of the problem which Edison gave to the world by the patent in suit?

Commercial and domestic exigencies required that the lamps should be so arranged that each derived its power independently from a common source, and not through another lamp, so that they could be individually lighted or extinguished at will, and the breaking down of a single lamp would not break the circuit. This is effected by what is called the "multiple arc" arrangement, the wires leading to and from each light being so connected with the main conductors as to form a separate circuit for each light. In this arrangement no greater electromotive force is required for a large number of translating devices than for a single one, the current being graduated to the number employed. The lower the resistance of each illuminating conductor, the greater the current it requires, and as their number is increased, their individual resistances remaining constant, the size of the main conductors must be likewise increased, an increase which, in the prior art, soon involved such an expense for main conductors as to preclude commercial success. The amount of heat developed by the passage of an electric current is greater as the flow of the current is greater. It is also greater as the resistance of the conductor is greater, and all electric conductors vary in resistance directly as their lengths and inversely as their cross sections. Conductors of different materials have also different specific resistances. The quantity of heat developed in a translating device is independent of, but the degree of heat (*i. e.*, the temperature) is dependent on, the extent of radiating surface. In the lamp shown in the patent these laws are availed of; the ratios of resistance of the burner to the resistance of the entire circuit and to its own radiating surface being so graduated that a light of the required intensity is produced by the expenditure of so small an amount of current at each illuminant focus as to admit of main conductors sufficiently small, and therefore sufficiently low priced, to warrant the introduction of the system into public use.

It is not necessary to enter into any elaborate discussion of the prior state of the art, so far as it bears upon the question of the patentable novelty of such embodiment of the principle of high resistance and small radiating surface. Irrespective of all patents or publications of others, the philosophy of that method of producing light is undoubtedly found stated clearly and sufficiently, and applied to the production of an in-

candescent platinum burner, in Edison's French patent, No. 130,910, taken out May 28, 1879. Whether, under section 4887 of the Revised Statutes, that patent, embodying as it does his own invention, is or is not, so far as Edison is concerned, a part of the prior art, and to what extent, in view of the prior art, that patent discloses patentable invention, need not be determined upon this appeal, inasmuch as we are satisfied that there was invention in the substitution of the carbon of the patent in suit for the platinum of the French patent, even though all knowledge as to what should be the ratio of resistance to radiating surface were pointed out, either in the French patent or elsewhere in the art. As stated above, conductors of different materials have different specific resistances. Without going into details, it may be stated that among the metals platinum (including its alloys) is the only one which seems to have given promise of success for incandescent lamp burners. With a method of preparation intended to remedy some of its defects, it is the material of the French patent, although the first claim of that patent is, generally, for a continuous metallic conductor. The specific resistance of platinum is sufficiently high to admit of its being raised to incandescence by the electric current. When so raised it is not consumed in the presence of oxygen, but is fusible at a temperature slightly higher than that at which it becomes incandescent. To produce light it has to be maintained so near the melting point that a slight fluctuation of the current above the normal strength destroys it, and a large part of the French patent is devoted to the description of methods and a complicated apparatus called the "Thermal Regulator," intended to regulate the current so as to avoid any such raising of the temperature.

In his invention, as described in the French patent, Edison departed from the existing idea of burners of low resistance, declared the commercial and scientific necessity of burners of high resistance, although they must be slender and presumably fragile, and attempted to find a method of protecting them from the effects of heat and of the atmosphere. It is said that the theretofore known laws of electricity should have taught every one that an electrical incandescent lamp must have a burner of small cross section and small radiating surface. The electrical laws had been known and had been recognized, but they did not tell how to protect the materials which would make efficient burners from the destructive effect of other forces than electricity to which they must be subjected; in other words, they did not tell how to construct a lamp. Edison, in his French specification, followed the principle of high resistance to an extreme, made platinum burners with a resistance of 200 to 300 ohms, and described the method by which they were to be prevented from speedy deterioration, "by destroying or intercepting the atmospheric action." He freed them from occluded gases by subjecting them to a high degree of electrical heat in a vacuum, and subsequently sealed them also in a vacuum. The platinum lamp, however, did not achieve success.

Inasmuch as carbon has a specific resistance from two to four hundred times that of platinum, (hard, dense carbon having a lower resistance than porous carbon,) is practically infusible, had been long before

suggested as a translating device, and used as such in many of the lamps devised by the prior art, it might be supposed that when one skilled in that art was seeking a substitute for the platinum wire,—something which would, by reason of high resistance and small radiating surface, apply the philosophy disclosed in the French patent, and yet admit of operation at higher temperature without melting,—he would have turned to carbon. But the record in this case clearly establishes the converse of that proposition. Carbon, when exposed to the air at a temperature sufficient to produce incandescence, undergoes combustion. To remedy this difficulty earlier inventors suggested inclosing the carbon burner in a glass globe, from which air and moisture were to be excluded. Their globes were separable to allow of replacement of interior parts. We do not find in the words “suitably sealed,” used in the King patent (British, 1845, No. 10,919) to describe a modification of his lamp for use under water, sufficient warrant for the contention that its structure was to be so radically changed as to substitute a light and compact all-glass globe, with irremovable burner, for the cumbrous apparatus with its column of mercury, which he describes in detail. Neither the inclosing chamber of Crookes’ nor the Geissler tubes (though being all of glass with wires sealed in, they would not leak) were used by the prior art to protect incandescent burners. By reason, in part, of that mode of construction, with separable chamber, the *vacua* which the earlier experimenters sought to secure could not be maintained. Though subsequent improvements in exhaust pumps might give their apparatus a higher initial vacuum, it would rapidly disappear in the leaking globe. It was against the oxygen or other carbon-consuming gases that all prior inventors sought to protect the burner, and later inventors tried to accomplish the same result by filling the chamber with nitrogen or some other gas which was inert, *i. e.*, did not combine with the carbon. The carbons themselves were also subjected to processes for making them harder and more tenacious, and series of carbons were arranged to be brought into operation successively without opening the chamber. But one and all of these devices failed to secure stability in the carbon. A deterioration, variously described as a “disintegration,” a “wearing away,” a “kind of evaporation,” was soon fatal to the life of the burner. The record abundantly establishes the proposition that, so far from turning to carbon for his burner, which was to have so high a ratio of resistance to radiating surface, one skilled in the art would have been led, by the teachings of that art, to suppose that its instability would prove fatal to its use, irrespective of the size of the burner. Especially is it true that the use of small carbons, in the attenuated or filamentary form, which Edison had indicated in the platinum patent, would not have been thought of. Nor do we find in the suggestions of Lane-Fox, either in his patents (British, Nos. 3988, 4043, 4626, of 1878, and 1122, of 1879) or his other publications, any such appreciation of the cause of the disintegration of carbon, or any such proposed method of preventing it, as would controvert the conclusion that the art was looking elsewhere than to carbon for the burner which should have a future. Certainly

Lane-Fox himself seems to have looked for success rather to his metallic alloys, and his compounds operated in nitrogen or other suitable gas, than to carbon in a perfect vacuum. The literature of the art fully sustains the statement of Mr. Schwendler, quoted in Telegraph Journal in 1879, that "we can scarcely expect that the principle of incandescence will be made use of for practical illumination," unless there be discovered a conductor without the defects of platinum, and "which does not combine at high temperature with oxygen."

In June, 1878, and January, 1879, (United States patents 205,144, 211,262,) Sawyer and Man indicated one of the causes which operated to produce this disintegration of the carbon, viz., that "some oxygen or other element or compound remains in the lamp," the carbon "occluding sufficient air or oxygen to render its consumption a mere question of time," as "the least quantity of oxygen in a sealed lamp is sufficient to combust an indefinite quantity of carbon." This they sought to remedy by heating the carbon pencils, immersed in a hydro-carbon liquid, to an extremely high temperature, thus producing a hard and dense carbon, and one whose specific resistance was lowered by that very process. They also, while the globe was on the pump, and nitrogen flowing in and out of it, heated the "carbon to incandescence, thus driving out all the impurities and occluded gases, which are carried out of the lamp by the current of nitrogen." Believing that the deterioration of the carbon burner was due to the presence of occluded oxygen, which escaped into the sealed chamber and promoted "combustion," they sought to secure stability by substituting for the oxygen they had forced out by heating on the pump an atmosphere of nitrogen. That done they sealed their chamber, which seems to have been a separable one.

Edison had experimented with carbon before he devised the platinum lamp of his French patent. Subsequently to the date of that patent, apparently because that lamp did not seem to promise the success he hoped for, he again turned to carbon. In the course of his investigations he made a discovery as to the causes of "disintegration," of which he availed himself to devise a lamp in which carbon, even in the filamentary form required for a burner, whose ratio of resistance to radiating surface was such as to apply the philosophy pointed out in his French patent, could be maintained for a sufficient length of time to become a commercial success. At the date of the application for the French patent he had apparently reached only the point that "pencils [not filaments] of carbon can also be freed from air in this manner, and be brought to such a temperature that the carbon becomes pasty, and if it is then allowed to cool it is very homogeneous and hard." The knowledge that practical stability could be given to a carbon filament was not gained until October, 1879.

The patent in suit sets forth that theretofore "light by incandescence has been obtained from rods of carbon of one to four ohms resistance, placed in closed vessels, in which the atmospheric air has been replaced by gases that do not combine chemically with the carbon. The vessel holding the burner has been composed of glass cemented to a metallic

base, [or, as the evidence in this case shows, sometimes to a glass base.] The leading wires have always been large, so that their resistance shall be many times less than the burner, and in general the attempts of previous persons have been to reduce the resistance of the carbon rod. The disadvantages of following this practice are that a lamp having but one to four ohms, resistance cannot be worked in great numbers in multiple arc without the employment of main conductors of enormous dimensions; that, owing to the low resistance of the lamp, the leading wires must be of large dimensions and good conductors, and a glass globe cannot be kept tight at the place where the wires pass in and are cemented. Hence the carbon is consumed, because there must be almost a perfect vacuum to render the carbon stable, especially when such carbon is small in mass and high in electrical resistance. The use of a gas in the receiver at the atmospheric pressure, although not attacking the carbon, serves to destroy it in time by 'air washing,' or the attrition produced by the rapid passage of the air over the slightly coherent, highly heated surface of the carbon. I have reversed this practice. I have discovered that even a cotton thread properly carbonized and placed in a sealed glass bulb exhausted to one-millionth of an atmosphere offers from one hundred to five hundred ohms resistance to the passage of the current, and that it is absolutely stable at very high temperatures. [Here follow further statements as to other carbon substances and their manipulation.] By using the carbon wire of such high resistance I am enabled to use fine platinum wires for leading wires, as they will have a small resistance compared to the burner, and hence will not heat or crack the sealed vacuum bulb. [The burner being placed on the glass holder,] a glass bulb (is) blown over the whole, with a leading tube for exhaustion by a mercury pump. This tube, when a high vacuum has been reached, is hermetically sealed. * * * The invention consists of a light-giving body of carbon wire or sheets coiled or arranged in such a manner as to offer great resistance to the passage of the electric current, and at the same time present but a slight surface from which radiation can take place. The invention further consists in placing such burner of great resistance in a nearly perfect vacuum, to prevent oxidation and injury to the conductor by the atmosphere. The current is conducted into the vacuum bulb through platina wires sealed into the glass." Edison's invention was practically made when he ascertained the theretofore unknown fact that carbon would stand high temperature, even when very attenuated, if operated in a high vacuum, without the phenomenon of disintegration. This fact he utilized by the means which he has described,—a lamp having a filamentary carbon burner in a nearly perfect vacuum.

Although all-glass globes, with leading wires passing through the glass and sealed into it, had been used before to preserve the conditions of the interior of a chamber from the effects of leakage at the joints, and although the prior art, including the French patent, indicated that subdivision of the electric light was to be obtained by the use of burners of high resistance and small radiating surface, and although pencils of car-

bon had been tried in imperfect *vacua*, and found wanting, it was invention, in view of the teachings of the art as to the disintegration of carbon under the action of an electric current, to still select that substance as a suitable material from which to construct a burner much more attenuated than had ever been used before, reduced in size to the filamentary form in which economy of construction requires that it must be used in order to avail of the philosophy of high resistance and small radiating surface, and so to combine old elements that the disintegration due to "air washing" should be practically eliminated, and the burner thus become commercially stable. It is true that carbon burners still break down, that the improvements neither of Edison nor of other inventors have made them absolutely stable, and in a sense it may be said that Edison only made them more stable than they were before; that it is a mere matter of degree. But the degree of difference between carbons that lasted one hour and carbons that lasted hundreds of hours seems to have been precisely the difference between failure and success, and the combination which first achieved the result "long desired, sometimes sought and never before attained," is a patentable invention.

It is also true that the combination and manipulation which secured a practically perfect vacuum by heating the burner while the exhaust pump was at work, and subsequently sealing the globe without introducing a foreign gas, is set out by Edison in his French patent as a means of effecting such a change in the condition of platinum as would permit of its being raised to higher temperatures without rupture, cracking, or diminution of weight by volatilization. But the evidence shows that the platinum lamp did not achieve success, and we think there was manifest invention in the substitution of carbon freed from occluded gases, and placed in a nearly perfect vacuum. The change of material involved a reorganization of the lamp. Dispensing with the thermal regulator, which was an essential part of the structure of the French patent, it developed new properties in the lamp by reason of the enormous differences between the resistances and the melting points of the two materials; it utilized the discovery of that cause ("air-washing") of the instability of carbon, which seemed to preclude all hope of its future usefulness as an incandescent illuminant. Finally and principally, by the substitution, there was presented the complete combination of elements, which for the first time in the art produced a practical electric light. We are of the opinion that on principle and under the authorities such a substitution of material is invention. Experts called for the defendant have testified that such change of material involved no invention, because the use, as a substitute for platinum, of carbon of any size, operated in a vacuum, would be obvious to one skilled in the art. To this proposition we cannot assent. Sawyer and Man were skilled in the art, but even after they had learned how to force out the occluded gases, and withdraw them from the lamp chamber, they turned away from the vacuum thus ready to their hands, feeling no doubt that they were following the teachings of the art in seeking stability by the use, not of a vacuum, but of a nitrogen atmosphere. Edison was skilled in

the art, but after he had the nearly perfect vacuum of the French patent, secured against leaking by the all-glass globe of Geissler and Crookes, it was only after months of patient and persistent experiment that he found, in the substitution for his platinum of a filament of carbon, the success he had long sought for, but not till then attained.

The second claim of the patent is broad enough in its phraseology to cover the invention above set forth, at least when the burner is a carbon filament. This last word is not specifically defined in the patent, though it therein appears for the first time in the art. It was a common English word with a meaning sufficiently plain to indicate that the cross section of any article which it was used to qualify must be so small as to be thread-like; and we think a sufficient indication of what that size is would be afforded by an examination of the ordinary threads in common use. An examination of the patent, however, indicates its dimensions with more exactness. It is to be fragile, so small in cross section that, compared with older carbon rods, its use is a "reversal" of former practice. One of the substances suggested in the patent to be used as a burner is to be reduced to .007 of an inch in diameter. Ordinary cotton thread, also suggested in the patent, has varying diameters, the largest in common use being 1-64th of an inch. The patent-office model has a diameter of about 1-66th of an inch. The evidence fails to satisfy us that the prior art furnished any burners less than twice this size. In contradistinction to these earlier burners, Edison calls his burner a "filament." The term is apt, and we do not think he was required to specify, by thousandths of an inch, its precise maximum and minimum. Surely no one could doubt that burners nearly approaching in size the examples of his filament, shown in the patent, would be filaments, nor that burners nearly approaching in size the earlier rod burners would be rods. The defendant's burners are smaller in cross section than the cotton thread of the patent-office model, and indisputably lie wholly on one side of the dividing line between rods and filaments, which, therefore, for the purposes of this suit, need be no more closely defined. The carbons which defendant operates in a high vacuum, in all-glass chambers with platinum wires sealed in, and which by such method are not exposed to air washing, and are thus rendered practically stable, are filamentary in size, and therefore filaments, within the meaning of the second claim, unless that word is to be qualified as defendant suggests. That it is to be so qualified by importing into it a "coiling" of the burner is unwarranted in view of the fact that the patent refers to both coiled and uncoiled threads, and the third claim specifically covers the coiled form. The first claim is the comprehensive one, intended to include—and by its use of the words, "made as described," in fact including—the principal invention, as the draughtsman understood it, to wit, the burner, which was to subdivide the electric light by its ratio of resistance to radiating surface, and also the subsidiary inventions (1) of coiling when desired, either as effecting that ratio or as a protection against flickering; (2) of securing the burner to the wires; and (3) of providing a place for its operation, to wit, the ex-

hausted all-glass globe, which would insure practical stability. To cover each of these inventions a separate specific claim is made, and the second claim seems clearly intended to cover the combination of parts which secures the stability of the burner, irrespective of the fact whether it is coiled or uncoiled, is clamped to the leading wires or secured by the plastic combination of the fourth claim, is made out of one or other of the varieties of carbon mentioned in the patent, or even out of some other known variety not mentioned therein, irrespective also of the fact whether its resistance is higher or lower, except so far as its filamental character and its designed function would determine the measure of that resistance.

This conclusion seems plainly indicated by the peculiar phraseology of the claim. It is for "the combination of carbon filaments with a receiver made entirely of glass, etc., and from which the air is exhausted, for the purposes set forth;" that is, for the purpose of preventing the disintegration of the burner resulting from air washing. All the experts and all the counsel agree that the words "carbon filaments" should read "a carbon filament," because the combination of the patent contemplated only the incandescence of a single filament in each lamp. This is quite correct, but the words thus altered found their place in the claim through no mere clerical error. Inapt though they may be to describe the individual concrete combinations which were to be protected against infringement, they are illuminative of the effort of the draughtsman to secure his exhausted all-glass receivers in combination with carbon filaments of all kinds, and he used the plural, omitting the phrases "of high resistance" and "made as described," used in the first claim, in order to make sure that he should not, as to this second claim, be confined by construction to any one variety of filament. For this reason the further limitations, which defendant seeks to read into this claim, viz., that the filament must be one of high specific resistance, or of at least 100 ohms resistance, cannot be accepted.

The second claim may be thus paraphrased: The combination of carbon, filamentary or thread-like in size, and properly carbonized, used as an illuminant in an incandescent electric lamp with a receiver made entirely of glass, and from which receiver the air is exhausted to such an extent that disintegration of the carbon due to the air-washing action of surrounding gases or to any other cause is so far reduced as to leave the carbon practically stable. Defendant's lamps are plainly infringements of the second claim as thus construed.

Defendant further contends that the patent is invalid because it does not so describe the lamp as to enable a person, skilled in the art at the date of the patent, to make a practically useful structure. The evidence of the witness Howell seems to us a conclusive answer to this contention. He made, as he testifies, according to the directions of the patent, and using only processes known to the art before its date, incandescent lamps such as the patent describes, which lasted 600 hours. Defendant criticizes this evidence, because the witness subjected the filaments made by him to the action of the electric current during the process of exhaustion.

But the patent repeatedly directs that the vacuum shall be high, and nearly perfect. Sawyer and Man had, prior to the date of the patent, shown that there were occluded in the carbon itself, and in the various internal parts of lamp chambers, gases and impurities which are set free by the passage of the current. Manifestly, if they were not removed before sealing, the nearly perfect vacuum would soon disappear. Edison's French patent also details a process for forcing them out of platinum and removing them while exhausting is going on. A person who was sufficiently skilled in the art to know of these earlier publications, and was carefully solicitous to conform to the directions of the patent, would naturally have resorted, as Howell did, to this method to secure a vacuum free, so far as might be, from the intrusion of such occluded gases. It is contended, however, that this process of "electric heating on the pumps" in effect produces a carbonization of the filament; that it is now used as a part of the process of carbonization; and that, because the patent simply directs that the filament be "properly carbonized," because electrical heating is now used with the understood object of supplementing the work of the carbonizing furnace, because Edison has always thus heated his filaments, and because such additional carbonization is necessary to make a practical lamp under his patent,—therefore he has either purposely suppressed an essential element of his process, or has failed to give the full, clear, and exact description of it which the statute calls for. To this proposition we cannot assent. It is immaterial that the philosophy of electrical heating on the pumps is better understood to-day than it was in 1879, so long as the requirements of the patent would not be complied with by one skilled in the art unless he did in fact so heat the filaments. Whether he heated to carbonize, or to secure a nearly perfect vacuum, the result would be the same,—an operative lamp produced by following the directions of the patent with the ordinary skill of the art, and that is all the patentee was required to show.

The other defenses interposed by defendant may be more briefly noticed. The patent in suit was issued January 27, 1880. A patent for the same invention was issued in Canada, November 17, 1879, (No. 10,654,) the term of which, expressed on its face, was five years; but the Canadian statute gave to the owner of the patent the right to an extension at his option, on the payment of a required fee, for the further period of 10 years. On May 4, 1883, the owner paid the fee required, and on October 30, 1883, obtained certificate of extension. In *Bate Refrigerating Co. v. Hammond*, 129 U. S. 164; 9 Sup. Ct. Rep. 225, it was held that, so far as the term of a Canadian statute operated to curtail the term of the United States patent under section 4887, Rev. St. U. S., it should be regarded as a continuous term for the entire period. It appears, however, that on March 5, 1880, a patent for the same invention was granted in Sweden, the grantee of which subsequently failed to prove, as required by the law of that country, that the invention was "being constantly practiced within the kingdom." Thereupon, on March 5, 1883, the Swedish patent right was lost and forfeited. Defendant

contends that in consequence the Canadian patent expired on the same day, March 5, 1883, or, if it continued till the expiration of the first five years expressed on its face, viz., November 17, 1884, it could not, by the payment of fees or the certificate of the Canadian commissioner of patents, be extended for the additional 10 years. For that reason defendant contends that the case at bar is distinguishable from *Bate Refrigerating Co. v. Hammond*, and that the patent in suit expired with the Canadian patent, either on March 5, 1883, or on November 17, 1884, prior to the beginning of this action. The Canadian statute provides as follows:

"An inventor shall not be entitled to a patent for his invention if a patent therefor in any other country shall have been in existence in such country more than twelve months prior to the application for such patent in Canada; and if during such twelve months any person shall have commenced to manufacture in Canada the article for which such patent is afterwards obtained, such person shall continue to have the right to manufacture and sell such article notwithstanding such patent; and under any circumstances, when a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires."

The soundness of the defendant's contention depends on the meaning, under Canadian law, of the phrase "where a foreign patent exists," as used in this statute. If that phrase is confined to foreign patents which exist before the relevant Canadian patent is issued, the loss and forfeiture of the Swedish patent right in no way affected the Canadian patent to Edison. The meaning of this phrase has not been declared by the Canadian courts; but a careful examination of the evidence given by the Canadian lawyers who have testified as to its practical construction by the Canadian government, and have given their professional opinions as to its meaning in Canadian law, satisfies us that it is there used as covering only foreign patents which exist before the issue of the relevant Canadian patent. We are of opinion, therefore, that neither directly (*Pohl v. Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. Rep. 577) nor indirectly, through the Canadian patent, is the patent in suit affected by what happened to the Swedish patent.

The failure to limit the patent in suit on its face to a shorter term than 17 years, so as to expire at the same time with the prior foreign patent having the shortest term, does not affect its validity. *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 9 Sup. Ct. Rep. 225. Nor do we think that validity is in any way affected by the attempted certificate of correction. The patent, as originally issued, being in every respect a regularly executed document, and the statute providing for no subsequent alteration thereof by the patent office, (except in cases of reissue, which this is not,) the action of the commissioner in indorsing it with an attempted "correction" was without jurisdiction, and wholly void. And in the absence of any provision of law contemplating the surrender of an original patent by the grantee or holder, except for reissue, we cannot find, in the request to have such unauthorized correction made, any reason for holding that the patent was by that act surrendered.

It is further urged by the defendant that the suit abated on December 31, 1886, by reason of the dissolution of the complainant consequent upon its merger, at the date named, in the corporation "Edison Electric Light Company." Except for the statute of the state of New York, permitting consolidation, the original companies could not have thus merged themselves into a new corporation. The state, which thus provided for the consolidation of the creatures of its own creation, undoubtedly had the power to regulate the manner of that consolidation and the extent to which the functions inherent in their former life should be thereby suspended or destroyed. Among these functions was the conducting of suits, actions, and proceedings in courts of justice. The right to appear as a party litigant was one which the corporation or artificial person obtained by the act of the state which created it, and it certainly has never been contended that because that creation was under state law such artificial person could not be a party litigant in federal courts. When the state undertook to regulate the matter of consolidation, and the extent to which it should terminate the life of the artificial persons it had created by destroying their functions, it expressly provided (Laws N. Y. 1884, c. 367, § 6) that—

"No suit, action, or proceeding then pending before any court or tribunal, in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party, shall be deemed to have abated or been discontinued by reason of any such consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporations had not entered into the said agreement of consolidation; or the said new corporation may be substituted," etc.

The state, by this act, expressly avoided interfering with the continued exercise of the artificial person's functions as a litigant in cases when such functions were already in use. Therefore, being properly a party litigant in the suit before consolidation, it would remain so afterwards, not because the state statute is operative to regulate the practice and procedure of federal courts in equity suits, but because, so far as the litigant life of the artificial person (properly a party to the suit when brought) is concerned, there has been no change, the only power which could destroy it having scrupulously refrained from doing so. As by the consolidation all the property and rights of the old company were transferred to and vested in the new, (Consolidated Act, *supra*, § 5,) and the new company succeeded to all the obligations and liabilities of the old one, the fruits of any recovery belong to the new company, and the provisions of an adverse judgment can be enforced only against it. The survival for purposes of pending suits is therefore merely nominal, but that is no anomaly; provisions of law allowing personal representatives to continue suits in the name of the original party after his death are common.

Nor do we find any bar to the maintenance of this suit in the provisions of section 4898, Rev. St. U. S., that "every patent or interest therein shall be assignable in law by an instrument in writing." Whether the bare legal title to the patent in suit passes with all beneficial interest

in the patent by the consolidation to the new company, or whether some instrument in writing must still be executed to make such transfer complete, (the life of the old company continuing sufficiently to consummate the devolution which the consolidation act provided for,—see *Edison Electric Light Co. v. New Haven Electric Co.*, 35 Fed. Rep. 236,) the new company would have the right to continue, under the name of the old one, pending litigation to enforce rights which are in fact its own, with the same force and effect as if it were itself complainant. We do not find in the various contracts introduced in evidence sufficient warrant for holding that the complainant was “without such interest in the subject of the controversy as to enable it to maintain the bill in its own name without joining other parties,” nor do the facts make out such a case that injunction should be refused on any theory of laches or equitable estoppel by reason of undue delay in bringing suit, or acquiescence in known infringements.

The decree of the circuit court is therefore affirmed, with costs.

ASHTON VALVE CO. v. COALE MUFFLER & SAFETY VALVE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 18.

1. PATENTS FOR INVENTIONS—ANTICIPATION—SAFETY VALVES.

Claim 1 of letters patent No. 200,119, issued February 12, 1878, to Henry G. Ashton, for an improvement in safety valves, consisting substantially of an ordinary spring valve with a pop-valve chamber added, in combination with a valve seat, an inclosed spring chamber, and an inclosed discharge chamber, is void because of anticipation by the English patent of 1872, No. 891, to Giles. 50 Fed. Rep. 100, affirmed.

2. SAME—EXTENT OF CLAIM.

In his specifications Ashton states that his combination is very important “in all cases where the steam is prevented in any way from escaping freely from the hood or casing, as is often the case.” In another place he states that he provides holes or vents in the spring chamber for the escape of such steam as may enter it, but these vents are not mentioned in the claims, which cover merely the above combination, “arranged to operate as described.” *Held*, that the patent did not cover the use of the vent holes. 50 Fed. Rep. 100, affirmed.

3. SAME—ANTICIPATION—SENIOR AND JUNIOR PATENTS—EVIDENCE.

Letters patent No. 299,503, issued June 3, 1884, to Ashton, for a combination of a muffling chamber, surrounding a safety valve, with a pipe communicating from the spring chamber to the outside air, was anticipated by patent 297,066, issued April 15, 1884, to Coale, which covers practically the same features, complainant having failed to show by a preponderance of the evidence that Ashton was in fact the first inventor. 50 Fed. Rep. 100, affirmed.

Appeal from the Circuit Court of the United States for the District of Maryland.

In Equity. Suit by the Ashton Valve Company against the Coale Muffler & Safety Valve Company and others for infringement of patents. In the circuit court the bill was dismissed. 50 Fed. Rep. 100. Complainant appeals. Affirmed.

J. E. Maynadier, for appellant.

W. J. O'Brien and *H. T. Fenton*, for appellees.

Before GOFF, Circuit Judge, and HUGHES and SIMONTON, District Judges.

HUGHES, District Judge. This suit relates to safety valves applied to steam boilers, particularly to those used on the locomotive engines of railroads. It presents two questions for adjudication. One is whether the first claim in complainant's patent, No. 200,119, was patentable, and has been infringed by defendant in the safety valves which it manufactures and sells, one of which is exhibited with the evidence in this cause. The other question is whether the defendant, in making and using his combined safety valve and muffler described in patent 297,066, one of which is exhibited, infringes complainant's combination of safety valve and muffler, described in patent 299,503. The court below decreed for the defendant on each of these questions. To this decree the complainant has filed 20 assignments of error. It is hardly conceivable that the court below could have fallen into as many as 20 distinct, different errors in passing upon the two questions at issue; and this court will not enter *seriatim* into an examination of these several assignments, but will treat the subject in a more compendious manner.

Between 40 and 50 exhibits have been filed in the evidence in this case, consisting, for the most part, of patents granted to various persons by the United States and Great Britain, illustrated by copies of the original drawings, and several of them also by models of machines in actual use. They show the evolution through which the steam safety valve has passed in the last quarter of a century. They show that neither one of the patents, 200,119, 297,066, or 299,503, with which we are immediately concerned, embraces any novel principle, and that these patents embody only some change of mechanical form, arrangement, or combination more or less variant from safety valves and muffler attachments previously in use. The utmost claim of their authors (with an exception that will appear in the sequel) is for novelty in the combination of known devices, and not novelty in any principle discovered. It is true that the combination of known devices in such manner as to produce results new in kind or character is patentable; yet, when patents for the combination of known devices in such manner as to produce results new and better only in degree than others previously produced are brought before the courts, they are held to be nonpatentable.

In further introduction to the subject before the court, a few things may be premised about safety valves and mufflers. The original safety valve was used in connection with a spring,—usually a spiral spring,—by which the amount of pressure to be allowed in the boiler before escape could be regulated. This spring safety valve was at first not inclosed from the outer air. Afterwards a metallic cylindrical chamber or box was placed over it, with more or less vent in the top for the outlet of any steam that might find its way into this box, as a safeguard

against back pressure. Experience with this simple form of safety valve taught that, while it was easy enough to contrive a valve which would relieve the boiler, yet it was difficult to devise one which, while it opened against the increasing resistance of the spring, would close quickly under the pressure of the same spring against the steam. It was found in practice that these valves were liable either to open too long, allowing too great an escape and a waste of steam, or not long enough to permit the escape of the amount of steam necessary to safety.

Then came the valve called the "pop valve," invented by Richardson, patented in 1866 and 1869, which consisted of an addition to the ordinary safety valve. Its inventor, describing it, says in substance: It consists in forming the valve with an additional surface outside of the ground joint for the escaping steam to act against; this additional surface being surrounded with an overlapping lip, rim, or flange, which projects downwards sufficiently to leave but a narrow escape for the steam when the valve is open, but which, although of greater diameter than the valve seat, yet, by means of the lap, presents a less area of opening for the escape of steam than is produced at the valve seat; so that the steam which escapes through the area between the valve and seat shall exert pressure against the additional surrounding surface, and thereby not only open the valve completely, but hold it up until the pressure of steam in the boiler falls below the pressure by which the valve was opened. This huddling of the steam after its passage through the valve by means of an additional chamber having a restricted outlet, formed by its lap or flange, which reaches down nearly to the surface surrounding the valve seat, accomplished the *desideratum* which the simple safety valve failed to do; the additional chamber, its flange, and its restricted outlet for the steam, constituting what has become known as the "pop valve." The discharge of steam from the simple valve and the pop valve was either into the open air or into a chamber called the "discharge chamber." If it is made to pass into such a chamber, the outlet from it is generally unrestricted; and it is to this discharge chamber or its outlet that apparatus for preventing the noise attending the escape of steam, called the "muffler," is attached. It is with this discharge chamber and the muffler attached to it that we have to do in the case under consideration.

Henry G. Ashton, the inventor of the apparatus patented by No. 200,119, described it in two claims, with the first of which only have we any concern. His language in this first claim was:

"What I claim as my invention is: (1) In a safety valve, the valve, *h*, having the chamber, *s*, in combination with the seat, *j*, cylinder, *d*, and casing, *f*, *n*, arranged to operate substantially as described."

His chamber, *s*, is the pop chamber. His cylinder, *d*, is the chamber inclosing the spring of the valve. His *j* is the valve seat, and his casing, *f*, *n*, is the cylinder constituting the discharge chamber, covered by a hood. So that his first claim, written in words instead of letters, is of a combination made up of a safety valve consisting of the ordinary spring valve, having the pop-valve chamber added, in combination with

a valve seat, an inclosed spring chamber, and an inclosed discharge chamber, arranged to operate substantially as described. In the descriptive clauses of his specification he says that the main feature of his invention consists in combining a pop valve with a hood or casing to receive the escaping steam, and a cylinder into which the valve rises, making an under-discharge pop valve, that is to say, a pop valve in which the escaping steam is prevented access to the outer surface of the valve by means of a cylinder into which the valve rises, and in which it fits closely enough to prevent the entrance of any considerable portion of the escaping steam. More briefly, his claim consists in combining the spring valve and pop valve with the spring chamber and discharge chamber. He asserts that he is the first to combine the two features in one valve, and remarks that he "has discovered that this combination is very important in all cases where the escaping steam is prevented in any way from escaping freely from the hood or casing, as is often the case."

It is this claim, thus stated and described, which the complainant insists has been infringed by the defendant in this suit. The patent is not for an original discovery, but only for the combination which has been described. But the patents of Ashfield, granted in 1869, No. 97,472, and of Prescott, granted in 1871, No. 121,659, show the combination of an under-discharge safety valve with a cylindrical chamber inclosing the spring and protecting it from back pressure of the escaping steam. Ashton's patent merely substitutes the improved pop valve in the place of the simple spring valve. In this substitution there is certainly no invention; the result obtained being better only in degree, and not in character. Even if this were not so, the English patent granted to Giles in 1872, numbered 891, shows a pop valve with under-discharge,—that is to say, with the spring inclosed from the steam by an inner casing,—in combination with an outer casing to confine the steam, so that the steam, passing the valve, ascends between these inner and outer casings, and then escapes through perforations or other outlet in the hood or top of the machine. This patent of Giles anticipates patent 200,119 as to its first claim, and has reduced the complainant to the necessity of relying for novelty upon what it claims now to be a strictured outlet for steam in the discharge chamber,—a device not claimed nor described in the application for patent 200,119. It is a settled principle of law enacted by statute and announced by the courts that a patentee and his assignees have no right to the exclusive use of anything patented which the inventor has not distinctly claimed in his application for the patent.

It seems perfectly clear that the patentee did not claim a strictured outlet from his discharge chamber in his application for patent 200,119; yet the complainant, in its twelfth assignment of errors, insists that the court erred in not holding that no safety valve was known prior to patent No. 200,119 in which steam could be prevented from escaping freely from the outer casing (discharge chamber) without crippling the action of the safety valve; that the first claim in patent 200,119 covered

all safety valves with that vital feature; and that the safety valves made and sold by the defendant contained that vital feature, and would be worthless without it. In its thirteenth assignment it says that the court erred in disregarding the fact that no structure was known prior to patent 200,119, and claimed in the first claim, in which there was a strictured chamber to increase the lifting force of the valve, (meaning the pop chamber) a second strictured chamber in which the escaping steam was confined, (meaning the discharge chamber,) and an unstrictured chamber, (meaning the spring-valve chamber,) which shielded the valve from the pressure in the second strictured chamber or discharge chamber. And in its fourteenth assignment it repeats the asseveration that no structure was known prior to patent 200,119 in which the steam which escaped past the valve was compelled to pass into a hood or casing, from which it was prevented from escaping freely.

Nothing can be more obvious in this patent 200,119 than that no claim is made in its specifications for a restricted outlet from the discharge chamber, now asserted to be a vital feature of the patent. The drawing filed with the application shows quite a large outlet from the discharge chamber, which is not lettered or described in the specification, and is apparently so large as to fail even to suggest a restriction of the steam passing out of it. There is a sentence in the specification already quoted in which the patentee says: "I have discovered that this combination is very important in all cases where the steam is prevented in any way from escaping freely from the hood or casing, as is often the case,"—a sentence which merely suggests that the steam may, from some cause not defined, fail to escape freely from the discharge chamber. But the patentee does not describe or even mention any specific means of preventing the free escape; much less does he claim a strictured escape of steam from the discharge chamber as a vital feature of his combination. In insisting now that the defendant has incorporated this vital feature in its safety valve, the complainant seems to place itself precisely within the animadversion of the supreme court in the case of *Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447, 5 Sup. Ct. Rep. 941, where it says:

"It has been held by this court that the scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged, by the language of other parts of the specification. The elements of the process under consideration cannot, therefore, be held to be covered by the patent. The contention that the patentee intended to include it in his process is evidently an afterthought."

So the claim here of a device for restricting the outlet of steam from the discharge chamber of the Ashton valve is evidently an afterthought. It was not specified in the claim accompanying the specification of patent 200,119, nor described, and, even if hinted at at all, it was in terms so vague as to avail nothing as a claim of the vital feature of a patent. The patentee claimed nothing new in his specification of patent 200,119 but the combination of previously known devices, which combination he there precisely described. Yet the complainant now insists that that

patent does contain something new; the novel feature being a strictured escape of steam from the discharge chamber, now ranked as the vital feature of No. 200,119. We have said enough to show that such contention is inadmissible, and that the use of a strictured outlet from the discharge chamber by the defendant, in combination with an inclosed spring and pop valve, constitutes no infringement of patent 200,119.

It may be well to advert, before concluding this branch of the subject, to what is said in the brief and evidence of complainant concerning vents or outlets from the spring chamber of the Ashton valve for such steam as may enter it in escaping from the valve. In the application for this patent it is merely stated that holes are provided to give free outlet to steam entering the spring chamber; but this feature is not spoken of as an invention or discovery, and is not distinctly mentioned in either claim of the application. If it is claimed at all, it is done merely in combination with the patentee's peculiar form of pop valve; and, as defendant does not use this latter, there is no infringement in that respect.

The second question in this suit relates to patents for mufflers in combination with safety valves,—one of them, belonging to the defendant, issued to Coale in April, 1884, numbered 297,066; the other, belonging to complainant, issued to Ashton in June, 1884, numbered 299,503. Each of the two patents is for a combination of a muffling chamber, surrounding a safety valve, with a pipe communicating from the spring chamber through its top or hood with the outer air. They are substantially the same machine; and, although much evidence was taken upon, and much space given in the briefs to a discussion of, the relative merits and constituent parts of the two implements, it is quite unnecessary for the court to go into these matters. This branch of the case turns upon a simple question of law, into which no question of mechanical invention enters. The defendant's patent having been issued before that of the complainant, upon an application filed in advance of the latter's application, the burden of proof is upon the complainant to establish a prior use of the machine by a preponderance of testimony over that of defendant to the contrary. This the complainant has failed to do. The defendant proves the use of a combined muffler and safety valve equivalent to that described in patent 297,066 as early as 1882. The complainant attempts the same thing in regard to patent 299,503, but fails in the effort. Its witnesses speak chiefly from memory, in terms far from positive or conclusive; and, when referring to written memoranda, fail to antedate the year 1884. On this branch of the case the priority of its patent establishes the right of the defendant to the exclusive use of its implement as against the complainant. What its rights are as against the rest of the world is not in issue in this cause. On the whole case, this court is of opinion that there was no error in the decree of the court below dismissing the complainant's bill, which is therefore affirmed.

THE RAPID TRANSIT.

DEMING *et al.* v. THE RAPID TRANSIT.

(District Court, D. Washington, N. D. October 3, 1892.)

No. 414.

1. ADMIRALTY PLEADING—DEPARTURE.

Under a libel *in rem* on a contract of affreightment to recover for cargo destroyed in extinguishing a fire, libellant may be allowed to shift his claim to a demand for a general average, when the facts alleged in the libel and answer are sufficient, taken together, to sustain the same. *Dupont de Nemours v. Vance*, 19 How. 173, followed.

2. SHIPPING—DAMAGE TO FREIGHT—FIRE.

A steamer with a cargo, chiefly of lime, took fire, and was scuttled by the city fire department, that being the only method of preventing a total loss of the vessel and cargo, whereby the lime was destroyed. *Held*, that under Rev. St. § 4232, which provides that no owner of a vessel shall be liable for any loss happening to the cargo by fire unless caused by his design or neglect, the purchaser has a complete defense against an action *in rem* against the vessel.

3. GENERAL AVERAGE—CARGO INJURED IN SUPPRESSING FIRE.

The owner of cargo which is damaged by water in suppressing fire is entitled to compensation in general average. *The Roanoke*, 46 Fed. Rep. 297, followed.

4. SAME—BASIS OF SHIPOWNER'S CONTRIBUTION—INSURANCE.

Insurance is not a part of an owner's interest in a ship, and in cases of general average the amount of insurance received by him should not be added to the value of what was saved, for the purpose of increasing the fund to be distributed. *The City of Norwich*, 6 Sup. Ct. Rep. 1150, 118 U. S. 468; *The Scotland*, 6 Sup. Ct. Rep. 1174, 118 U. S. 507; and *The Great Western*, 6 Sup. Ct. Rep. 1172, 118 U. S. 520, — followed.

5. ADMIRALTY—COSTS.

A libellant *in rem*, suing on the contract of affreightment to recover damages for loss of cargo, failed to sustain the allegations of his pleadings, and increased the expense of the case by introducing immaterial evidence. He was allowed, however, to recover in general average, but had not attempted an adjustment on that basis before commencing the suit. *Held*, that he was not entitled to full costs.

In Admiralty. Libel *in rem* by Deming, Burntrager, and others against the steamer Rapid Transit, Elmer E. Caine, claimant. Decree for general average.

Applegate & Tilow, for libellants.

John H. Elder, for claimant.

HANFORD, District Judge. On the 14th day of August, 1891, the steamer Rapid Transit, with a cargo consisting principally of lime on board, suffered damage by fire in the harbor of Seattle, and was, by the fire department of the city, beached and scuttled for the purpose of extinguishing the flames. The sinking of the steamer caused a total destruction of the lime, but that was the only method by which a total loss of the vessel, as well as the cargo, could have been prevented; and it was effective. The libellants owned the lime which was destroyed, and this suit was instituted by them to recover the full value thereof upon their contracts of affreightment.

Section 4282, Rev. St. U. S., provides that—

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by design or neglect of such owner."

The claimant purchased the vessel after the fire, and he claims the protection of this statute on the ground that if the former owners are, by its terms, shielded from liability upon their contracts, the vessel is also entitled to immunity from proceedings *in rem*. I find that there is in the proofs absolutely nothing to support an accusation against the owners of any intentional act or negligence which could have been the cause of the fire and consequent injury to the vessel and her cargo; therefore the statute affords a complete defense as against the claim originally put forth by the libelants.

The libelants, however, after a total failure to sustain their original claims for the full value of the lime because of the breach of the contracts of affreightment, have taken a departure, and now assert that they are entitled to recover a portion of their losses upon a basis of general average. All the facts essential to a recovery in general average, additional to the allegations contained in the libels, are set forth in the answer. The objection, therefore, that the allegations of the libelants are insufficient to make a case of general average is technical, rather than substantial. I hold that, although there has been a radical departure, the case as now developed is one in which the court may lawfully apportion the losses sustained among the losers. It is expedient for all the parties to have their differences growing out of the transaction alleged in the pleadings, and which are cognizable in a court of admiralty, fully determined in the present suit, rather than bear the additional expense and suffer the delay incidental to commencing anew; and it is competent for the court to decree "upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him." *Dupont de Nemours v. Vance*, 19 How. 173.

There is a conflict of authority upon the question as to the right of an owner of merchandise which has been, while being carried as freight upon a vessel, destroyed or damaged by water in consequence of a fire happening on board the vessel, to partial compensation in general average. The arguments for and against the validity of such a claim are very concisely and clearly stated, and the authorities are collated in the learned opinion of Judge JENKINS in the case of *The Roanoke*, 46 Fed. Rep. 297. Rather than indulge in further discussion of the subject, I will rest my decision upon the authority of that case, and the decisions which it follows.

From the evidence I find that the value of the steamer immediately before the fire was \$10,000, and the values of different portions of her cargo were as follows: Lime, \$1,825; oats, \$205; hose, \$380; total value of vessel and cargo, \$12,410. I also find from the evidence that the value of the steamer in her condition and situation, immediately

after the fire had been extinguished, was \$2,000. In addition to this sum, the oats and hose were saved, making the total value of property saved \$2,585. There was lost to the owners of the steamer by damages to the steamer \$8,000; pending freight, \$218.50. The libelants Deming & Burntrager lost 700 barrels of lime, worth \$700; the Tacoma Trading Company, 1,000 barrels; worth \$1,000; and the libellant A. L. Aiken, 125 barrels, worth \$125; total amount of losses, \$10,043.50. On this basis the adjustment will be decreed.

The libelants claim that the amount received by the owners of the steamer upon policies of insurance should be added to the value of what was saved to them, for the purpose of increasing the fund to be distributed. But this cannot be allowed. The supreme court of the United States has, after full consideration and due deliberation, in a series of decisions definitely held that insurance is not a part of an owner's interest in a ship. *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. Rep. 1150; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174; *The Great Western*, 118 U. S. 520, 6 Sup. Ct. Rep. 1172. Although four of the judges who participated in the disposition of these cases, in carefully prepared and well-reasoned opinions, dissented, the decisions are declarations of the law by the highest court of this country, and the question is now settled. *Butler v. Steamship Co.*, 130 U. S. 558, 9 Sup. Ct. Rep. 619. It would be unbecoming for this court to hear from counsel arguments questioning the justice of the law as it has been so declared. I therefore declined to hear arguments upon this point, for the reason that these decisions cannot be, by this court, overruled or disregarded.

Considering the failure of the libelants to sustain the allegations made in their pleadings, and the fact that the expenses of the case have been greatly increased by the introduction on their part of evidence which is wholly immaterial, and the further fact that no attempt was made to obtain an adjustment in general average before commencing the suit, it is my opinion that it would be unfair to award them full costs. The decree will require each party to pay all fees and expenses of his own witnesses. No proctor fee will be taxed, and the libelants will pay one third and the claimant two thirds of all the other fees and costs.

THE MINNIE C. TAYLOR.

THE F. H. WISE.

MORAN *et al.* v. THE MINNIE C. TAYLOR.QUINLAN *et al.* v. THE F. H. WISE.

(District Court, S. D. New York. July 13, 1892.)

1. COLLISION—SAILING VESSEL AND TOW—CROSSING COURSES—WHEN DUTY TO ABANDON RIGHT OF WAY.

The tug Wise, with two barges, one behind the other, in tow on a hawser, was proceeding along a channel in Vineyard sound by night, bound east. Some 200 to 600 feet off on her starboard hand, sailing free, and drawing ahead of the tow, was a sailing vessel. The schooner Minnie C. Taylor, bound west, was beating across the channel, and was on the starboard bow of the Wise. It was the statutory duty of the Taylor, in that situation, to keep her course, and of the sailing vessel and the tug to avoid her. The sailing vessel went across the bows of the Taylor, which always held her course, until she struck the hawser between the tug and the forward barge, and was then run into and cut down by that boat. The court found that the intention of the sailing vessel to cross the bows of the Taylor became evident to the latter when she was 800 feet from the line of the tug and tow, and had ample room to tack. *Held*, that in such situation, with the sailing vessel crossing her bows, and the tow almost directly ahead, and ample time for herself to have gone about, it was the duty of the Taylor, though she had the right of way, to have tacked, and that the pilot of the Wise was justified in thinking that the Taylor would do so; but that, when the actual course and intention of the Taylor not to tack became evident, the tug should have slackened her hawser, as she had abundant opportunity to do, and permitted the Taylor to cross it. *Held*, therefore, that both vessels were in fault, and the damages should be divided.

2. SALVAGE—AID RENDERED VESSEL IN COLLISION BY COLLIDING VESSEL.

After the collision the tug towed the schooner into port. *Held*, that the tug, being partly in fault for the collision, could not maintain an action for salvage.

In Admiralty. Libel for salvage. Cross libel for damage by collision.

Benedict & Benedict, for the Minnie C. Taylor.

Carpenter & Mosher, for the F. H. Wise.

BROWN, District Judge. The above actions grew out of a collision which took place at about 2 A. M. of May 8, 1892, in Vineyard sound, between barge No. 55, in tow of the steam tug F. H. Wise, and the schooner Minnie C. Taylor, by which the schooner was seriously damaged. After the collision the schooner was towed by the tug into Vineyard haven. The owners of the tug, claiming that the collision was caused solely by the fault of the schooner, filed the libel first above named for salvage compensation for their aid to the schooner after collision. The cross libel was filed to recover damages to the schooner, on the contention that the collision was caused solely by the fault of the tug. If the latter contention is correct, the libel for salvage cannot be sustained.

The place of collision was in the channel way between Squash meadow and Hedge fence, a passage less than three fourths of a mile in width, as bounded by the range of the red light from Nobska point on the

north, and by the red range of the West Chop light on the south. The tug was bound east, going along the northerly side of the channel way near the red range of the Nobska point light, and heading about south-east by east. She had in tow barge No. 55 astern on a hawser of 125 fathoms, and another barge astern of the latter upon a hawser of from 80 to 100 fathoms. The schooner Taylor was bound from St. Johns to New York, with a cargo of lumber. The wind was north northwest, and a good sailing breeze. The schooner was 108 feet long, with three masts and three jibs. All her lower sails were set, and both she and the tug were making about four knots an hour. Not long before the collision the schooner had come about from her starboard tack, close hauled, and heading about northeast by east; that is, at right angles with the course of the tug and tow. The night was clear, with moonlight; and the schooner and her course were recognized by the pilot of the Wise, by her sails, at a sufficient distance without distinguishing her lights.

There is some confusion in the testimony as to the position of the vessels when seen by each other. I have no doubt, however, that the schooner was seen when at least a quarter of a mile distant from the line of the tug and tow, at which time, computing backwards from the collision, the plotting of the navigation will show that the schooner must have borne about two and one half points forward of the tug's beam. At the same time another schooner, bound eastward, with the wind free, was going between the line of the tug and the schooner, parallel with the tug, and about one third faster than the latter, as I find by computation from the evidence of the tug's witnesses. When the Taylor was first seen, the other schooner had already passed, or was passing, barge No. 55, and was drawing up towards the tug on a course distant from her, according to the estimates of the different witnesses, from 200 to 600 feet.

By the ordinary rule of navigation it was the duty of the tug and tow, and of the other schooner, which had the wind free, to keep out of the way of the Taylor. The mate of the Taylor, who was in charge of her navigation, testifies that he expected both of them to turn to starboard and go under his stern. But the other schooner was at a sufficient distance, and had sufficient speed, to keep out of the way of the Taylor by going ahead of her, and did so; and the tug and tow, so long as the parallel schooner kept on her course, could not turn to starboard, since that would involve collision with the latter. The Taylor, on the other hand, was bound, as respects the other schooner, to hold her course until the risk of collision with the latter was over; and it is contended that when that risk was past, she was too near the line of the tug and tow to tack without coming into collision with the barge. She accordingly kept her course as above stated, without change, and as the evidence shows, ran within 75 feet of the barge till she brought up against the hawser; and her speed being checked thereby, the barge came up and struck the schooner at her main chains about 60 feet from her stem.

The above circumstances constitute, it is evident, a case of peculiar circumstances. But these circumstances were palpable and open to the observation of both vessels alike. Either, by the use of reasonable endeavors, might, as it seems to me, easily have avoided this collision, and both, therefore, are in fault.

1. The schooner ought, under the circumstances, to have tacked and come about when the determination of the other schooner to go ahead of her was perfectly assured, if there was room for her to do so; and that there was room I have not the least doubt. The design and course of the other schooner were, as I find, perfectly evident when the Taylor was at least 800 feet from the line of the tug and tow. That allowed an ample space for the schooner to come about and avoid collision.

That the Taylor had this room is easily deducible from the evidence.

The concurrent testimony, both of the tug and of the schooner, shows that the other schooner must have been from 400 to 500 feet to southward of the tug. The mate estimated the distance at 500 or 600 feet; the master and the officers of the *Wise*, at half that distance. But the facts of the navigation furnish the best evidence. For the Taylor was just coming up under the stern of the other schooner when the master and pilot of the *Wise* saw that she was not going to tack, and, therefore, starboarded and slowed. At this time the other schooner was just lapping the stern of the *Wise*, which then bore a little on the Taylor's starboard bow. When the master of the Taylor came on deck, he says he was right astern of the other schooner, about half way across her and from one to two lengths distant. The line of the Taylor's course, therefore, at the time when her bow had come up even with the stern of the other schooner, say 100 feet distant, was about 200 feet astern of the tug, which agrees with the master's estimate. As the Taylor went within less than 100 feet of barge 55, which was 750 feet astern of the *Wise*, it follows that the barge moved from 400 to 500 feet, while the Taylor was passing from the line of the other schooner to that of the tug and tow; and as the Taylor was going at least as fast as the barge, the other schooner must have been at least 400 or 500 feet from the line of the tug and tow. But the intention of the other schooner to cross ahead of the Taylor must have been perfectly evident to the Taylor from the time when she had come within 300 feet of the line of the Taylor's course, showing no change. Assuming that the other schooner was of the same size as the Taylor, that is, 165 feet over all, she must therefore, have traveled about 570 feet from that time till the bow of the Taylor was astern of her; and the Taylor must have sailed in the same interval about 400 feet. Adding this to the distance of the other schooner from the line of the tow, it follows that the Taylor was free to tack, if she chose, when from 800 to 900 feet distant from the line of the tow, and more than 1,200 feet distant diagonally from the barge. If, to make assurance doubly sure, the Taylor had waited until the other schooner was within 100 feet of the line of her course, the Taylor would have been about 300 feet to the southward of the schooner; *i. e.*, from 700 to 800 feet to the southward of the tug and tow.

In that situation it was the duty of the Taylor to tack, because there was ample room for her to do so. The tug was right ahead of her, and there was no other probable way of avoiding collision, except by taking the chance of running over the hawser, an experiment which a sailing vessel should not resort to on her own responsibility except *in extremis*. The tug had given no signal suggesting to cross the hawser; nor had she stopped; and stopping was a necessary precaution if the schooner was to cross. The tug had been expecting the schooner would tack, because she could do so and was near the northerly line of the channel. The schooner's continuance on her course was, therefore, a deliberate and unnecessary running into danger, in the face of evident peril, when she had abundant means of avoiding it by tacking. A radius of 700 feet is much more space than is necessary for a schooner only 108 feet long to tack in. Otherwise there would be little beating in the East river. The mate testified she wanted "three or four lengths,"—"500 or 600 feet." Three lengths would be but 324 feet. When the master came on deck he asked the mate why he had not tacked, *i. e.*, before; and the latter replied, "on account of the schooner." But it is noticeable that even then, when the available distance for tacking had been diminished by almost one half, the mate asked the captain if he should put the wheel down. This would indicate that the mate thought tacking was possible even then, as the master and pilot of the Wise testify it was. The captain ordered him to keep his course.

The mate's knowledge of the rules as to the meaning of a tow's lights was defective; and I doubt whether he recognized, as he ought to have recognized, that the barge was in tow of the Wise, until the other schooner had passed the Taylor; and it was then that he first called the master. Even at that time had the wheel been put hard astarboard, the Taylor must have gone astern of the barge; and if she did not wholly clear, the most that could have resulted would have been, I think, a harmless sagging of the schooner upon the hawser between the two barges. He had no right to run blindly upon a dangerous course, when a safe tack was easy.

It is evident, however, that the master expected to run over the forward hawser, and took his chances of clearing it rather than tack at that time. He, no doubt, miscalculated entirely as to what part of the hawser he would cross. Had he crossed it near the middle, where he says he went, he would, no doubt, have cleared it. But instead of going midway, as he might have done by porting his helm, he went so near the barge as to encounter the hawser.

The channel in which these vessels were moving resembled a river more than the open sea. The tug and tow were proceeding, in effect, near the bank; represented here by the red range of the Nobska point light; and there was no real occasion for the schooner to cross that line. In the ordinary course of navigation she would have speedily tacked. In such a situation it was but reasonable in the tug to assume that the Taylor would tack as soon as she was free to do so, just as in proceeding near the river bank a tug thus incumbered by a long tow, would not

expect a schooner to insist on crossing her course merely to run a length or two nearer the river shore.

2. In the circumstances of this case I do not think it was reasonably incumbent on the pilot of the tug to stop and allow the boats to huddle together, simply to give the schooner a chance to cross his course if she should choose to do so, instead of tacking at about the place where she would naturally be expected to tack, provided the tug took care to give the schooner the chance to cross a perfectly slack hawser, if she insisted on crossing his line. The tug had the right, I think, to perform her duty of keeping out of the way by either stopping early enough to let the schooner go ahead, or by stopping later, in season to give a safe course across a slack hawser. I think the tug could have stopped in time to allow the schooner to go ahead of the tug, if she wished. But without passing upon the question of her duty to do so under such circumstances, I think the tug must be held to blame for not stopping sooner, or casting off her hawser, when the actual intention and course of the Taylor not to tack were perceived, in order that the manifest danger from the hawser might be avoided by letting it all drop to the bottom. The schooner's intention to cross the hawser instead of tacking was evident in abundant time either to slacken it thoroughly, or to cast off. The evidence of the tug is, that she did stop her engine before collision so as to slacken the hawser to some extent. But the evidence of the pilot shows that the Taylor was then very near the hawser. A small interval after stopping would have been enough to allow the barge to run up so that the hawser would have dropped nearly perpendicularly from her stem, instead of running out ahead considerably as it evidently did. The greatest depth of water there was only from 10 to 14 fathoms, so that a short stop would have brought the whole hawser down to the bottom.

In the case of *The Galileo*, 28 Fed. Rep. 469, the tug was held in fault, on appeal, in the circuit court, for not having stopped sooner and cast off the hawser of the tow, although the tug had the right of way, and the other steamer, (which was in the situation of barge 55,) had given her a signal assuring the tug that she would keep out of the way. In this respect I cannot distinguish the present case from that of *The Galileo*, except that in the present case the duty of the tug was much plainer and stronger, because the primary duty to keep out of the way was upon the tug, and the schooner had given no assurance that she would keep out of the way, and was evidently proceeding to cross the hawser.

Both vessels being, therefore, in fault, the libel for salvage is dismissed; and the owners of the schooner are entitled to recover one half their damages, which, if not agreed upon, may be determined by a reference.

THE ROSE CULKIN.

THE A. C. NICKERSON.

ELDRIDGE v. THE ROSE CULKIN.

CULKIN v. THE A. C. NICKERSON.

(District Court, S. D. New York. July 22, 1892.)

1. COLLISION—STEAM AND SAIL—WHEN SAILING VESSEL TO AVOID STEAMER—RULE 24.

The ordinary rule that a steamer must avoid a sailing vessel presupposes an ability to keep away, and a relative freedom of motion in the steamer as respects the sailing vessel. When these conditions are mainly reversed, the exceptional case arises that is provided for by rule 24. Accordingly, where a tug with a tow was crossing the mouth of the North river, diagonally, at the rate of about two miles an hour, and a sailing vessel came down the river before a strong gale at the rate of about ten miles, *held*, that it was the duty of the sailing vessel seasonably to shape her course so as to avoid the tug. The sailing vessel having at first luffed to go astern of the tow, and then paid off again, when close up, in an attempt to cross the bows of the tug, and the latter not being able to do anything thereafter to keep out of way, *held*, that the sailing vessel was solely liable for the collision which ensued.

2. LIMITATION OF LIABILITY—SURRENDER OF VESSEL—PREVIOUS STIPULATION FOR VALUE—INTERMEDIATE VOYAGES, WHEN NO BAR.

The giving of a stipulation for the value of a vessel, on libel in collision, is no bar to a subsequent proceeding in limitation of liability, nor any bar to the *surrender* of the vessel herself in that proceeding; and though the vessel may have made several short voyages after the giving of such stipulation, and before the surrender, she may still be surrendered in exoneration of liability, provided her value has not in the mean time become impaired, and the circumstances show that no waiver of the right of surrender was intended. Foreign authorities considered.

In Admiralty. Libel by Albert B. Eldridge, owner of the steam tug A. C. Nickerson, against the schooner Rose Culkin, for collision. Cross libel by Catharine A. Culkin, owner of the Culkin, against the Nickerson. Immediately after the filing of the libel against the Culkin, her owner gave a stipulation for \$3,500 as the agreed value of the vessel, and thereafter repaired and used her in voyages between New York and Rockaway. Subsequently her owner filed a petition for limitation of liability, and offered to surrender the vessel.

Carpenter & Mosher, for Nickerson.

Alexander & Ash, for the Rose Culkin and petitioner.

BROWN, District Judge. Between 3:30 and 4 P. M. of October 27, 1891, as the schooner "Rose Culkin" bound down the bay from the Erie Railroad dock at Jersey City, was approaching Ellis island, she came in collision with the steam tug Nickerson, striking with her stem the port side of the tug at an angle of from five to eight points. Both received damages, for which the above libel and cross libel were filed. The wind was blowing such a gale from the northwest, or west northwest, that a lighter came down to the westward of the schooner sailing under bare poles. The schooner was light, about 74 feet long, and sailing under a jib, foresail and two reefed mainsail, and she was going through the water at the rate of about 10 knots, or against the flood tide about 8

knots by land. The tug had taken the barge Kodiak in tow on a hawser of 18 fathoms from the anchorage ground south of Ellis island, and was heading about east for the Battery nearly across the tide, and going at the rate of about 2 knots through the water. The place of collision was near the edge of the anchorage ground a little to the northward and eastward of Ellis island, probably about 200 yards below the permanently anchored barge above Ellis island, and less than 100 yards to the eastward of that barge. The witnesses for the schooner contend that the collision was brought about by a sudden turn of the tug to starboard across the bows of the schooner, when the latter was 100 feet distant. The tug's witnesses deny this, and contend that the collision happened because the schooner, after heading so as to pass to the westward of the tug and tow, paid off to the eastward in the attempt to cross the bow of the tug when very near.

1. The schooner had come down about one-third the distance across from the Jersey shore, and, as her witnesses say, was heading towards Owl's Head. But in her three different pleadings it is stated that her course was southwest, which is three points more to the westward than the course for Owl's Head. If instead of being upon a southwesterly course, she was making for Owl's Head, without any change of course, as her witnesses contend, she must have gone at least 300 yards to the eastward of the place of the collision.

The ordinary course down the bay is south by west one-half west; and that course also would have carried the schooner considerably to the eastward of the place of collision. To account for the collision at all, therefore, I must find that she was not heading as her witnesses say she was, but more nearly towards the southwest as her pleadings allege, and as the tug's witnesses also state; and such a general course would have carried her to the westward of the tug and tow as the latter's witnesses allege. The tug's course was necessarily about due east, interrupted but a short time by a little starboarding in accordance with a signal of two whistles given a few minutes before this collision to a large steamer which came down the bay and passed to the eastward. As the tug was bound for the East river and previously heading about due east, there is small probability that she at any time, with no apparent motive or necessity, turned from four to five points to the northward, so as to head to the westward of the schooner's southwesterly course. It is difficult to make out what Capt. Woglan means to testify to. He first saw her about 900 feet off, he first says; afterwards he says about four lengths off, or less than 300 feet. The tug, he says, was then heading for the Battery, and if she had kept her course she would have passed under his stern. Yet that course was nearly due east, and no further swing to the eastward is claimed in the schooner's pleadings. The claim that the collision was caused by the sudden porting of the tug when only 100 feet away, whereby she threw herself across the schooner's bow, is absurd. Going only about one fifth as fast as the schooner, the tug could not in any such space have materially changed her position. The apparent change of the tug was caused, I have no doubt, by the real change of the schooner's heading, as the other witnesses state. The whole case on the part of the

schooner presents such contradictions and inconsistencies as to make it impossible to place much reliance on their testimony concerning her navigation.

The persons in the best position to judge of the course of the schooner, were the captain of the Kodiak, who was behind the tug, and the persons on the Raymond alongside the barge. They all testify that the schooner at some little distance away was heading towards or to the westward of the tug and tow; that she luffed up somewhat in passing the anchored barge so as to go very near to it, and that had she continued that luff, she would have passed the tug and tow without difficulty to the westward; but that instead of doing this, she paid off again when near the barge apparently attempting to cross the bow of the tug, and thus brought about the collision. The account given by the schooner is so inexplicable and unreliable, that I am compelled to adopt the above as substantially correct; so that it becomes unimportant to determine what previous yawing, or what changes of heading before that had been made by the schooner, or whether her course when from one fourth to one half mile distant was such as to go to the eastward or to the westward of the tug and tow, about which the witnesses differ. The fact that she got so near to Ellis island from a position one third across the North river, proves that she was all the time working to windward of the usual course down the bay. She was probably unsteady; and the fact that the schooner's master, lookout, and crew saw no steamer go down just before them, and only saw the tug when she was near and roused their attention by her whistles, proves great negligence and inattention in their navigation at such high speed, and in part explains the confusion and contradiction in their testimony. But the tug's narrative and the testimony of disinterested witnesses leave no doubt that after having approached near the tug and upon a course to the westward of the tug, the schooner brought on collision by a sudden change of her course and an attempt to cross the tug's bow. This was at her own risk and fixes the blame on her, because there was undoubted room to continue on her previous course to the westward of the tug and tow.

2. I do not think, under the circumstances, any fault can be ascribed to the tug. Though bound, under rule 20, to do all she could to keep out of the way of the schooner, she was not bound to do more than was possible. But what is possible to a tug and tow going at the rate of two knots through the water, as respects a schooner coming down near the line of her course at the rate of ten knots? The ordinary rule presupposes an ability to keep away, and a relative freedom of motion in the steamer as respects the sailing vessel. When those conditions are mainly reversed, the exceptional case arises that is provided for by rule 24. *The A. P. Cranmer*, 1 Fed. Rep. 255; *The C. F. Ackerman*, 9 Ben. 179. Under such circumstances, when the tug has comparatively small power to make any change in her position, in respect to a sailing vessel at high speed, it is the duty of the sailing vessel seasonably to shape her course with reference to the situation of the tug and tow, and not to rush blindly into danger, or into such close quarters that it is practically im-

possible for the tug to avoid accident. The general testimony on the part of the schooner indicates that her master, from the time he saw the tug, intended to act on this principle; but that from miscalculation through not observing the tug and tow seasonably, or by undertaking to run too close, or at the last by some vacillation or change of purpose, he brought about the collision by attempting to cross the tug's bow. Both the master and the lookout of the schooner ascribe the collision to the change made by the tug when not over a hundred feet off. This apparent change as I have already said, was the schooner's change; not the tug's. Nothing the tug could possibly have done within any such small distance could have contributed anything material either to bring on, or to avoid, the collision. And before the schooner's change, so certain is it that she was working up close to windward towards the southwest, that I am satisfied the best the tug could do to keep out of her way was to pull off to the eastward, as she did, as fast as she could. The course when heading for the Battery was about east by north, instead of northeast by east as stated by the captain. But this error is immaterial. I must, therefore, hold the collision to have occurred by the fault of the schooner.

3. The amount of damages sustained by the Nickerson being in excess of the amount in the registry realized from the sale of the Culkin, viz., \$888.05, it has been objected both in the answer to the petition and on the argument, that the petitioner cannot limit her liability to that sum, through a surrender and sale of the vessel, because immediately after the filing of the Nickerson's libel, the petitioner, as owner of the Culkin, gave a stipulation in that cause for \$3,500, as the agreed value of the vessel; and having afterwards repaired her, thereafter employed her in making a number of voyages between New York and Rockaway during about seven weeks prior to the filing of the petition to limit liability, with the offer to surrender the vessel; this being nearly four months after the libel was filed.

The stipulation for value in the sum of \$3,500, seems on the evidence to have been given unadvisedly, and in ignorance of the right to limit liability under the statute. The petition was not filed until after a substitution of proctors. But aside from this circumstance, the stipulation in all such cases is only to abide by and pay the decree of the court. The proceeding to limit liability under the statute, however, if lawfully taken, stays further proceedings in pending suits. This would prevent any enforcement of a prior stipulation, even though a decree were obtained before the petition was filed. Such was the express adjudication in *The City of Norwich*, 118 U. S. 468, 489, 6 Sup. Ct. Rep. 1150. In the present case the proceedings to limit liability were taken before decree or trial. If rightly taken, they, therefore, supersede the prior stipulation, because the court cannot make any order for its enforcement. *Providence, etc., Co. v. Hill, etc., Co.*, 109 U. S. 578, 3 Sup. Ct. Rep. 379, 617.

The only question, therefore, is whether the circumstances above stated are sufficient to debar the petitioner from proceeding to limit her

liability by a *surrender of the vessel*, instead of *giving security* for the value of the vessel and freight at the close of the former voyage. For the latter method of procedure would have been sustained by the express adjudication of the supreme court in *The City of Norwich*, which is a much stronger case in its circumstances, both as regards the difference between the amount of the original stipulation, and the fund distributable, and as to the time during which the vessel was run upon subsequent voyages before the proceeding to limit liability was commenced.

I have not found any reported case precisely like this, in which after the release of the vessel on a stipulation for value and the prosecution of subsequent voyages, she has been offered for surrender in a subsequent proceeding to limit the original liability. The proceedings have been usually taken by *giving security*, with reappraisements if necessary, as in the cases of *The City of Norwich*, *supra*, and *The Doris Eckhoff*, 30 Fed. Rep. 140. Such cases have been frequent. The only case found having any analogy to the present is that of *The Alpena*, 8 Fed. Rep. 280, where the petitioner sought to group together, under one surrender, the claims of several creditors arising out of different voyages, viz., that of one creditor for collision damage, who had sued the owner *in personam*, and the claims of various other damage claimants arising out of the stranding of the vessel on a voyage five weeks after the voyage on which the collision occurred; and the petitioner surrendered the wreck, stripings and freight upon the last voyage, claiming a discharge from both sets of creditors. Judge BLODGETT held that this could not be done; and that the former collision claimant was not bound by the proceeding.

There can be no doubt, I think, of the correctness of that decision, for the conclusive reason that the owner had there disabled himself by his subsequent employment of the vessel and by her stranding, from effectively "transferring his interest in the vessel" as it existed at the close of the former voyage. The statute (section 4283) limits the shipowner's liability to "the value of his interest in the vessel and pending freight;" and this means as they exist at the close of the voyage. *City of Norwich*, 118 U. S. 468, 491-493, 6 Sup. Ct. Rep. 1150. And see *Gokey v. Fort*, 44 Fed. Rep. 364; *The Abbie C. Stubbs*, 28 Fed. Rep. 720; *The Anna*, 45 Fed. Rep. 900. To tender afterwards something of materially less value, is not a compliance with the statute. The "transfer" required by section 4285 is a transfer of the same valuable "interest" which section 4283 prescribes as the limit of liability. If by the owner's acts or laches the "value of his interest in the vessel" is substantially diminished, he is no longer able by a surrender of the vessel to "transfer" the interest or value which the statute contemplates; the creditor in that mode of proceeding would not get "the value of the owner's interest" (section 4283) at the close of the voyage. The shipowner's right to proceed by *surrender* must, under such circumstances, therefore, be held lost, though the right to proceed by either of the other three methods pointed out by the supreme court, including that by giving *security* for value at the close of the former voyage, might remain. *The Scotland*, 105 U. S. 24, 34, 35.

Upon those grounds, therefore, although the mere subsequent naviga-

tion of the vessel cannot be treated as a personal assumption of the debt such as to exclude all right to limit liability afterwards, or "perhaps so long as any damage or loss remains unpaid," (per BRADLEY, J., in *The Benefactor*, 103 U. S. 245; *The City of Norwich*, 118 U. S. 489, 6 Sup. Ct. Rep. 1150; *Gokey v. Fort*, 44 Fed. Rep. 364,) yet if the *Rose Culk*in had been stranded, or otherwise so damaged, or so depreciated in her subsequent voyages, as to be of substantially less market value than immediately after this collision, I should have held that the right to proceed by *surrender* was gone, and that the owner must resort to some one of the other modes of proceeding to obtain the benefit of the act. But the schooner in this case was herself damaged by the collision; she was then repaired and improved, her navigation afterwards was for seven weeks only; no accident is shown to have happened to her; and the petition avers that when tendered she was in as good a condition as at the close of the prior voyage. Meantime her liability was not certain, but strenuously contested; the owner was but imperfectly at least informed of her rights; and when the surrender was offered, her responsibility was still unadjudicated, and her liability denied. If the value of the vessel was unimpaired, and the creditor in no way prejudiced by the use meantime, I cannot perceive any sound reason why, under circumstances like these, the right of *surrender*, which the statute expressly gives, should be refused.

In the absence of any time limit, the only limitations upon the statutory right of *surrender*, are such as are to be deduced from the general principles of law, or from the manifest purpose of the act. Every privilege, no doubt, may be waived, or lost by laches, or forfeited by the voluntary act of the party incompatible with its exercise. Mr. Justice BRADLEY, in *The Benefactor*, 103 U. S. 239, 246, intimates that the proceedings to surrender must be taken "within a reasonable time;" and Mr. Justice BLATCHFORD says the transfer is to be made before "anything has intervened amounting to a waiver or forfeiture of the right to make a transfer." *Thommassen v. Whitwill*, (*Great Western*,) 12 Fed. Rep. 891, 902. But the time is not unreasonable if even the liability is in doubt, and not yet adjudged (*The Benefactor*, *supra*, 244) and if the delay and use of the vessel before the surrender have been short, and not such as to diminish her market value. Under such circumstances as exist in this case there is manifestly no intentional waiver; nor should any forfeiture of the owner's right, under such circumstances, be adjudged, if the creditor's rights and interests remain substantially unimpaired, and the owner's dealing with the vessel has not been designedly such as to prejudice or embarrass the creditor.

These views are in accord with the construction given abroad to similar provisions in the ordinance of 1681, and in article 216 of the French Code of Commerce, which embody the long prevailing law of the maritime countries of Europe, and from which the surrender provision of the act of 1851 was drawn. The ordinance of 1681 (liv. 2, tit. 8, article 2) provided that the owners might be discharged from responsibility for the acts of the master, "by abandonment of the ship and freight," (*en aban-*

donant leur bastinet et le fret.) The Code of Commerce provides (article 216) that as respects obligations for the acts and contracts of the master relating to the ship and voyage, "the owners may in all cases discharge themselves by surrender of the ship and freight," (*par l'abandon du navire et du fret.*) As the law prescribes neither time nor condition, Emerigon says the surrender "may be made in any manner whatsoever * * * and in any and every case," (*du quelque maniere que ce soit * * * en tout etat de cause.* Traite de Contrat de la Grosse, c. 4, § 11, sub. 6.) Bedaride says, (1 Comm. du Com. Mar. § 288) "As a general rule the abandonment may be made at any time (*en tout etat de cause*) so long as the owner has not expressly renounced it. This determination may be inferred from acts incompatible with the exercise of the right." Goirand (Code of Commerce, § 216) says, "the owner may abandon * * * so long as by his conduct he has not shown that he intended to make himself responsible for the liabilities of the captain." In this general proposition all seem to concur. As regards a renunciation or waiver of the right, Desjardins says: "It suffices, but it is necessary, that it result from acts implying on the owner's part the intent to pay the debt personally," which the judge of the facts is "to determine upon the circumstances." (2 Droit Com. Mar. § 295.) Valroger (1 Droit Mar. § 274) says: "Abandonment can be made in all cases, provided it has not been clearly renounced, and there has been no judgment personally condemning the owner." As respects subsequent voyages, he says "the owner will not be presumed to have waived the right to abandon so long as no formal claim has been made upon him." And in this all text writers and decisions seem also to agree. If new voyages are undertaken after suit, continues Valroger, (§ 274,) the owner "ought in general to be presumed to have waived his right as respects that creditor, whose rights upon the ship he should not be allowed to compromise; but the voyage must be one that *implies the intent* to waive the right of surrender." In the *resumé* of this subject given in the recent supplement (1890) to Jurisprudence Generale, by Dalloz, it is said: "The right to surrender the ship can no longer be exercised when the owner has done acts implying that he has renounced the use of his right. Such is the case where after suit the owner has employed the vessel on new voyages, in consequence of which she has been damaged; [citing the case of *The Rochelais*, *infra*] but not where judicial notice of the claim was not delivered to him until after signature of the charter party, from which it was sought to infer an implied renunciation of his right; nor if, after departure upon a new voyage, the owner makes declaration of abandonment, when sued by the creditor; and the abandonment may be first made on appeal." Sup. 6 Droit Mar. p. 93, §§ 328, 329. In the case of *Le Rochelais*, the court of appeals of Poitiers, 3d July, 1876, affirmed the judgment of the court below, denying the owner of that vessel the right of abandonment where the owner had employed the vessel in various voyages in the fishing business, for more than six months after suit, until she was wrecked by stranding, and then offered to surrender her in that condition. The surrender was refused on the ground that the wreck "no longer represented

the vessel as of the time when the owner's liability was fixed, (*ne representent plus le navire des 10 et 11 Fevr. 1875.*) being "no longer in condition, or entire, but damaged anew by the owner's own act, and the nature of her condition changed," (*dénaturé.*) Dalloz, 1877, part 2, p. 70.

In the later case of *The Alfred*, in the court of appeals of Caen, (Feb. 15, 1888,) it is said "The right of abandonment continues until the proprietor has renounced it; and renunciation, if not express, can result only from acts or facts implying on his part a fixed determination (*volenté arrêtée*) with knowledge of the facts (*en connaissance de cause*) to renounce his right; and that the right was not lost by new voyages in execution of a charter made before suit, and when in executing them the owners had not intended to accept indirectly the consequences of a responsibility, the whole extent of which they had not up to that time understood." 5 *Revue Int. Droit Mar.* 189; 4 *Revue Int. Droit Mar.* 398. In a note to that case the editor of the *Revue* observes that "the continued navigation of the ship before suit constitutes no obstacle to the right of abandonment; but if continued after suit, it is, according to Desjardins, a question of fact and intention; and is still permissible, according to De Courcy et Lyon-Caen et Renault, Questions, etc., 2d Serie, p. 175."

The tribunal of Amsterdam, 10th January, 1873, under a similar provision of the Netherlands Code, (section 321) held that "the right of abandonment is not lost, in principle, though the ship, equipped, undertakes a new voyage; but if the new voyage is commenced after suit, the rights and duties of the owner are modified;" and in that action the right was disallowed. *Jour. Droit Inter. privé*, 1875, p. 146. In the brief notice of the case last cited, the circumstances are not stated, as respects the duration of the navigation, or whether the vessel sustained any injury, or depreciation, thereby.

In the projected revision of the French Code in 1867, additional sections were proposed giving the right of abandonment "at any time before suit in the tribunal of commerce;" and requiring that "after such suit the owner desiring to abandon must give notice thereof through the marshal within eight days at the latest after suit brought against him." The projected revision of 1867 was not, however, adopted. But provisions to the same effect were inserted in section 492 of the Code of Italy, adopted in 1882. The Code of Chili allows abandonment of the ship "even after her departure, under whatever condition she may be, provided the owner has not formally renounced that right, and the abandonment is made before judicial sale." 2 Desjardins, *Droit Mar.* § 296.

These citations show that in the foreign practice under a surrender provision like our own, a surrender of the vessel is not barred by her subsequent navigation even after suit, unless the vessel is damaged, or an intent is found to waive the right of surrender.

After suit, the situation of foreign creditors under the foreign practice is somewhat different from that of creditors under our own practice. The former have no suit *in rem*, and do not in the first instance ob-

tain security for their claims, as is common with us. Consequently, the navigation of the vessel after suit there, is more at the risk of the creditor than it is here; because if the vessel is lost, and the owner is not otherwise responsible, there the claim will be lost, though no attempt to surrender be made; while here the security usually obtained by the creditor will remain.

In holding the surrender to have been lawfully made in this case, the delay having been without prejudice to the creditor, I do not intend to sanction any long-continued navigation of the vessel after suit in ordinary cases. On the contrary, that, in most cases, must result injuriously to the creditor, not only through the loss of the interest on the fund, which a timely surrender and sale would produce, but through the natural depreciation in the vessel itself. If the owner sought to make good this depreciation by subsequent repairs, then the sufficiency of the restoration would be liable to become an additional subject of litigation; and it would be unjust and impolitic that any such additional burden of litigation should be imposed upon the creditor. Various circumstances may affect an owner's right to surrender. If the vessel, for instance, had been kept purposely out of the jurisdiction, so that the creditor could only sue *in personam*, and the vessel was meanwhile deliberately used for the owner's profit, so that if she were lost the creditor must rely on the doubtful personal responsibility of the owner alone, such acts of deliberation and of speculation on the chances of navigation, to the creditor's prejudice, and at his risk, might well be held to be a forfeiture of the owner's right of surrender. The owner in short ought to be held to the exercise of good faith and fair dealing with the creditor. All subsequent navigation of the vessel must in any event be wholly at the owner's risk; because if the vessel is not of equal value to the creditor when tendered, the right to surrender should be held lost. On the other hand, the owner's obligations and necessities may be such as to make an immediate surrender specially injurious to him; and where the liability itself is doubtful and not yet adjudged, it would be unreasonable to subject the owner to such loss by requiring an immediate surrender before his liability was determined. Every case must be determined upon its circumstances. "Each," says Mr. Justice BRADLEY, "will suggest the proper course to be pursued therein." *The Benefactor*, 103 U. S. 245. No objection having been made at the time of the surrender of the vessel, or on the motion for her sale, that she was not of as much value to the creditor when surrendered as she was after the collision, and no such averment being found in the answer, I excluded at the hearing some evidence offered for the petitioner that she was of equal value, supposing that question not to be in issue; but under one of the general denials of the answer, I think the evidence should have been received. Either party may, therefore, within 10 days take evidence by deposition on that point, and be further heard thereon, unless the averment in the petition in that regard be admitted by stipulation; in the latter case, decrees may be entered in accordance herewith.

COLUMBUS WATCH CO. *et al.* v. ROBBINS *et al.*

(Circuit Court of Appeals, Sixth Circuit. October 10, 1892.)

No. 46.

APPEALS—JURISDICTION—CIRCUIT COURTS OF APPEAL—INTERLOCUTORY INJUNCTION IN PATENT CASES.

A decree sustaining the validity of a patent, declaring infringement, directing an injunction perpetual in form, and referring the cause to a master to take an account of damages and profits, is not appealable in its entirety, so as to give the circuit court of appeals jurisdiction to finally determine the questions of validity and infringement; for the decree is not final in its nature, and appealable as such under prior laws, but is interlocutory, and on an appeal therefrom, under section 7 of the act creating the circuit court of appeals, the court is limited to the question whether the injunction was providently granted in the exercise of a legal discretion, and it can have no jurisdiction to render a decision on the other questions, even at the request of both parties. *Jones Co. v. Munger Manuf'g Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, disapproved.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

Statement by JACKSON, Circuit Judge:

On application of the parties to have this court, under the appeal from an interlocutory order of the lower court granting an injunction, hear and finally determine the merits of the controversy relating to the validity of the patent in suit and the infringement of same.

James Watson and M. D. Leggett, for plaintiffs.

Lysander Hill and Geo. S. Prindle, for defendants.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

JACKSON, Circuit Judge. The appellees, as assignees and exclusive owners of reissued letters patent No. 10,631, dated August 4, 1885, for improvements in stem-winding watches, brought this suit in the ordinary form against appellants for the infringement thereof. On the hearing of the cause upon the pleadings, proofs, exhibits, etc., the circuit court sustained the validity of the original and reissued patents, adjudged that defendants had infringed certain claims of the reissue, ordered the usual account as to damages and profits, and granted an injunction restraining them, their officers and agents, from making, selling, or using watches or watch movements embracing and embodying the invention or improvements described in and covered by the claims of the reissue which were held to be infringed. See 50 Fed. Rep. 545. This decree was passed in May, 1892. The defendants filed an assignment of errors, and prayed an appeal from the entire decree, and for a *supersedeas* of the injunction. The circuit court allowed an appeal from so much of its said decree as granted the injunction, but denied it as to the balance of the decree; the order of the court upon the prayer for appeal being as follows:

"And now upon the filing of the assignment of errors and petition for appeal of the defendants by their solicitors for an appeal in said cause to the
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United States circuit court of appeals for the sixth circuit, and for a *superseas* of the injunction granted in said cause, the court refuses the appeal as prayed, being of the opinion that such an appeal can be taken only from a final decree, but allows an appeal from so much of the decree, the same being interlocutory, as grants an injunction against the defendants, on condition that appellants [defendants] file an appeal bond for ten thousand dollars herein, within ten days, conditioned as required by law, with security to be approved by one of the judges of this court."

Under and in pursuance of this allowance of appeal, the defendants, on the same day, June 1, 1892, filed the required bond for superseding the injunction, which bond recited that "an appeal has been allowed from so much of said decree as grants an injunction against the defendants, and a *superseas* of said injunction granted." The appellants having perfected their appeal from so much of the decree below as granted the injunction, a full and complete transcript of the record has been filed and the case docketed in this court. The appellants and appellees now make application to this court to hear and finally determine the entire cause upon its merits,—that is, to finally decide and adjudicate the matters of controversy touching the validity of the reissue patent and the question of its infringement,—to the end that the delay and expense incident to taking of the account of damages and profits directed by the decree below may be obviated should this court adjudge that the circuit court was in error in sustaining the patent and in finding that it had been infringed. This application is rested upon the authority of *Richmond v. Atwood*, 48 Fed. Rep. 910, 1 C. C. A. 144, (decided by the circuit court of appeals for the first circuit,) and *Jones Co. v. Munger Manuf'g Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, (decided by the circuit court of appeals for the fifth circuit.) In the latter case the circuit court of appeals for the fifth circuit expressed the opinion that an appeal like the present, under the seventh section of the act of March 3, 1891, invested the appellate court with such jurisdiction over the cause that, if the appellee submitted to its being heard and decided upon its merits, the court had the authority to consider and finally determine the entire controversy. It will, however, be observed that the order in that case, remanding the cause to the circuit court, only directed the injunction to be dissolved and discharged. In *Richmond v. Atwood* the court went into a consideration of the questions relating to the validity of the patent and its infringement for the purpose of ascertaining whether the injunction was properly or improperly granted, and did not undertake to pronounce any judgment or decree upon the merits, as this court is requested to do in the present case. We entertain no doubt as to the power and duty of this court, under the present appeal, to examine and consider the case presented by the record, for the purpose of determining whether the order of the lower court, granting the injunction, was or was not erroneous. But we find ourselves unable to concur in the opinion expressed by the court in *Jones Co. v. Munger Manuf'g Co.*, that this court can, by the submission or consent of the parties, assume and exercise jurisdiction over the subject-matter of the litigation not covered

by the appeal allowed and taken. It admits of no question that the entire decree of the circuit court was not appealable either under the sixth section of the act of March 3, 1891, or under previous provisions of law. *Barnard v. Gibson*, 7 How. 650; *Humiston v. Stainthorp*, 2 Wall. 106; *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32. It was not final, but interlocutory, in its character, and subject to the further and future control of the court below, and that court properly denied an appeal from the entire decree, and allowed it only from so much thereof as related to the injunction as authorized by section 7 of the act of March 3, 1891. This limited appeal from a part of the interlocutory decree clearly did not remove the whole case or the entire decree from the circuit court to this court. It only brought up for review the question whether the action or order of the circuit court granting the injunction was proper or improper. This court by virtue of that appeal has before it for determination only the question whether that injunction should be sustained or dissolved. The cause is still pending in the circuit court upon all other questions and matters involved in the litigation. It is well settled that, in respect to all matters and questions not withdrawn by said appeal, and still under its jurisdiction and control, the circuit court may hereafter, either before or upon the coming in of the master's report upon the matters of account, change its opinion on the very questions this court is requested to decide finally. In *Fourniquet v. Perkins*, 16 How. 84, the rule is laid down that the whole case is open for revision, and that the court may change all interlocutory decrees or orders relating to the merits when the cause comes to final hearing. The same general principle is announced in *Beebe v. Russell*, 19 How. 283-287; *Craighead v. Wilson*, 18 How. 199; *Farrelly v. Woodfolk*, 19 How. 288; and *Green v. Fisk*, 103 U. S. 518.

If this court were now to pronounce a final decree upon the matters or questions which still remain subject to the jurisdiction and control of the circuit court, it would be going beyond its legitimate sphere of judicial authority. This court, under the law of its creation, possesses and can properly exercise only an appellate jurisdiction. If it should, upon the request or consent of parties, assume to pass on and finally decide upon their merits causes or questions pending in a court of original jurisdiction, and not properly before this court, such action would clearly involve the exercise of original jurisdiction. Consent of parties cannot invest this court with such power or authority. The province of this court is the correction of errors in cases properly brought before it by writ of error or appeal. Each party to suits is not only entitled to the benefit of a final decision of the court below on the merits, but to the revisory jurisdiction of this court for its final disposition, after the court of original jurisdiction has ceased to have any further control over the controversy or litigation. Until the questions of controversy leave the lower court, and cease to be subject to its control, this court cannot rightfully take jurisdiction thereof, without invading and encroaching upon the judicial domain of such lower court. The act of 1891, § 7, permits an appeal from an interlocutory order

granting or continuing an injunction. The present appeal is allowed and taken from such an order, and its legal effect and operation is to remove from the trial court to this court only that part of the decree which relates to the injunction. That part of the interlocutory decree is, before this court for review. The lower court has no further control or jurisdiction over that subject until it receives the mandate of this court affirming or reversing its order granting the injunction. But all other parts or portions of the interlocutory decree, such as those relating to the validity of the reissue patent and its infringement, and the questions that may arise upon the account ordered to ascertain damages and profits, have not yet left the jurisdiction of the lower court. That court may hereafter change its interlocutory decree on the very questions this court is requested to decide finally. For aught that appears or is known to this court, the lower court may have already done so. But suppose this court should decide the merits of the case, its decision of matters or questions not before it for review, under the present appeal, would have no binding force on the lower court, and might be wholly disregarded when that court came to a final hearing of the cause. Nor would the premature decision of this court upon questions not properly before it prevent either side from taking an appeal from the final decree of the circuit court when such a decree shall be hereafter rendered.

Such a course of practice and procedure as this court is requested to pursue, in respect to matters not properly before it, involving the exercise of original jurisdiction, would be attended with great confusion and perplexity, and would greatly embarrass the orderly administration of justice. It is contrary to all precedent, and entirely out of harmony with the federal judicial system of the United States. Under that system, original jurisdiction can only be exercised by the courts on which it is conferred by the constitution or laws. The blending of original and appellate jurisdiction is not sanctioned by either the constitution or laws of the United States. Sound principle, as well as wise public policy, requires that original and appellate jurisdictions should be kept distinct and independent. To blend them, or allow one court to exercise both, would be attended inevitably with evil and mischievous results. It would doubtless have been well if in the creation of this court the seventh section of the act had permitted or authorized an appeal from interlocutory decrees sustaining the validity of patents and adjudging their infringement, so as to obviate in many cases the taking of expensive accounts, and the delays incident thereto. This has not, however, been done, as we construe the act of March 3, 1891, and it is not in the power of this court to afford relief, such as the present application seeks to secure.

In our view of the subject this court cannot properly comply with or accede to the application of the parties, for the reasons already stated, that the appeal as allowed and taken does not bring up for review anything more than that portion of the interlocutory decree which granted the injunction, and that to consider and finally decide other matters, not covered by or included in the appeal, would involve the exercise

of original jurisdiction, when this court, under the law of its creation, is restricted and confined to the exercise of appellate jurisdiction. In our opinion the submission or consent of parties cannot invest this court with the jurisdiction to pass upon and determine finally matters of controversy still pending in the lower court, and subject to its control and jurisdiction. But, inasmuch as the circuit court of appeals for the fifth circuit, in the case of *Jones Co. v. Munger Manuf'g Co.*, above referred to, seems to have entertained, if not taken, a different view of the question, this court deems it proper to certify the matter to the supreme court of the United States, to the end that an authoritative decision may be made by that court, which will, by their construction of section 7 of the act of 1891, establish a uniform rule for all the circuit courts of appeals.

The following order was thereupon entered :

This cause comes before this court by an appeal from the decree of the circuit court of the United States for the eastern division of the southern district of Ohio, sustaining the letters patent of the appellees, and declaring that the appellants have infringed said letters patent, and directing the issue of a perpetual injunction, and ordering the statement of an account of profits and damages. The transcript presented to this court shows that the appeal was taken immediately from said decree before accounting was had. Both parties desire that this court should give a full hearing on the merits of said decree, so far as relate to the validity of the patent and infringement, and should enter a final decree in this court thereon, the parties agreeing between themselves to suspend accounting until the decision of this court can be had. This court, however, cannot find that they have, under the seventh section of the act creating United States circuit appellate courts, jurisdiction to grant such a hearing and enter such a final decree as is asked, because said decree of the circuit court is only an interlocutory decree, and presents on appeal, under section 7, only the question whether the decree for an injunction, interlocutory in fact, however final in form, was improvidently granted, in the legal discretion of the court, and involves only incidentally the question of the validity of the patent and the infringement complained of. The circuit court of appeals for the fifth circuit, under similar circumstances, after listening to adverse argument, in *Jones Co. v. Munger Manuf'g Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, held that said section 7 gave jurisdiction to the court, on agreement of parties, to render a final decree on the merits of the validity and infringement of the patent involved. As the judgment of this court differs from that of a co-ordinate court, the instruction of the supreme court is respectfully requested upon the question.

It is therefore ordered that a copy hereof, certified under the seal of the court, be transmitted to the clerk of the supreme court of the United States.

MERCANTILE TRUST CO. v. ZANESVILLE, MT. V. & M. RY. CO. *et al.*

(Circuit Court, S. D. Ohio, E. D. October 17, 1892.)

No. 543.

RAILROAD COMPANIES—BONDS—CONTRACT.

The title to railway bonds issued and delivered to a contractor in consideration of his promise to build certain track is in the contractor, with the right to pledge or sell them; and the purchaser or pledgee, although he has full knowledge of the terms of the contract, and of the fact that only four miles of the nine contracted for have been built, can recover their full value as against the receiver of the road.

In Equity. Bill by the Mercantile Trust Company of New York against the Zanesville, Mt. Vernon & Marion Railway Company and others to foreclose a mortgage. The receiver of the railway filed a cross bill to scale down the mortgage bonds. On demurrer to the cross bill. Sustained, and the cross bill dismissed.

A. A. Frazier, for cross complainant.

W. H. Safford, John J. Stoddard, and Gilbert D. Munsen, for complainant.

Moses M. Granger, J. B. Foraker, and A. J. Sheppard, for respondents.

SAGE, District Judge. This case is before the court on demurrer to the cross bill of the receiver of the Zanesville, Mt. Vernon & Marion Railway Company. The complainant's bill is for foreclosure of a mortgage securing bonds issued by said railway company. The cross bill sets up, among other things, that the mortgage bonds secured by the deed of trust given to the complainant were authorized and directed to be issued by said railway company under and by virtue of a contract in writing dated August 24, 1888, and made by it with one Chase Andrews. By the terms of this contract it was provided that he should have an issue of \$225,000 of bonds, in consideration whereof, and upon the further consideration of \$225,000 of the capital stock of said railway company, he bound himself, his heirs and assigns, to fully construct and equip that portion of said company's railroad known as the "Belt Line" with a trackage of not less than nine miles. It was further provided that the bonds were to be issued to him before the commencement of said work, and they were accordingly so issued and delivered for said purpose, and for no other. A copy of the contract is attached to and made part of the cross bill.

The cross bill further sets forth that Andrews and his assigns failed and refused, and still refuse, to fulfill the obligations imposed upon them by the terms of said contract, in that they failed and refused, and still refuse, to build said belt line, excepting only about four miles thereof; and that he sold or hypothecated all of the bonds so issued and delivered to him to persons who had full knowledge of the terms of the contract, and of the conditions upon which said bonds were issued; also that said persons took the same with full knowledge that Andrews had

not built said belt line, and was in default, except as above stated. Wherefore the cross complainant insists that the holders of said bonds are not entitled to receive from the proceeds of sale under the foreclosure payments upon the principal and interest of said bonds, but only upon the proportion thereof that the value of the four miles of said belt line that has been built sustains to the value of the whole nine miles, and prays that the bonds may be scaled down accordingly.

The demurrer must be sustained. The bonds were issued before the commencement of the work, in exact accordance with the stipulations of the contract, and Andrews was then invested with the title to them, and had the right to pledge or sell them. The averments that the purchaser or pledgee had full knowledge of the terms of the contract, and of the fact that Andrews had built only four miles of the belt line, are therefore wholly immaterial. It may be properly inferred from the contract that it was the intention of the parties that Andrews should have the bonds in advance of the performance of the work which he was to do, in order to enable him by negotiating them to procure the funds which he would require. The cross bill, therefore, does not state a case entitling the cross complainant to any relief, and it will be dismissed.

MASON v. BENNETT.

(District Court, D. Alaska. July, 1892.)

1. EXECUTION—RETURN DAY—ALASKA.

Under Code Or. § 278, in force in Alaska, the return day of an execution is ascertained by computing 60 days from the day of its receipt by the marshal, and not from the day of its issuance.

2. SAME—LEVY—SALE AFTER RETURN DAY.

When a levy is made under an execution before the return day thereof, the marshal may make the sale after the return day without new process.

3. SAME—SALE—CONFIRMATION—INADEQUACY OF PRICE.

Under Code Or. § 296, in force in Alaska, an execution sale cannot be set aside for mere inadequacy of price, in the absence of fraud, collusion, or substantial irregularity, to the injury of the complaining party, especially when the property consists of an undeveloped mining claim, the value of which is conjectural and speculative.

At Law. Action by George M. Mason against William M. Bennett. Motion to confirm an execution sale. Granted.

Delaney & Gamel and J. F. Malony, for plaintiff.

John G. Heid and C. S. Johnson, for defendant.

TRUITT, District Judge. The record in this case shows that the plaintiff, on the 8th day of March, 1892, in this court, recovered judgment against defendant for the sum of \$2,170.48, with a decree of foreclosure of the mortgage given to secure the note sued upon herein, and for the sale of the mortgaged premises, which includes the real property, for the sale of which an order of confirmation is asked by this motion.

Within the time allowed by law, the defendant appeared and filed objections to the confirmation for the reasons—

"*First*, that the sale is void, it having been made on the 91st day after the receipt of the execution, when said execution, at the time of sale, was dead in the hands of the marshal, and should have been returned within ninety days to the clerk's office from whence it issued; and, *second*, that no bidders were present at said sale, that the bid of the plaintiff, the execution creditor, herein, was the one and only bid offered at such sale, and that the sum bid is so grossly inadequate to the value of the property sold, as to amount to an absolute and unnecessary sacrifice of the defendant's property."

Section 7 of the organic act, providing a civil government for Alaska, approved May 17, 1884, declares the general laws of the state of Oregon at that time in force to be the law in this district, so far as applicable and not in conflict with the act or the laws of the United States. By virtue of this statute, the execution in this case was issued in accordance with the provisions of title 1, c. 3, Code Or., and the proceedings conducted thereunder, and their regularity must be tested by them.

In considering this motion and the objections offered by the execution debtor to its allowance, I will take up the objections in regular order. The first is that the sale was made after return day, and is therefore void. This objection may be considered under two heads, viz., was this sale made after return day? and, if so, is it for that reason void? There seems to be some misunderstanding on the part of counsel as to how the return day is to be ascertained or fixed in this case. Section 278, Code Or., is as follows:

"The sheriff shall indorse upon a writ of execution the time when he receives the same, and such execution shall be returnable within sixty days after its receipt by the sheriff to the clerk's office from whence it issued."

Then, in section 293, in regard to the postponement of sales, it is provided that a sale may, for causes therein stated, be adjourned from time to time, not to exceed 30 days beyond the return day. The execution in this case was issued on March 14, 1892, but the marshal's return shows that it did not come into his hands until the 25th day of March, 1892. This, then, is the date from which the 60 days mentioned in said section 278 should be computed, and not the date of the execution. Excluding this day, and counting 60, the return day would be May 24, 1892. The marshal, however, set the 13th day of May, 1892, as the day of sale, but on that day the respective attorneys for plaintiff and defendant appeared, and served upon him a written stipulation, duly signed by them as such attorneys. This stipulation is made a part of the return on the execution, and it is agreed therein that—

"The sale is hereby postponed for the term of thirty days, from said 13th day of May, 1892, to the 13th day of June, 1892, and the said U. S. marshal for the district of Alaska is hereby authorized to postpone the said sale until the said 13th day of June, 1892, as above stipulated."

This stipulation was no doubt made, and the sale adjourned, for the benefit of the defendant, and it is not claimed that he was in any manner injured by the adjournment. But without the stipulation the

marshal could not have made an adjournment for a longer period than one week at a time, not exceeding 30 days altogether, beyond the day at which the writ is made returnable. The return shows that the sale was adjourned until the 13th day of June, 1892, according to said stipulation, and that the real property described herein was then sold to the plaintiff for \$2,300. However, this was not more than 30 days beyond the return day, which, as already shown, was May 24, 1892. But, if my views are correct on the second question raised by this first objection, it makes no difference whether the sale was in fact made after the return day or not; it is only necessary that the levy be made before that time.

The Oregon statute says that the court shall confirm a sale of this kind unless it shall satisfactorily appear that there were substantial irregularities in the sale, to the probable loss or injury of the party objecting. Section 296, p. 363. It is not claimed that the defendant sustained loss or injury by this adjournment, but it was certainly deemed advantageous, or his attorney would not have made the stipulation which he did for it. I do not, under my views of the case, think it necessary to pass upon what effect that stipulation might have in sustaining the regularity or validity of this sale, were it irregular or void without it. Counsel for defendant refer to *Furull v. Cooke*, 19 Or. 455, 26 Pac. Rep. 662, to sustain their first objection, but the case is not in point. In that case the sale was made more than eight years after the date of the execution, and in the opinion STRAHAN, J., says:

"It does not appear that the officer had made a levy under the execution while it was still in force. The sole question, therefore, is whether or not a sheriff may hold an execution until long after the return day, and until his term of office has expired, and then make a levy and sale."

The court very correctly held that such a writ is *functus officio*, and confers no authority. But if the levy be made before the return day of the writ, the officer may sell afterwards on the same writ without a renewal of process. "It is immaterial to the purchaser, as to the validity of the sale, whether it be made before or after return day." Ror. Jud. Sales, p. 248, and numerous authorities there cited. This was passed upon and settled in the United States supreme court, at an early date, in *Wheaton v. Sexton's Lessee*, 4 Wheat. 503. In this case JOHNSON, J., delivered the opinion of the court, in which it is stated:

"At the trial two bills of exception were taken; the first of which brings up the question whether a sale by the marshal after the return day of the writ was legal. The court charged that it was, provided the levy was made before the return day, and on this point the court can only express its surprise that any doubt could be entertained. The court below was unquestionably right in this instruction."

In *Remington v. Linthicum*, 14 Pet. 84, the following is asserted as a settled proposition of law: "But if property, real or personal, is seized under a *fieri facias* before return day of the writ, the marshal may proceed to sell at any time afterwards without new process." Accepting the law as laid down by these authorities disposes of this objection.

I will now briefly notice the second objection to the confirmation. The property sold is an undivided two-thirds interest in a lode claim in the Harris mining district in this territory, and known as the "Aurora Lode." There are three affidavits offered in support of the objection of inadequacy of price. The execution debtor makes one, in which he says he was offered \$40,000 for this lode in the summer of 1891 by a *bona fide* purchaser. In one of the affidavits the value is estimated at \$50,000, while the other affiant says that, according to his best judgment, the lode is worth at least \$35,000 or \$40,000. It was admitted in the argument that this lode is undeveloped. It is a well-known fact that an undeveloped mining claim is property upon which it is very difficult to place even an approximate value. An undeveloped lode is hidden from the eye, buried perhaps deep in the earth, or extending into the rocky side of a mountain. Its real value is a matter of conjecture for even mining experts. One might say a claim was worth \$50,000, and another of as good judgment, with equal honesty, might say it was not worth the cost of developing it. It is not claimed that there was any fraud, collusion, or irregularity in the proceedings of the sale, and the law presumes that the officer acted fairly and for the best interests of the parties concerned in conducting the same. Section 296, Code Or., *supra*, seems to give the court no discretion in cases of this kind unless there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party who makes the objections to the confirmation. I have been unable to find a case where the supreme court of Oregon ever set aside a sale simply for inadequacy of price. Counsel for defendant cite *Flint v. Phipps*, 20 Or. 340, 25 Pac. Rep. 725, in support of their second objection, but in that case the defects in the writ, which the lower court allowed to be amended, were the primary reason for reversing the decree. The general policy of the law is to uphold and maintain execution sales. Rorer, in treating on this subject, says:

"Ordinarily, inadequacy of price is not alone sufficient cause for setting aside an execution sale which is in other respects unexceptionable." Ror. Jud. Sales, § 854.

And Herman, in his very excellent work on Executions, states the rule to be that—

"Courts will not in general set aside sales made under its process for mere inadequacy of price, in the absence of fraud and collusion. Inadequacy of price, within itself, cannot be a ground for setting aside a contract, or affording relief against it." Herm. Ex'ns, 412.

In support of this rule the author cites a list of 70 different decisions, and in the case at bar I feel bound to adhere to it. Having thus disposed of the objections, the motion for confirmation is allowed.

TRINIDAD ASPHALT PAVING Co. v. ROBINSON.

*(Circuit Court, E. D. Michigan. April 11, 1892.)***COSTS—TAXATION—ACTIONS AT LAW.**

In actions at law the federal courts must tax the costs against the losing party, except in cases where special provision to the contrary has been made by act of congress, (Rev. St. §§ 968, 973;) and in the absence of such provision they have no authority to modify the rule by reason of hardship or inequity resulting from special circumstances.

At Law. Action of replevin brought by the Trinidad Asphalt Paving Company against Eugene Robinson. A verdict was directed for plaintiff, and a motion for a new trial denied. The question as to whether costs should follow the judgment was reserved by the court, and is now up for determination. Judgment for plaintiff.

Statement by SWAN, District Judge:

This is an action of replevin for 766 barrels of asphalt that were formerly the property of Carter, Hawley & Co., of New York, both parties tracing title to them. The evidence is uncontradicted that plaintiff, wishing to obtain asphalt of Carter, Hawley & Co., whom plaintiff knew would not sell to it, employed one Coburn to make the purchase for it, —the Trinidad Asphalt Company,—instructing Coburn not to reveal the name of his principal, but to make the purchase as for himself. The asphalt was bought for the benefit of plaintiff, who had the right to it as against its agent, Coburn, or any one to whom the latter might deliver it, except a purchaser in good faith and for value. Coburn, it seems from the facts found by Mr. Justice BROWN, who tried the case, went to Carter, Hawley & Co. for the plaintiff, but exceeded his authority in effecting the purchase. Instead of representing himself simply as the principal in the transaction, or withholding the name of his employer, he untruly stated that he had no connection with the plaintiff whatever,—a statement which he had no authority from plaintiff to make. Carter, Hawley & Co. delivered to Coburn the asphalt, which he turned over to plaintiff. A month or two afterwards, Coburn made a contract with a lighterman to go to South Amboy, where the asphalt lay, load it on board his lighter, and take it up the North river. The asphalt was accordingly laden on the lighter, and was insured for transportation to the docks of the plaintiff at Jersey City. Instead of thus forwarding it, Coburn diverted it from its original and proper destination, and sent it to Weehawken, when it was delivered to the West Shore Railroad for transportation and delivery to defendant, and in due course of time came into the possession of defendant, who in good faith had dealt for and purchased it through Coburn from Carter, Hawley & Co., whom he supposed to be the owners of it, and whom he paid for it. The asphalt was taken from defendant's possession under the process in this cause. After the commencement of this suit defendant wrote Carter, Hawley & Co., who had received their pay for the property from plaintiff, through Coburn, asking them to credit him with the amount

which he had paid them for the asphalt, and this Carter, Hawley & Co. did. The trial judge held that, because of the allowance of this credit to Robinson by Carter, Hawley & Co., though Robinson, the defendant, bought and paid in good faith, a verdict in his favor for the value of the asphalt in this action of replevin would put four or five thousand dollars in his pocket for which he had paid no consideration, and for which he would be obliged to account to Carter, Hawley & Co., who had received their pay through Coburn, and thus will be twice paid for the asphalt. The consequence would be that plaintiff would be obliged to resort to an action against Carter, Hawley & Co. to recover the amount paid by it for the property on Coburn's purchase. To avoid this circuitry of action, the court permitted plaintiff to show the fact that defendant had been credited by Carter, Hawley & Co. with the sum paid for the property taken by the writ since the beginning of this suit, and directed a verdict for plaintiff, with nominal damages, reserving the question whether costs to plaintiff should follow the judgment. A motion for a new trial was made and overruled. On the foregoing facts both parties claim costs.

Griffin, Warner & Hunt, for plaintiff.

C. I. Walker, for defendant.

SWAN, District Judge, (*after stating the facts.*) The statute giving costs to the prevailing party provides as follows:

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. * * *" Rev. St. U. S. § 983.

In cases of original jurisdiction this provision has been regarded as mandatory, and exclusive of all state legislation. Congress having legislated on the subject, it would seem, on familiar principle, that there is no room for the application of any other rule of taxation in such cases than that fixed by the statute. *U. S. v. Treadwell*, 15 Fed. Rep. 532; *Cooper v. Steamboat Co.*, 18 Fed. Rep. 588; *The Baltimore*, 8 Wall. 377, 388. In cases removed from a state court it has been properly held that costs which have accrued before removal may be added to those taxable under the act of congress. The authorities, however, are not in harmony on this point. In support of taxation of such costs are: *Scripps v. Campbell*, 22 Int. Rev. Rec. 250; *Wolf v. Insurance Co.*, 1 Flip. 377, and cases cited. *Contra* are: *Clare v. Bank*, 14 Blatchf. 445; *Chadbourne v. Insurance Co.*, 31 Fed. Rep. 625.

Section 983 is taken bodily from the fee act of February 26, 1853. Before the enactment of the statute the practice had generally been in accordance with the statute of Gloucester, (6 Edw. I. c. 2.) *Hathaway v. Roach*, 2 Woodb. & M. 68; *The Baltimore*, 8 Wall. 388. This statute, commonly referred to as the "Fee Bill of 1853," seems therefore to be a substantial adoption of the usage which had so long and generally

obtained, allowing costs to the successful litigant. Without reviewing in detail the various acts of congress regulating the recovery of costs, which are collated in the opinion in *The Baltimore*, 8 Wall. 377, 388-393, in the language of Mr. Justice CLIFFORD in that case, "the conclusion appears to be clear that congress intended to allow costs to the prevailing party as incident to the judgment, as most of the regulations referred to [in the statutes mentioned in the opinion] would be meaningless on any other theory." No intent to recede from this purpose is manifested in the act of 1853, nor in the Revised Statutes. The only qualifications material here of the usage thus recognized by the statute are found in Rev. St. §§ 968, 973. The first of these sections denies costs to a plaintiff or petitioner in a circuit court who recovers less than \$500 in a case which could not be brought there, unless the amount in dispute, exclusive of costs, exceeds that sum or value; and refuses costs to a libellant who recovers upon his own appeal less than the sum or value of \$300. Section 973 disallows costs to a plaintiff upon a judgment or decree "for the infringement of part of a patent when the patentee in his specification claimed to be original and first discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor," unless the disclaimer required by the patent laws had been entered at the patent office before suit was brought. Other sections expressly exempt the United States from liability to costs. The inference from this exceptional legislation seems strong that congress has defined the only cases in actions at law in which the losing party is absolved from liability for costs.

In equity and admiralty cases, in which the courts are less trammelled, and may mold their judgments according to the very right of the matter, costs are imposed, withheld, or divided as the facts in the particular case may warrant. *Kittredge v. Race*, 92 U. S. 116; *Trustees v. Greenough*, 105 U. S. 535; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 481, 6 Sup. Ct. Rep. 809; *U. S. v. The Malek Adhel*, 2 How. 210; *The Atlas*, 93 U. S. 312. No such latitude is accorded, however, to the courts in actions at law, notwithstanding considerations of hardships calling for exceptions to the enforcement of the statute. In *U. S. v. Schurz*, 102 U. S. 407, the defendant was sued in regard to the manner in which he had discharged certain official duties as secretary of the interior, in which no intentional wrong was charged or proved against him. Upon motions for taxation of costs, the court, through Mr. Justice MILLER, admitting the hardship of making the defendant pay the costs out of his own pocket, said:

"But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights."

So, too, costs followed the judgment in *Kendall v. U. S.*, 12 Pet. 524, and *U. S. v. Boutwell*, 17 Wall. 604, in both of which the officers sued were guilty of no intentional wrong. In *Kittredge v. Race*, 92 U. S. 116, 121, the distinction between the powers of the court in common-law and equity cases in the matter of costs is clearly stated by Mr. Justice BRADLEY. He says:

"In actions at law it is a general rule that the losing parties or the parties against whom judgment is rendered are to pay the costs, and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interest in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit."

The only exception to this rule not expressly made by statute is where the court is without jurisdiction of the cause. In *Railway Co. v. Swan*, 111 U. S. 379, 387, 4 Sup. Ct. Rep. 510, Mr. Justice MATTHEWS says:

"Ordinarily, by the long-established practice and universally recognized rule of the common law in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being that, where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and, as the court can render no judgment for or against either party, it cannot render a judgment even for costs."

The case at bar is apparently a hard one for the defendant. At the time of suit brought he was clearly entitled to the possession of the property which he had acquired in good faith. Unfortunately for him, by his own inadvertent action in asking and obtaining credit with Carter, Hawley & Co. for the asphalt taken from him by the writ, he practically renounced the title he had received on his purchase, and accepted in its stead reclamation on Carter, Hawley & Co. The equities are with him to the recovery of his costs, but the settled rules of decision in cases at law will not permit of exception in his favor, and costs must follow the judgment.

MORTON v. CITY OF NEVADA.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1893.)

No. 96.

LIMITATION OF ACTIONS—RUNNING OF STATUTE—MUNICIPAL BONDS.

Bonds issued by the town of Nevada, Mo., in 1870, were repudiated, and the payment of interest refused, in 1873. In 1877 action was brought to recover upon the past-due coupons, but by agreement was suspended pending a suit in the supreme court of the United States, wherein the act authorizing such issues was declared unconstitutional. It was subsequently taken up in 1881, and judgment given for defendant. Thereafter an action for money had and received was begun. *Held*, that it was barred by the Missouri statute of limitations, which began to run at least from the repudiation of the bonds, and which limits actions on implied contracts to five years. 41 Fed. Rep. 582, affirmed.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by William H. Morton against the city of Nevada, in the state of Missouri, for money had and received. Trial by the court on an agreed statement of facts. Judgment for defendant. 41 Fed. Rep. 582. Plaintiff brings error. Affirmed.

Statement by CALDWELL, Circuit Judge:

This was an action brought by the plaintiff in error against the defendant in error for money had and received. The defense was a general denial, and a plea of the statute of limitations. The case was tried by the court below upon the following agreed statement of facts:

"It is hereby stipulated and agreed that the following facts are admitted by both plaintiff and defendant to be true, and no other proof thereof than this stipulation need be produced upon the trial of said cause, but the same may be used by either party. It is further agreed that either party shall, under this stipulation, have a right to introduce any other testimony they may deem proper; it being understood this agreement only extends to the admission of the truth of the facts herein contained. In March, 1869, the town of Nevada, Vernon county, Missouri, was incorporated under chapter 41, Gen. St. Mo. 1865. In the year 1870, in order to secure the location of the depot of the Tebo & Neosho Railroad, then building, within one half mile of the public square of said town, instead of within the distance of three quarters of a mile of said public square, as then contemplated by the board of trustees, agreed with the Tebo & Neosho Railroad Company to donate ten acres of ground for depot purposes if it would put the depot within one half mile of said public square, and by resolution entered of record on June 29, 1870, made the following proposition: 'Resolved, that whereas, the county of Vernon has subscribed to the capital stock of the Tebo & Neosho Railroad Company to aid in building the railroad of said company within the county of Vernon, and it will be advantageous to the town of Nevada to have the depot of said company established as near as practicable to the business of said town: It is therefore ordered that the town of Nevada will procure and donate to the said Tebo & Neosho Railroad Company the right of way for said company's railroad within and through the said town, and will also pay the said company such sum of money, not exceeding the sum of five thousand dollars, as shall be the actual cost to said company of establishing the depot of said company within one half mile of the public square of said town, instead of within the distance of three quarters of a mile of said public square. Ordered further, that the town will procure and donate said company suitable grounds for said depot and the other purposes in connection with the operation of said railroad, not less in quantity than ten acres.' And thereafter, to wit, on June 4, 1870, under and by virtue of the act of the general assembly of the state of Missouri entitled 'An act to authorize cities and towns to purchase land, and to donate, lease, or sell the same to railroad companies, approved March 18, 1870,' the board of trustees of said town ordered an election of the qualified voters of said town to be held on October 25, 1870, to vote upon the proposition to issue ten thousand in bonds of said town, with which to purchase ground to be donated to said Tebo & Neosho Railroad Company. That said election was held, as ordered, on October 25, 1870, and at said election a majority of the qualified voters of said town voting at said election voted in favor of issuing said bonds to purchase ground to be donated to said railroad company; and thereafter, to wit, on November 1, 1870, under and by virtue of said act of the general assembly of the state of Missouri, approved March 18, 1870, before referred to, and in pursuance of said election so held as aforesaid, and under the order of said board of trustees, there was executed, by its chairman, John T. Birdseye, signing his name thereto, and by the clerk of said board, S. A. Claycomb, attesting the same and affixing thereto the seal of said town, twenty bonds numbered from 1 to 20, both inclusive, each for the sum of \$500.00, which said bonds, by their terms, were made payable at the National Bank in the city of New York, in the state of New York, ten years after the date thereof, to wit, on the 1st day of November, 1880, and were made payable to the Tebo & Neosho Railroad Company or bearer. That said bonds, by their terms,

were to bear interest at the rate of ten per cent. per annum, payable semi-annually at the National Bank on the 1st day of May and the 1st day of November of each year thereafter, on the delivery of certain interest coupons thereto attached to each of the said 20 bonds. That, after said bonds had been executed, Oscar M. Nelson, then a citizen of the town of Nevada, was appointed by said board of trustees the financial agent for said town for the purpose of selling said bonds and receiving the money therefor, for and on behalf of said town. That said bonds were placed in his hands, and he, acting for said town as its financial agent by virtue of said appointment, all of said bonds, through the firm of Jaynes & Newkirk, bankers at Sedalia, Mo., to Wm. H. Morton, the plaintiff. That in January, 1871, said firm of Jaynes & Newkirk, bankers, as aforesaid, paid to Oscar M. Nelson, the financial agent aforesaid, the following amounts: January 19, 1871, \$4,000.00; January 31, 1871, \$4,171.00,—total, \$8,171.00; making the total sum actually received by the said board of trustees in money on account of the sale of said bonds eight thousand one hundred and seventy-one dollars, (\$8,171.00.) That in pursuance of the agreement with the Tebo & Neosho Railroad Company, said board of trustees purchased from various parties ten acres of ground, to be donated to said railroad for depot purposes, paying therefor out of the \$8,191.00 dollars derived from the sale of said bonds the sum of \$6,785.50 dollars, and had all of said land deeded directly to the 'incorporated town of Nevada.' The balance of said money was used by said board of trustees for various purposes incident to the government of said town. The said Tebo & Neosho Railroad Company, having fully complied with the terms and conditions upon which said donation was to be made, took possession of said property. The said Tebo & Neosho Railroad Company having thereafter sold, conveyed, and merged all of its entire line of railroad in this state, and all its property, rights, and franchises, in and to the Missouri, Kansas & Texas Railroad Company, the inhabitants of the town of Nevada, by E. E. Kimball, chairman of the board of trustees, on the 19th day of May, 1875, conveyed said ten acres of ground to the Missouri, Kansas & Texas Ry. Co.; the Tebo & Neosho Railroad Company having taken possession of said ten acres, as before mentioned, some time prior to its merger into the M., K. & T. R. R. It is further agreed that on the 23d day of August, 1877, Wm. H. Morton, plaintiff herein, instituted suit against the town of Nevada in the United States circuit court for the western district of Missouri, at Jefferson City, to recover upon the past-due coupons that were attached to said issue of bonds, and thereafter, to wit, on the 20th day of November, 1877, the town of Nevada interposed a defense to said suit by filing an answer, in which it was claimed that said town was not liable in said action, for the reason that the act of March 18, 1870, under which the bonds to which said coupons had been attached, was unconstitutional. That thereafter, and on the same day, plaintiff in said action filed a demurrer to said answer, and on the 22d day of November, 1877, said demurrer was submitted. That at that time there was pending in the supreme court of the United States the case of *Jarrott v. Town of Moberly*, in which the same question, to wit, the constitutionality of the act of March 18, 1870, was involved, which said cause has been certified to the supreme court of the United States by reason of a division in opinion of the two judges sitting in said cause, which fully appears by a record of said cause reported in 103 U. S. 586, and to which reference is made. The parties to said case of *Morton v. Town of Nevada*, by their attorneys, then agreed that no further action was to be taken in the matter, but that the same was to stand upon the pleadings as then made until the supreme court passed upon said *Jarrott Case*, after which either party might proceed in said matter as might be deemed best by said party; and that the same stand continued. That the supreme court in said *Jarrott Case*, in 103 U. S. 580, decided the act of March 18, 1870, unconstitutional, to which

case reference is made to show what was passed upon, and that thereafter, and, to wit, on the 25th day of November, 1881, said cause of *Morton v. Town of Nevada* was taken up, and, following the rulings,—said *Jarrott Case*,—the demurrer to the answer was overruled, and judgment given for defendant, the town of Nevada, on the pleadings. It is further agreed that in the year 1884 the town of Nevada was reincorporated under the general laws of Missouri as a city of the third class, under the name of the 'City of Nevada,' and as such succeeds to all rights of said town, and assumed all of its liabilities. It is further stipulated that the interest on said bonds was paid by the town of Nevada for the year 1871 and 1872, after which the town refused to pay plaintiff any further interest, for the reason that said bonds and the coupons thereon were unconstitutional, and issued without any authority.

"J. B. HENDERSON,

"REYNOLDS & LEWIS, and

"J. B. JOHNSON,

"Attorneys for Plaintiff.

"BURTON & WIGHT,

"Attorneys for Defendant."

The lower court held the defendant was not liable for the money had and received, except possibly as to the sum of \$1,385.50, and that the whole cause of action was barred by the statute of limitations. There was judgment for the defendant, and the plaintiff thereupon sued out this writ of error.

Matt. G. Reynolds and James M. Lewis, for plaintiff in error.

C. G. Burton and S. A. Wight, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) It is needless to discuss the question of the liability of the defendant to the plaintiff for the money received for the void bonds. Under some circumstances money thus paid may be recovered back; under other circumstances it cannot. To which class this case belongs we need not inquire, because, if any such liability ever existed, it was clearly barred before this action was brought. By section 3230 of the Revised Statutes of Missouri the limitation of actions on implied contracts is five years. The plaintiff's action is bottomed on the alleged implied obligation of the defendant to repay the money it received for the bonds. The action is barred, whether it accrued when the money was paid for the void bonds, or when the town refused to pay interest, and denied its obligation to pay the bonds, upon the ground that they were void for want of authority in the town to issue them, or when that defense was formally interposed to the suit on the bonds. All of these events happened from 8 to 15 years before the suit was brought. No fact is shown which, in law, would interrupt or suspend the running of the statute after the town refused to pay interest and repudiated the bonds, which it did in 1873.

The bonds were void, and not merely voidable. They were infected with a fatal and incurable vice. It was beyond the power of the town to impart legal validity to them. There could be no ratification, and no estoppel, which would render them valid or binding obligations on

the town. Upon the admitted facts of the case, therefore, the plaintiff could have sued for the recovery of his money the very day he received the bonds, and the general rule is that the statute begins to run from the time the party might have brought his suit. But it is not necessary to apply this rule in this case. The town paid the interest on the bonds for two years. Giving to these payments the utmost effect that can be claimed for them, and conceding that the statute did not run as long as the town treated the bonds as valid and paid the annual interest, it ceased to do this after 1872, and from and after that date denied the validity of the bonds, and paid no interest; and, undoubtedly, the statute of limitations would run against an action for the money paid for the bonds from that date. *Furlong v. Stone*, 12 R. I. 437; *Bishop v. Little*, 3 Greenl. 405; *Bank v. Daniel*, 12 Pet. 32, 57; *Bree v. Holbech*, 2 Doug. 654; *Cowper v. Godmond*, 9 Bing. 748, 23 E. C. L. 788; *Lunt v. Wrenn*, 113 Ill. 168; *Jones v. School Dist.*, 26 Kan. 490; *Weaver v. Leimann*, 52 Md. 709; *Miller v. Adams*, 16 Mass. 456; *Palmer v. Palmer*, 36 Mich. 488, 494; *Tupley v. McPike*, 50 Mo. 591.

The judgment of the circuit court is affirmed.

SCANLAN *et al.* v. HODGES *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 20.

1. CONTRACT—EVIDENCE—CONSTRUCTION—PROVINCE OF COURT AND JURY.

The questions whether certain commercial correspondence constitutes a contract, and, if so, what its proper construction is, are ordinarily for the court, though in exceptional cases, when the alleged contract rests partly in correspondence and partly in oral communications, the question whether there is a contract is for the jury.

2. SAME—BREACH.

The consignees of shipments of wheat were under contract to collect the bill from the purchaser, a milling company, and then to give an order on the railroad company to deliver the wheat to the milling company, and thereupon to remit the amount to the shippers. *Held* that, if the consignees expressly or impliedly consented to its delivery by the railroad company to the milling company before payment of the bill, they were liable for its price.

3. SAME—PLEADING—REDUNDANCY.

In an action by the consignors against the consignees to recover the value of the wheat, an allegation that the wheat was delivered to them by the railroad company was redundant, and need not be proved, it appearing that the wheat was in cars on a spur track, and confessedly subject to their order as consignees.

4. SECONDARY EVIDENCE—ADMISSIBILITY.

Parol evidence by the station master of the contents of a writing given him by the consignees, stating that the railroad was not liable for wheat consigned to them and delivered to the milling company without written orders, was admissible, it having been shown that the paper was lost, and could not be found by diligent search.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Lyman F. Hodges and Samuel Y. Hyde against Michael Scanlan and O. G. Wall to recover the value of 24 car loads of wheat. Verdict and judgment for plaintiffs. Defendants bring error. Affirmed. Statement by CALDWELL, Circuit Judge:

This suit was brought in the circuit court of the United States for the district of Minnesota by Lyman F. Hodges and Samuel Y. Hyde, the defendants in error, against Michael Scanlan and O. G. Wall, the plaintiffs in error, to recover the value of 24 car loads of wheat, alleged to be of the value of \$8,601.90. The defendants in error were dealers in wheat on the Southern Minnesota Railroad, with headquarters at La Crosse, Wis. The plaintiffs in error were bankers, doing business under the name of Bank of Lanesboro, at Lanesboro, a station on the railroad, in Minnesota, about 50 miles west of La Crosse. At Lanesboro there was a firm engaged in operating flour mills under the name of Lanesboro Milling Company.

The complaint alleges "that in the year 1884 the plaintiffs and the defendants entered into an agreement and arrangement whereby the Lanesboro Milling Company, a company doing business as millers in said Lanesboro, were to order from the plaintiffs such wheat as they desired to use in their milling business, and that the plaintiffs would deliver said wheat free on board of cars to said defendants, and the same should be consigned by rail to said defendants under their style of Bank of Lanesboro. That the said bills for said wheat should be mailed by plaintiff to said bank, and the said wheat should be shipped by plaintiffs exclusively to the said Bank of Lanesboro. That said bank would receive said wheat and hold possession thereof until the said Lanesboro Milling Company paid for the same, when the bank was to remit therefor to the plaintiffs; or, in default of so holding possession, defendants agreed to pay for said wheat themselves. That under said agreement and arrangement wheat was shipped by plaintiffs to the Bank of Lanesboro, as ordered by the Lanesboro Milling Company, almost daily from May, 1884, up to April 9, 1889. The wheat was consigned in the same way, and the said defendants have during all of said time, up to March, 1889, paid on presentation the bills for the price of said wheat." That between March 8 and April 9, 1889, plaintiffs, at the request of the milling company, shipped to defendants 24 cars of wheat, which "was all received by the defendants under the agreement above stated. * * *. That the said defendants, in violation of their contract with plaintiffs, allowed said Lanesboro Milling Company to take possession of and use said wheat without collecting or receiving the price therefor;" and that the mill company has not paid for the same, and is insolvent; and they demand judgment for the value of the wheat.

In their answer the defendants admit that the plaintiffs sold wheat to the milling company, and shipped it by rail consigned to the defendants; "but the defendants never had, nor was it agreed or understood that they should have, possession of or dominion over or any responsibility for the said wheat, except to give an order for its delivery on payment therefor, and to transmit to the plaintiffs, less exchange, on pay-

ment therefor to them by the said milling company." They deny that they ever authorized delivery to the milling company of any of the wheat shipped under that arrangement until it was demanded and paid for by that company, or that any wheat was delivered to them by the plaintiffs.

Prior to June, 1884, one Easton owned and managed the Bank of Lanesboro, and there existed between him and the defendants in error and the milling company an arrangement by which the wheat sold by the defendants in error to the milling company was consigned to the bank upon the understanding expressed in the following letter:

"LA CROSSE, WIS., May 12th, 1884.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: Hereafter our agent on the railroad will send bill of wheat shipped you for Lanesboro Milling Company, and we shall expect you to collect on those bills, and not wait for a bill from our office, unless you stand in the gap,—that is, become responsible for the wheat. If there are any errors, the mill company and our firm can adjust afterwards. We inclose a list of freights from stations that are liable to ship there. We will advise our agents to put rate of freight on bills.

"Yours, truly,

HODGES & HYDE.

"We ship the wheat to you to collect before the wheat is delivered.

"H. & H."

About the 1st of June, 1884, the plaintiffs in error became the owners of Bank of Lanesboro, and succeeded to its business, which they continued to conduct in that name. At their respective dates the defendants in error wrote the plaintiffs in error the following letters:

"HODGES & HYDE.

"*Dealers in Grain and Produce on the Southern Minnesota Division of the C., M. & St. P. Ry.*

"LA CROSSE, WIS., June 6th, 1884.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: Your favor 5th inst., with statement, at hand. If possible, we will examine account before this letter is mailed. We are surprised at your inquiry, how about wheat shipped to Lanesboro Milling Co.? as we supposed you knew all about it, and had been following method as follows: We ship wheat from certain stations to Bank of Lanesboro. At time of shipment, our agent at station shipped from, mails an invoice to Bank of Lanesboro. On arrival of car of wheat, Bank of Lanesboro collects the bill from and delivers the wheat to Lanesboro Milling Co. Bk. of L. then credits our account with the amount collected. Why the inquiry? Has Bk. of L. changed proprietors?

"HODGES & HYDE.

"CLARKE."

"JUNE 18th, 1884.

"*Messrs. Scanlan & Wall, Home Exchange Bank, Lanesboro, Minn.*—GENTLEMEN: We have sold to Lanesboro Milling Company eleven cars of wheat, which will be shipped to you. The price of wheat is 91 cents per bushel, less freight to Chicago. Invoice will be mailed to you from station shipped from. On arrival of each car please collect amount from Lanesboro Milling Company, then deliver wheat, and remit proceeds to us. * * *

"Your friends,

HODGES & HYDE.

"CLARKE."

The course of business was this: When a car of wheat was shipped to the bank the defendants in error sent to the bank a bill therefor in the following form:

"WELLS, MINN., March 14th, 1889.

"*Bank of Lanesboro, Lanesboro, Minn., to Hodges & Hyde, Dr., Dealers in Coal, Grain, and Produce:*

"On Southern Minnesota Division, C., M. & St. P. Railroad.

"1 car wheat, No. 5,594,

"467 bushels, at 85c.

Am't.

\$396.95."

At the same time the milling company was advised of the shipment by a notice in the following form:

"LA CROSSE, WIS., March 8th, 1889.

"Wheat shipped to Lanesboro, Minn.

"Bought of Hodges & Hyde,

"Dealers in

"Grain and Produce.

"On the Southern Minnesota Division, C., M. & St. P. Railway.

"DATE. CAR. WHERE FROM. BUSHELS. GRADE. PRICE. AM'T.

"One (1) car wheat.

"5304 Mapleton 462

76c.

"Tare 15

4½

"447

80½

\$359.80."

The defendants in error continued to ship wheat to the bank and the bank continued to collect and remit, less its exchange, for the wheat consigned and billed to it from June, 1884, until May, 1889. The shipments amounted on an average to 6 car loads of wheat per week, averaging in value about \$350 per car, making the total value of all shipments for the whole period between \$500,000 and \$600,000. During this time the business was conducted to the satisfaction of both parties, and without complaint, save in one instance, the occasion and the nature of which is shown by the following correspondence: On the 6th day of January, 1889, the defendants in error wrote the plaintiffs in error the following letter:

"(Confidential.)

JAN. 6th.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: There are 34 cars wheat billed to your bank by us that has not been paid for. We understand they have been, or most of them have been, unloaded. Now, will you please tell us just how this matter stands? We are holding you, and we suppose you are holding the R. R. Co. We presume this matter is all right, but it implies a good deal of money, which we want before you give orders to have it unloaded. Have they the wheat on hand that is not paid for? We hope this matter will come out O. K. without trouble; and please consider this letter confidential. Yours, truly,

HODGES & HYDE."

To this letter the plaintiffs in error made the following answer:

"M. SCANLAN, President.

O. G. WALL, Cashier.

"*Bank of Lanesboro. Scanlan & Wall, Successors to J. C. Easton.*

"LANESBORO, MINN., 1-7-1889.

"*Messrs. Hodges & Hyde, La Crosse*—DEAR SIRS: Yours 6th at hand. The railroad company, through its agent here, had permitted L. M. Co. to

unload cars without orders from us, we exacting payment for all cars delivered by order. The auditor of the road came along one day this week, and checked up agent, and got 'onto' the arrangement, which precipitated a crisis. I delivered the company (its agent) orders for the cars, taking a bill of sale of all wheat, flour, and stock in the mills, and an assignment of all insurance covering the same, (\$9,000.) There was, approximately, \$9,000 to \$10,000 worth of wheat on hand, or in flour ready for shipment, at this time. I have since then remitted you nearly \$3,000, and would have been able to have remitted you \$2,000 more to-day had it been possible to handle the cars, but the push engine is off bucking snow, and will not be back until to-night, if then. If the stock can be gotten out, I will be able to remit you \$2,000 or \$3,000 to-morrow. It will be ready for the cars, and I trust we will be able to get them set in where they can be loaded. I have taken every precaution to be on the safe side, and think everything safe, and assure you that it will be looked after with more anxiety on our part than you can feel. If the cars can be handled, the whole matter can be cleaned up by the middle of next week. Car '20 Tyler,' 600 bushels, is not unloaded yet, and will not be until all else is cleaned up. Please send me a statement of all cars charged to us.

"Resp'y,

O. G. WALL."

The station agent of the railroad company at Lanesboro testified that, at the request of the auditor of the railroad company, he went to Mr. Wall, to get a writing with reference to the cars which had been delivered without the order of the bank, and that Mr. Wall gave him a paper, the original of which has been lost, and cannot be found, which read as follows:

"The Chicago, Milwaukee & St. Paul Railway Company is not held responsible for wheat, or are not liable for the wheat consigned to the Bank of Lanesboro and delivered to the Lanesboro Milling Company without written orders."

There was evidence tending to show that wheat consigned to the bank was sometimes delivered to the milling company without an order from the bank, and that the bank had knowledge of this fact. The cars loaded with wheat intended for the milling company were placed on a spur track running up to the mill, from which the wheat could be unloaded directly into the mill.

The court below ruled that the letters of the 6th and 18th of June constituted the contract between the parties, and that that contract imposed on the defendants the obligation, upon the arrival of the wheat at Lanesboro, to use reasonable diligence and ordinary care to take possession of the same, and not deliver to the milling company until it was paid for according to the bills of invoice sent the defendants. The court, in the course of a lengthy charge to the jury, told them that—

"These two questions of fact are submitted to you: *First*. Did the defendants receive the wheat in question? *Second*. Did they allow the mill company to take or get possession thereof or of any portion of said wheat, without collecting or receiving the pay for the same? These two facts must be found in favor of the plaintiffs, or they cannot recover. * * * The burden of proof is upon the plaintiffs to show by a preponderance of evidence that the defendants either expressly or knowingly or tacitly assented to or acquiesced in the taking of that wheat by the mill company without their first paying the price for the same. * * *. This is an action against the de-

defendants for allowing the mill company to get possession of this wheat after it was delivered to them. If, therefore, the wheat was never delivered to defendants by the railroad company, they cannot be legally held in this action."

And at the request of the plaintiffs in error the court gave the following, with other, instructions to the jury:

"The burden is on the plaintiffs to show by a preponderance of evidence that this wheat in question was delivered to the defendants, and, if the plaintiffs have failed to show this, they are not entitled to recover in this action.

"If the railroad company or its agents or servants delivered this wheat to the mill company without the authority or consent of the defendants, the defendants are not liable therefor.

"There can be no recovery in this action for any wrongful or illegal act of the railroad company unless the defendants authorized such act.

"The burden is on the plaintiffs to show by a preponderance of evidence that the defendants delivered or authorized the delivery of this wheat to the mill company, and, if the plaintiffs have failed to show that fact, the defendants cannot legally be held liable in this action.

"Delivery of cars by the railroad company to the mill company without orders from the defendants cannot make defendants responsible to plaintiffs, unless defendants knew of such delivery, and consented to it.

"These defendants were not bound to guard against the illegal delivery of this wheat to the mill company by the railroad company before it had been delivered to the defendants.

"The transportation of the wheat by the railroad company to the village of Lanesboro, and the notice that such wheat had arrived at Lanesboro, or even the setting of the cars on the side track of Lanesboro, did not constitute a delivery of such cars to these defendants, unless the defendants knowingly consented to accept such acts as a delivery."

There was a verdict and judgment for the plaintiffs, and the defendants sued out this writ of error.

Thomas Wilson and Lloyd W. Bowers, for plaintiffs in error.

J. W. Lusk and C. W. Bunn, for defendants in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) The plaintiffs in error received the letters of the defendants in error dated, respectively, June 6 and 18, 1884, and January 6, 1889, and it is not controverted that the business was conducted on the part of the defendants in error in the mode outlined in those letters. Exception is taken to the ruling of the lower court that the letters of June 6th and 18th constituted the contract between the parties. The letters, though characterized by that brevity of statement common in commercial correspondence, are not of doubtful meaning. They state succinctly and clearly the proposed course of dealing, and make no reference to material extrinsic facts; nor is it necessary to their proper construction to have recourse to any extrinsic facts. Undoubtedly, the general rule is that the question whether given written instruments constitute a contract, as well as the interpretation of such written instruments when it is determined that they do constitute a contract, belongs to the court, and not to the jury; and this rule is as applicable to commercial correspondence as to a formal written

contract. *Brown v. McGran*, 14 Pet. 479, 494, 495; *Turner v. Yates*, 16 How. 16, 23; *Drakeley v. Gregg*, 8 Wall. 242; *Goddard v. Foster*, 17 Wall. 123, 142. Exceptional cases arise where the contract rests partly in correspondence and partly in oral communications, in which it is held that the question whether or not there is a contract is a question for the jury; but this is not one of those cases.

In the construction of a written contract the court may consider the relation of the parties to the contract and its subject-matter; in other words, the court is not denied the same light and information the parties enjoyed when the contract was entered into. *Goddard v. Foster*, *supra*. Looking at these letters in this light, it is clear they expressed the contract of the parties. But the bill of exceptions puts this question at rest. The bill of exceptions states in terms:

"The evidence also establishes the fact that no wheat was delivered to the L. M. Co. after its failure, April 9, 1889, and that the contract and arrangement between the plaintiffs and defendants were made by letter; and all of the letters tending to show what that contract was are hereto annexed and made a part of this bill of exceptions."

Moreover, the course of business for five years, and the letter of the defendants in error to the plaintiffs in error, dated January 6, 1889, and the reply thereto, show conclusively that the letters of the 6th and 18th of June expressed the arrangement of the parties, and that they agreed perfectly in their understanding of the contract. When the relation of the parties to this arrangement is considered, there is no room for doubt as to the object of the contract, or its proper construction. The defendants in error were wheat dealers, and wanted to sell wheat by the car load to the Lanesboro Milling Company, but were unwilling to ship the wheat in a mode that would enable that company to get possession of it before it had been paid for. Thereupon the plaintiffs in error agreed that the wheat might be consigned and billed to them, and that they would collect the price from the milling company, and then, and not before, give an order upon the railroad company for the delivery of the wheat to the milling company. It is useless and irrelevant to the case to speculate as to what would have been the duty of the plaintiffs in error if the railroad company had tendered the wheat to them, and made a peremptory demand for its cars, before the milling company had paid for and received the wheat. The contract having been proved, the principal and the vital question in the case, after that, was one of fact, and was whether the plaintiffs in error authorized or consented to or knowingly allowed or permitted the delivery of the wheat by the railroad company to the milling company before it was paid for. This issue was very clearly put to the jury in the charge in chief, and in several instructions given at the request of the plaintiffs in error. These instructions are set out in the statement of the case, and need not be here repeated. The jury were told over and over that the defendants were not liable unless they authorized and consented that the railroad company might deliver the wheat to the milling company before it was paid for, and that, if the railroad company delivered it without their consent or authority, they

were not liable. They were also told that the defendants were not liable unless they had received the wheat. Under the instructions, it was not possible for the jury to find a verdict for the plaintiffs in the action without finding that the plaintiffs in error received the wheat, and that the wheat was delivered by the railroad company to the milling company, with the knowledge and consent of the plaintiffs in error, before it was paid for. The finding of the jury on this issue renders extended discussion of the other questions raised unnecessary.

The learned counsel for the plaintiffs in error concedes in his brief that it may be inferred from the letters that the plaintiffs in error "were required, (1) on arrival of the wheat at Lanesboro, to collect the bill from the mill company; (2) thereupon deliver the wheat (*i. e.*, give an order for it) to the mill company; and (3) thereupon credit the plaintiffs' account with, or remit to them, the amount." We think this is a fair statement of the obligations of the plaintiffs in error under the contract, and it is, in substance, what the court below told the jury it meant. It was implied, of course, that in the discharge of these obligations they would act in good faith, and exercise ordinary care and diligence. The contract, as construed by the plaintiffs in error, bound them not to give orders for the delivery of the wheat, or consent, expressly or impliedly, to its delivery by the railroad company to the milling company, until it was paid for. If they gave such orders, or were aware of and assented to such delivery before the wheat was paid for, their liability for the price of the wheat thus delivered to the milling company cannot be disputed. This question of fact was fairly submitted to the jury under instructions certainly as favorable to plaintiffs in error as they had any right to ask. There was evidence from which the jury could rightfully find the fact that they did authorize or consent to the delivery of the wheat to the milling company, and their verdict must therefore be accepted as settling that question.

The complaint alleges that the wheat was delivered to the plaintiffs in error, and because of this allegation, probably, the court below instructed the jury that the plaintiffs could not recover unless the wheat had been delivered to the defendants by the railroad company. We do not think the plaintiffs were bound to prove this fact, notwithstanding it was alleged in the complaint. It was a case of redundancy of allegation. The material question was not whether the railroad company had delivered the wheat to the plaintiffs in error, but whether the plaintiffs in error had such dominion over the wheat that they could control and direct its possession. Confessedly, as consignees, they had that right. While the wheat was in the cars on the spur track at Lanesboro, if it was not technically in their possession, it was there subject to their order; as much so as if there had been a formal surrender of the cars to them by the railroad company. Having the undoubted and exclusive right to control the delivery of the wheat, the jury, by their verdict, have found that they exercised that right, and that they authorized the railroad company to transfer the possession of the wheat to the

milling company before collecting the price. These findings are conclusive against the plaintiffs in error upon their own version of the contract.

These views render it unnecessary to further discuss the exceptions to the giving and refusing of instructions. The exceptions relating to the admission of the letter dated May 12, 1884, written by the defendants in error to the Bank of Lanesboro before the defendants purchased the bank, are unavailing, because the letter was withdrawn from the consideration of the jury, and was not considered by the court. There is an exception to the admission of parol proof of the contents of the written paper or instrument given by Mr. Wall to the railroad company, relating to wheat delivered by the railroad company to the milling company without the written order of the plaintiffs in error; but the proper foundation for the admission of parol proof of the contents of the paper was laid, by showing that the paper was lost, and could not be found after diligent search in the office and places where it ought to be, and where there was any reason to suppose it could be found.

A separate examination of the numerous other exceptions to the ruling of the court in admitting and rejecting evidence is not necessary, as none of them are of any general importance. They have all been examined very carefully, and we are satisfied that none of them have any merit. Finding no error in the record, the judgment below is affirmed.

NEWPORT NEWS & M. V. Co. v. HOWE.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1892.)

No. 20.

1. MASTER AND SERVANT—FELLOW SERVANTS—ENGINEER AND BRAKEMAN.

A brakeman who is sent by the conductor from the rear portion of a parted train to signal the forward portion, of which the engineer is, by the rules of the company, the conductor, is a fellow servant of the engineer, and cannot recover from the company for an injury caused by the engineer's negligence. *Railroad Co. v. Andrews*, 50 Fed. Rep. 728, 1 C. C. A. 636, followed.

2. SAME—RULE OF DECISION IN FEDERAL COURTS—STATE DECISIONS.

In the absence of statutes, the decision of the courts of Kentucky that a brakeman and an engineer are not fellow servants, so as to prevent recovery from the company by the brakeman for the engineer's negligence, since it is a construction of the general contract of service, and not a rule of property, does not bind federal courts when construing the common law of Kentucky.

3. SAME—NEGLIGENCE—PROXIMATE CAUSE.

An engineer running back at night in search of cars broken from his train owes no duty to keep a sharp lookout with respect to a brakeman who, being sent forward to signal him, has gone to sleep upon the track; and the company is only chargeable with negligence constituting proximate cause in case of want of care by the engineer after discovering the brakeman.

In Error to the Circuit Court of the United States for the District of Kentucky.

At Law. Action by David C. Howe against the Newport News & Mississippi Valley Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by TAFT, Circuit Judge:

This was a writ of error to reverse a judgment for \$5,825, in favor of David Howe against the Newport News & Mississippi Valley Company. The defendant below was a corporation of the state of Connecticut, operating a railroad in Kentucky, and Howe was a brakeman in its employ. Howe based his right of action on the loss of his arm, caused, as he alleged, by the carelessness of an engineer of the company in operating an engine. The facts are substantially as follows: Howe was a brakeman on a freight train running east from Lexington at night. A drawbar of one of the gondola coal cars, of which the train was made up, pulled out, and the train parted. The engine and the several cars in front of the point of breaking ran on. Hughes, the conductor, and Howe were on the caboose at the rear end of the train. On the forward part were the rest of the train crew, consisting of the engineer, Kirsch, the fireman, McGuire, and a brakeman, Mann. By the rules of the company applicable to such an emergency, the engineer became the conductor of the forward portion of the train, and the trainmen thereon were made subject to his orders. As soon as the conductor, Hughes, discovered the accident, he sent forward Howe with a lantern to signal the engine when it should return, and to give the engineer information as to the whereabouts of the rear cars. Howe went forward several hundred yards, sat down on the end of a tie, put his light down near him, and went to sleep, with his arm thrown over the rail. The engineer, after running about five miles, discovered the parting, side-tracked the cars still attached, and then started his engine and tender back to take up the rest of the train. He had with him on the engine the fireman McGuire and the brakeman Mann. The three were the only witnesses of what occurred at the time of the accident. Mann testified on behalf of the plaintiff that, when within a distance of between 100 and 200 feet from the point where Howe lay, he saw the reflection of the light from Howe's lamp. The night was very dark, and it was raining slightly. As he saw the light, he called to the engineer: "Look out! there they are;" meaning the rear portion of the train. He looked again, and saw on the other side of the track from him an object which he took to be the signaling brakeman, waiting to step on the engine. He crossed to the engineer's side, and then saw a prostrate man only 10 or 15 feet from the approaching engine. He whistled through his teeth, giving what is known as the "steady signal" for stopping at once. The engineer applied the air brakes, reversed his lever, and did all he could to stop. Although he succeeded in bringing the engine to a standstill in 20 feet, the back wheel of the tender had passed over Howe's arm, and cut it off. McGuire testified that the engineer did not look out of the cab window, and that without doing so he could not get a clear view of the track; that the track was straight for 150 yards to where Howe lay, and that

if the engineer had looked out of the cab window he could have seen Howe, and could then have stopped the engine in time to avoid the accident. The engineer's evidence contradicted that of Mann and McGuire. A motion to direct a verdict for the defendant on this state of the facts and the evidence, was denied by the court below. Error is assigned for such denial.

W. A. Sudduth, (*Stone & Sudduth*, on the brief,) for plaintiff in error.

Matt. O'Dougherty, (*Thos. F. Hargis*, on the brief,) for defendant in error.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

TAFT, Circuit Judge, (*after stating the facts*.) We think the motion to direct a verdict for defendant should have been granted, and for two reasons: *First*, because the engineer, who, it is claimed, caused the accident by his negligence, was a fellow servant of the plaintiff below; and, *second*, because the negligence of the plaintiff contributed to cause the injury of which he complains.

First. The principle that among the risks incident to the business of the master which the servant, by his implied contract of service, assumes, are those arising from the negligence of his fellow servants, provided they have been selected with due prudence and care, was first satisfactorily expounded in the leading case of *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49, by Chief Justice SHAW. It has been fully recognized and followed by the supreme court of the United States. In *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, it was held that the defendant railroad company was not responsible to a brakeman in its employ, who, while switching his own engine and train, was struck by another engine of the defendant, negligently operated by its engineer, because the brakeman and the engineer were fellow servants, working together at the same time and place, in pursuance of a common object, to wit, the moving of trains. An exception to the general rule was first suggested, perhaps, by the decision of the case of *Stevens v. Railroad Co.*, 20 Ohio, 415, and afterwards fully confirmed in the case of *Railroad Co. v. Keary*, 3 Ohio St. 201. This exception has been recognized by the supreme court of the United States in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, where it was held that, when an engineer's injury resulted from the negligence of the conductor of his train, the negligent conductor was the representative of the company, and his negligence was its negligence. The counsel for the defendant in error rely on the exception announced in the *Ross Case* to take the case at bar out of the general rule.

It was decided by this court at the last term, in the case of *Railroad Co. v. Andrews*, 50 Fed. Rep. 728, 1 C. C. A. 636, that the mere fact that the negligent employe was of a higher grade than the injured servant did not prevent their being fellow servants, within the general rule, unless it also appeared that the injured servant was actually subject to the orders of the negligent employe when the accident happened. It was accordingly held that a brakeman on one train, who was

killed by the negligence of a conductor of a colliding train, was a fellow servant of such conductor, and that the brakeman's representatives had therefore no cause of action against the railroad company. It was held that the facts brought the case within the *Randall Case*, rather than the *Ross Case*, and that it was error in the court below to direct a verdict for the plaintiff. We see no reason to question the correctness of the conclusion or the reasoning of the court in the *Andrews Case*, and it remains only to apply them to the case at bar.

The breaking of the train, under the rules of the company, made the engineer the *pro tempore* conductor of that part which still remained attached to the engine, and required the trainmen to act accordingly. With reference to the fireman, McGuire, and the head brakeman, Mann, therefore, the engineer was a superior officer, entitled to their obedience; and if, while the train was in two parts, the engineer's negligence had caused injury to either of them, he would have had his action against the company under the doctrine of the *Ross Case*, already referred to. But the plaintiff here was in the rear portion of the train, and subject to the order of the conductor, Hughes. In obedience to Hughes' order, he went forward to signal the returning engine, and when the accident happened, he should have been discharging a duty assigned him by Hughes. Howe was not then acting under, nor was he subject to, the engineer's orders. The case is exactly like the *Andrews Case*, where the brakeman of one train was injured by the negligence of the conductor of another. Howe and the engineer were fellow servants, and the company is not liable to Howe, therefore, for the engineer's negligence.

It is suggested that, as the accident occurred in Kentucky, the decisions of the court of appeals of Kentucky should be controlling. It is held by that court that a brakeman and an engineer are not fellow servants, so as to prevent liability of the company to the brakeman for the negligence of the engineer. *Railroad Co. v. Brook's Adm'r*, 83 Ky. 131; *Railroad Co. v. Moore*, Id. 677. Were the question one of local law or usage, the decision of which had become a rule of property in the state, it would be our duty to regard the judgments of the Kentucky court of appeals as authoritative and final. But the question who are fellow servants, within the rule under consideration, is one of the interpretation and construction of a general contract of service according to the common law of Kentucky. It is a question of general jurisprudence, and is not local. A decision upon it could not, in its nature, have become a rule of property. Upon questions of the general common law of a state, the courts of the United States, exercising a jurisdiction concurrent with that of the state courts, are vested with the constitutional power of rendering and enforcing their independent judgment as to what the law is, even if this judgment is not in accord with the conclusions of the ultimate tribunal of the state whose law they are administering. The supreme court of the United States, speaking by Mr. Justice STORY, laid down the principle in the case of

Swift v. Tyson, 16 Pet. 1, 18, 19, and at nearly every term since, that court has had occasion to reassert it. Many of the authorities are col-
lated in the opinion of Mr. Justice BRADLEY in the case of *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. Rep. 10. Mr. Justice MATTHEWS, in discussing the subject in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. Rep. 564, said at page 478, 124 U. S., and page 569, 8 Sup. Ct. Rep.:

"There is no common law of the United States in the sense of a national customary law, distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of the state."

The question who are fellow servants within the general rule would seem to be not less a question of general common law than the question whether public policy forbids a common carrier from stipulating against liability for his own negligence,—the point involved in *Railroad Co. v. Lockwood*, referred to by Mr. Justice MATTHEWS. In *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974, a statute punishing any one traveling on Sunday by a fine of \$10 was held to afford a good defense to an action by one who, while traveling in violation of the statute, was injured by the negligence of the defendant railroad company, on the ground that a long line of decisions by the supreme judicial court of Massachusetts sustaining the defense made this the local law, binding on the federal courts. But there the state statute gave the question at issue a local color, which is not present in the case at bar. In *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, the court declined to weigh the conflicting views of the various state courts upon the limitations of the fellow-servant rule, but decided it as one of general jurisprudence. The same is true of the decision of this court in the case of *Railroad Co. v. Andrews*, *supra*.

In *Hough v. Railroad Co.*, 100 U. S. 213, the question was whether the defendant company could escape liability, under the fellow-servant rule, for an injury received in Texas, and Mr. Justice HARLAN spoke for the supreme court, with reference to the effect of state decisions upon the subject, as follows:

"Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be

this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

The decision in the *Randall Case* and the subsequent one in the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, must, then, control United States courts in considering similar cases in states where the question is one of common law, and is not controlled by statute. There is no statute in Kentucky which affects the subject. We are bound, therefore, to hold that by the common law of that state, under the circumstances as admitted by the plaintiff below, he and the engineer, Kirsch, were fellow servants, and that the company was not liable for an injury to him caused by Kirsch's negligence.

Second. We are of the opinion that, on the evidence adduced, it was the duty of the court below to have directed a verdict for the defendant on the ground of the plaintiff's contributory negligence. In order that a defendant shall be exonerated from liability by the plaintiff's negligence, it must appear that it was the proximate cause of the accident. It need not be the sole proximate cause. It is enough if it concurs with the defendant's negligence to produce the injury. Plaintiff admits that, with the knowledge that an engine was approaching, on a very dark night, he lay down with his arm over the rail and went to sleep. Grosser negligence, more certain to result in injury, can hardly be suggested. It is charged that the engineer was negligent in not sending out before him his brakeman, in not signaling his return by whistling as often as he should, and in running at a higher speed than four miles an hour,—all, contrary to the rules of the company. There was evidence tending to show such negligence, but it all was plainly concurrent with that of the plaintiff, and therefore constitutes no ground for recovery. The counsel for the plaintiff below rely, however, on the conduct of the engineer at the time of the accident in failing to stop the engine before Howe was run over, as bringing the case within the so-called exception to the general rule of contributory negligence, according to which plaintiff's negligence is no defense, if it appears that by the exercise of due care the defendant might have avoided the consequences of plaintiff's negligence. The exception obviously refers only to those cases where the negligence of the plaintiff is not a proximate cause of his injury, because, after the fact of plaintiff's negligence, and with that as a circumstance or condition of the situation, defendant might then by exercise of due care avoid the injury. In such cases, defendant's negligence in the chain of causes leading to the accident intervenes between plaintiff's negligence and the injury, and is, in law, the sole proximate cause.

Was there any substantial evidence which the court might have submitted to the jury for the application of this principle? It does not appear from the evidence of any witness that the engineer saw Howe upon the track until he received from Mann the "steady" signal to stop. McGuire, the fireman, testified that on account of the tender's obstructing

his view, the engineer could not have seen Howe upon the track unless he had looked out of the cab window, and that he did not do that. The engineer testified that he did not see Howe until he was signaled to stop, and Mann testified to nothing from which the contrary can be inferred. Mann, the witness upon whose evidence the plaintiff's case chiefly rests, admitted on the stand that, after he gave the signal to stop, the engineer did all that could be done to stop the engine. It follows that there was no evidence to show any want of care on the engineer's part after he became aware of the peril to which Howe had exposed himself. The theory of counsel for the plaintiff below is that, when Mann saw the reflection of Howe's light, and called to the engineer, "Look out! there they are," this was notice to the engineer of Howe's perilous situation. We cannot agree with this view. Mann testified that he meant by this remark to indicate to the engineer that they were approaching the rear portion of the train, and the evidence of the engineer is that he so understood it. Mann stated that when he first saw the light the engine was between 100 and 200 feet from it; that, after calling to the engineer, he looked again, and saw in the darkness an object which he supposed to be the form of a brakeman waiting to get on the engine. It was not until he crossed the gangway of the engine, and the object was not more than 15 feet away, that he saw it was a prostrate man. Now there was nothing in what Mann said to lead the engineer to think that anybody was in danger of being run over. Mann did not think so. Why should the engineer have thought so? The peril which the engineer failed to use due care to avoid, as charged by the plaintiff, was that of running over a sleeping man. Neither the nearness of the other part of the train nor the flash of a light would or could suggest the possibility of such a peril to the engineer, and he had no other facts upon which to exercise his reasoning faculties. It would seem, therefore, that there was no evidence tending to show a want of due care on the part of the engineer in stopping the engine after he became aware of any fact or facts from which he could reasonably infer Howe's peril.

Upon the point, however, whether, if the engineer had looked out, he could have seen Howe's perilous position in time to stop the engine before striking him, the evidence is conflicting, and, if the point is material to the case, it should have been submitted to the jury. It remains to inquire, therefore, whether a failure of the engineer to see Howe on the track in time to avoid the accident, when by looking out he might have seen him, can be said to be a legal cause of the accident. If so, it is the sole proximate cause, and would render the company liable. When a man lies down to sleep upon a railroad track at night, with full knowledge that a train is soon to pass that way, does he thereby impose upon the engineer the duty with respect to him of keeping a lookout, and of discovering him upon the track? It is true that the engineer owes it to the passengers on the train, and to persons lawfully upon the track, to keep a lookout, in order to prevent injury to them. But that is because danger to such persons is probable, and should be looked for, to be avoided. One is bound to use one's own so as not

to injure another. This duty, of course, is commensurate with the reasonable probability that any particular use of one's own will injure another. Now there is no probability that a man will be asleep upon the railroad track. While, therefore, an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travelers, because of the probability of danger to each from such failure, such conduct is not a want of due care with respect to a man asleep upon the track, because of the presumption upon which the engineer has a right to rely, that no one would be so grossly negligent in courting death. As there was no duty imposed upon the engineer to look out for the sleeping man, there was no negligence in his failing to see Howe. It would follow that the engineer's failing to learn the peril earlier was not a proximate cause of Howe's injury.

As applied to a case like the present, therefore, we believe the rule relied on by counsel for plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense if the defendant, after he knew the peril of the plaintiff, did not use due care to avoid it. This view seems to be sustained by authority and by several eminent text writers. 2 Thomp. Neg. p. 1157; Cooley, Torts, § 674; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Yarnall v. Railroad Co.*, 75 Mo. 575; *Dennan v. Railroad Co.*, 26 Minn. 357, 4 N. W. Rep. 605; *Button v. Railroad Co.*, 18 N. Y. 248, 259.

In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653, the plaintiff's foot was crushed between the timbers of a wharf by the defendant's steamer's striking the wharf with undue force. The defense was plaintiff's contributory negligence. The court told the jury that, if the defendant's agents might have avoided the consequence of plaintiff's negligence by due care, it was no defense. To the objection that this rule was not applicable to the circumstances, the supreme court answered that it was, because there was evidence to show that the defendant's agents knew where the plaintiff was standing, and that undue force in striking the wharf would result in his injury. This would seem to show that, in the opinion of the supreme court, knowledge of the plaintiff's peril was required to make the rule applicable.

In *O'Keefe v. Railroad Co.*, *supra*, a man lay down at night on the defendant's track in a state of intoxication. He was there run over by an engine which had no headlight. The court charged the jury that he could not, under these circumstances, recover, "unless they found that defendant or its agents had knowledge that he was thus lying, in time to prevent the accident, or could have known, with the exercise of ordinary caution." The judgment of plaintiff was reversed on the ground that the italicized clause was error.

In *Yarnall v. Railroad Co.*, *supra*, the plaintiff's intestate lay intoxicated upon the track, and it was held that the railway company could only be held for such negligence causing the accident as occurred after its agents became aware of plaintiff's exposed condition.

In *Button v. Railroad Co.*, *supra*, plaintiff lay down at night in a state of intoxication on a street car track, and was run over. The court be-

low said to the jury that the defendants were liable unless the negligence of the deceased directly contributed to the injury, and a verdict followed for the plaintiff. The case was reversed, HARRIS, J., saying of the plaintiff:

"If in his senses, as he must be presumed to have been, he courted his own destruction. Under these circumstances, he must be regarded as having co-operated with the defendants to produce his death. Unless the jury could be made to believe that, after the deceased was discovered, the defendants by reasonable care could have avoided the fatal result, they were not liable."

In *Denman v. Railroad Co.*, *supra*, the plaintiff went to sleep on the defendant's track, and was severely injured by a passing train. In holding that the plaintiff could not recover, the supreme court of Minnesota used the following language:

"The only negligence upon the part of defendant's employes upon the train, which the plaintiff argues that the evidence tends to establish, is evidence going to show that the track at the place of the accident, and for a long distance on either side of such place, was level and straight, so that an object no larger than a man's hat could be seen for four or five hundred yards, and that therefore the employes were negligent in not observing the defendant. In our opinion, this is no evidence whatever of negligence on the part of the defendant in a case of this kind. The plaintiff had no right whatever to sit or lie down upon the track, or near enough to it to be within reach of a passing train, and go to sleep. If he saw fit to do so, he took the risk upon himself. The defendant owed him no duty except that of exercising due diligence to avoid injuring him after discovering that he was there. If the defendant's employes in charge of the train had neglected to watch the track, and so had failed to observe some obstruction by which the train was thrown from the track, and, as a consequence, a passenger was injured, the case, unless some excuse appeared, might well be one in which the defendant would be liable to the passenger for negligence. The reason would be because the defendant owed the passenger a duty, the neglect of which had occasioned the injury. But, for the reasons before given, the plaintiff occupies a position entirely different from that of a passenger."

The foregoing is, in our opinion, a correct statement of the law governing the present case. We are aware that there are many cases, which are collected in *Shearman & Redfield's work on Negligence*, (4th Ed. § 99, note,) in which the rule is thus expressed: The defendant is liable, in spite of plaintiff's negligence, if, after he discovers, or ought by due care to discover, plaintiff's peril, he might by the use of due care avoid the consequences of plaintiff's negligence, and does not do so. The due care with respect to discovering plaintiff's negligence depends upon the relation of the parties. In a case like the present, where, in our view, there is no duty on the part of defendant to discover plaintiff's peril, the additional clause adds nothing to the effect of the rule, but implies a duty which, as we have found, does not exist.

The result is that on two grounds the court below should have directed a verdict for the defendant, and the refusal to do so was error which requires us to reverse the judgment and order a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. NEEDHAM.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 106.

1. DEATH BY WRONGFUL ACT—WHO MAY SUE—"HEIRS AT LAW" DEFINED.

The widow and all other persons entitled under the Arkansas statutes to share in the distribution of the personal estate of persons dying intestate are "heirs at law," within the meaning of Mansf. Dig. Ark. §§ 5225, 5226, giving a right of action to the heirs at law (if there be no personal representatives) of any person whose death is caused by the wrongful act, neglect, or default of another.

2. SAME—NECESSARY PARTIES.

Mansf. Dig. Ark. §§ 5225, 5226, give only one right of action against the person or corporation whose wrongful act, neglect, or default causes the death of another; and when the widow brings such action she must join all persons having an interest in the subject thereof, including a half-brother, who is entitled to a share of the damages recovered, though he suffered no direct pecuniary loss. This rule is not changed by section 4933, which provides that every action must be brought in the name of the real party in interest.

3. SAME—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action by a widow for wrongful death of her husband under Mansf. Dig. Ark. §§ 5225, 5226, it is error to positively instruct the jury to measure the plaintiff's damages by a mathematical calculation based upon the yielding power of money when invested in an annuity; for, while it is proper for the jury to consider this method of investment, they should not be confined thereto, but may consider other safe investments, such as government bonds, real-estate mortgages, etc., and in case they find difficulty in reaching a conclusion by any mathematical calculation they are authorized to estimate the damages by their own good sense and sound judgment.

4. SAME.

It appearing that the widow was 20 years old and her husband 22 at the time of his death, and that his wages up to that time had been entirely consumed in the expenses of his household, it was error to charge that, in case the jury believed the widow's expectancy of life was greater than her husband's, they should add to the amount required to purchase the annuity the present value of any property she would probably have received from her husband as dower if he had not been killed, for the realization of any sum as dower depended on too many contingencies, such as life and death, health, divorce, birth and rearing of children.

5. SAME—ERRONEOUS INSTRUCTIONS—CURATIVE CHARGE.

Where, in an action for wrongful death, the court, at plaintiff's request, erroneously gives positive directions for ascertaining the damages by certain mathematical calculations, the error is not cured by the subsequent statement of the court on its own motion that in the end the whole matter of damages is left entirely to the sound judgment of the jury as to what is proper under all the circumstances.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Mrs. D. L. Needham against the St. Louis, Iron Mountain & Southern Railway Company to recover for the death of her husband. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by SANBORN, Circuit Judge:

This is a writ of error to reverse a judgment against the plaintiff in error for its negligence in causing the death of the husband of the defendant in error, who was the plaintiff below, and will hereafter be so designated. The statute of Arkansas under which this action was brought reads as follows:

"Sec. 5225. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. Sec. 5226. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person: provided, that every such action shall be commenced within two years after the death of such person. Act March 6, 1883." Mansf. Dig. Ark. §§ 5225, 5226.

Plaintiff in her amended complaint alleged the citizenship of the parties to the suit; her marriage with D. L. Needham; that he was killed through defendant's negligence; and then averred that there had never been any administration of his estate; that he left no issue or father or mother, but did leave a brother of the half blood, a son of his mother, who was a minor, and his next of kin. The Arkansas statutes provided that in such a case the personal property should be distributed to the widow and next of kin in equal shares. Sections 2522, 2533, 2592, Mansf. Dig. To this complaint a demurrer was interposed by the railroad company, and overruled by the court. The company then answered, and for a second defense pleaded the statute set forth above, (section 5226, Mansf. Dig.,) and averred that the plaintiff could not maintain the action under this statute. The plaintiff interposed a demurrer to this second defense, and this demurrer was sustained. The rulings of the court upon these demurrers and various rulings during the trial which followed are assigned as error.

George E. Dodge and B. S. Johnson, for plaintiff in error.

J. C. Marshall, C. T. Coffman, and James P. Clarke, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, (*after stating the facts.*) In the determination of this case it has been necessary to decide but a single question, and that is: When a cause of action for the negligent killing of a deceased person is given by statute to his heirs at law for the exclusive benefit of his widow and next of kin, can the widow or any one of the heirs at law maintain the action without joining other heirs who are in existence, and entitled to a share of the amount recovered? The contention of the defendant that the words "heirs at law" in this statute do not

include the widow, and hence that she may not be a party to this action, cannot be sustained. It is true that at common law the technical meaning of the term "heir at law" is one upon whom the law casts an estate in real property immediately upon the death of the ancestor intestate; but, in view of the facts that under the statutes of Arkansas the inheritors of the real estate also inherit the personal estate in the same proportions, (section 2522, Mansf. Dig. ;) that the widow receives a larger share in the personal than in the real property, (sections 2571, 2591, 2592, Mansf. Dig. ;) that, if there are no children or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred, capable of inheriting, the whole estate of the deceased husband descends to her by operation of law, (section 2528, Mansf. Dig. ;) (and in the latter case, if the widow could not maintain the suit, there would be no heir at law to bring it, although the widow would be entitled to the entire amount to be recovered ;) and the further fact that the evident purpose of the statute in question in permitting the action to be brought by the heirs at law when there were no personal representatives of the deceased was to give the action in that event to those beneficially interested,—we are constrained to hold that these words in this statute were intended to have a broader signification; that they were used in contradistinction to devisees, and include all those entitled to a share in the distribution of the personal estate of persons dying intestate, under the Arkansas statute.

The question then recurs, can one of these heirs at law maintain this action without joining others in being, who are entitled to a share of the amount recovered? The statute in question was passed March 6, 1883. At common law no one could maintain an action for the negligent killing of a deceased person, and, in the absence of this or some similar statute, this action could not be maintained. *Railway Co. v. Barker*, 33 Ark. 353; *Wood v. Blackwood*, 41 Ark. 299; *Nash v. Tousley*, 28 Minn. 5, 8 N. W. Rep. 875; *Wilson v. Bumstead*, 12 Neb. 3, 10 N. W. Rep. 411. Since the right of action and the remedy for the wrongful killing exist only by virtue of the statute, they exist for the benefit of the persons there specified, and of such persons only; and where, as in this case, such a statute expressly specifies the parties who may bring the action, those parties, and those parties only, can maintain it. Thus in *Nash v. Tousley*, *supra*, where the statutes of Minnesota provided that "where death is caused by the wrongful act or omission of any party, the personal representative of the deceased may maintain an action, * * * and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person," an action brought by a father for the negligent killing of his son was dismissed, and it was held that such an action could be maintained only by the executor or administrator of the son's estate. To the same effect are *Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. Rep. 411; *Miller v. Railway Co.*, 55 Ga. 144; *Books v. Danville*, 95 Pa. St. 159, 166; *Woodward v. Railway Co.*, 23 Wis. 404; *Kramer v. Railway Co.*, 25 Cal. 436;

Needham v. Railway Co., 33 Vt. 304; *Hulbert v. City of Topeka*, 34 Fed. Rep. 510. The first section of this statute provides that the person or corporation whose wrongful act, neglect, or default causes the death of a person shall be liable to an action in all cases where he or it would have been liable to the person killed if the injury had not resulted in death. The second section provides that every such action shall be brought by and in the name of the personal representatives of such deceased person, and, if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; that the amount recovered shall be for the exclusive benefit of the widow and next of kin, shall be distributed to them in the proportions provided by law for the distribution of the personal property of persons dying intestate; and that the jury may give such damages as they shall deem a fair and just compensation for the pecuniary injuries resulting from such death to the widow and next of kin.

Obviously the purpose of the legislature was to provide for the recovery in one action of a single amount, which should, as nearly as possible, equal the aggregate amount of pecuniary loss the widow and next of kin sustained. The statute does not provide, and nothing in it evinces any intention to provide, that each of the heirs shall receive by a separate action, or by distribution of the amount recovered in a single action, such an amount as will reimburse him for the pecuniary loss which he has sustained from the death. On the other hand, it does provide that the amount shall be distributed to the same persons, and in the same proportions, as the personal estates of intestates are distributed, although it is perfectly obvious that under this provision it must often happen that the distribution will give large shares to those who suffer little pecuniary loss, and inadequate compensation to those who are grievously injured. Thus, in the case at bar, it is alleged that the half-brother, who is the next of kin to deceased, suffered no pecuniary loss by his death, while the widow, who brings this action, was dependent upon him for support, and suffered all the pecuniary loss sustained by any one; nevertheless, under this statute, the half-brother is entitled to one half of the amount recovered in the action, since it is provided by the statutes of Arkansas that the personal property of the intestate shall, in such a case, be distributed in this proportion. In other words, no one of the beneficiaries named in the statute is entitled to measure his recovery by the pecuniary loss he has suffered, but he must take that share of the aggregate amount recovered for the pecuniary injury to the widow and next of kin which the statute would give him in the personal estate of the deceased dying intestate. From these provisions of the statute, from the basis of distribution there fixed, it clearly appears that none of the heirs is given a separate action, or a separable interest in the action, against the wrong-doer, until after the judgment is recovered, but that all are jointly interested in the cause of action until distribution of the proceeds is adjudged. In this case the half-brother had a joint and equal interest with the plaintiff in the action and the recovery, and it is well settled that when the action is for the asser-

tion of a joint, and not a several, interest, all persons having an interest in the subject of the action or the relief demanded must be joined.

Any other rule would lead to endless confusion, and great injustice. Suppose, in a case arising under this statute, there are 20 heirs entitled to share the personal estate in proportions varying from one twentieth to one third, and that each may maintain a separate action for the wrongful killing of a deceased person. The aggregate damages to the widow and next of kin must, in reality, be the same in each case, but how the estimates of 20 juries would differ. The amount recovered in each case must be distributed among the 20 heirs in the same proportions, and 20 trials must be endured to determine the rights of these litigants. No such practice or result was intended by the legislature or provided for by this statute. It gives "an action"—a single action, not several actions—for the wrongful killing. It provides that every such action must be brought in the name of the personal representatives, if there are such; otherwise by the heirs at law. It will not be gravely insisted that the personal representatives could maintain more than a single action, or that, where there were several administrators, one of them could maintain the action without joining all; and it is equally clear that when the action is brought by the heirs there must be but a single action, and all the heirs must be made parties to it, so that the entire controversy may be determined and the entire amount recovered and distributed in the single action given by the statute. The simplicity and effectiveness of such an action, the inconvenience and injustice to plaintiffs and defendants alike resulting from any other practice, the rule of distribution of the amount recovered, based, not on the injury to each person entitled to receive a share, but upon the statute of descent, the settled rule of law as to parties jointly interested in a cause of action, and the plain reading of the statute, compel the conclusion that such was the intention of the legislature, and that the court below erred in proceeding to the trial of this action in the absence of the half-brother as a party thereto.

That the statutes of Arkansas provide that "every action must be brought in the name of the real party in interest, except as provided in sections 4935, 4936, and 4938," (Mansf. Dig. § 4933,) in no way militates against this conclusion, because, as we have shown, the half-brother, though he may have suffered no pecuniary loss, was entitled to one half of the amount recovered, and therefore was a real party in interest; and because section 4936 expressly provides that a trustee of an express trust, or any person expressly authorized by statute so to do, may bring an action without joining the real parties in interest, and by the act of 1883 (section 5226, Mansf. Dig.) the heirs of the person wrongfully killed are expressly authorized to bring this action.

The contention that the action on behalf of the half-brother, though he was a minor, was barred by the limitation contained in the act of 1883 before the answer in this action was filed, will not now be considered, because the question on which this case turns was fairly presented by the demurrer to the complaint within the two-years limitation pre-

scribed by that statute, was renewed and insisted upon by the second defense set forth in the answer and throughout the trial, and ought not to be disregarded now; and for the further reason that any opinion we might now express as to the effect of this limitation on the rights of this half-brother would not bind him, (since he is not in court,) and ought not to be formed or expressed until he is heard. The result is that, where an action that had no existence at common law is given by statute to the heirs at law of a deceased person for a wrongful act for the benefit of the widow and next of kin, all the heirs at law are indispensable parties to the maintenance of the action.

In view of the fact that there may be another trial of this case, we notice another error assigned. It is that the court below gave the following instruction to the jury:

"If the jury find that the death of the husband of plaintiff was caused by the negligent acts of the defendant, as defined in these instructions, then they will return a verdict for plaintiff for such sum as will compensate her as widow of said deceased for the pecuniary injury which she has sustained by the death of her said husband. To ascertain this, the jury will consider the probable duration of the life of deceased had his death not been caused at the time it was, as well as the probable duration of the life of plaintiff, and for this purpose reference may be had to the tables introduced in evidence, not as absolute guides on the subject, but as important and authentic information on this point, to be considered with the other evidence in the case in reaching a conclusion on this point; the habits of the deceased with reference to his attention to business, and his sobriety, and in other respects which would affect his capacity for earning money; his probable earnings, and the amount that he would have probably devoted to the support and maintenance of plaintiff. When this is ascertained, you will allow plaintiff such sum, not to exceed the probable earnings of deceased, nor the amount named in the complaint, as will purchase an annuity for such sum as will yield annually during the term of the expectancy of deceased an amount equal to the annual value of the pecuniary benefits that plaintiff would have received from her said husband during said term. But if the jury find that the probable duration of plaintiff's life is shorter than that of her said husband, then she should only be allowed such sum as will equal the value of the benefits she would have received during the term of her life. And if the jury believe that plaintiff's expectancy of life is greater than that of her said husband, then they will add such additional sums as will equal the present value of any property that she would probably receive from her said husband as dower in the event she should so survive him, provided the jury find that the said deceased would have accumulated any such property in excess of what was required for the support and maintenance of himself and family. In plaintiff's case the amount of such dower interest would be one half of any personal property and a life estate in one half of any realty which her husband would own at his death if no children survived him and, if he left children, her interest would be one third instead of one half."

Aside from the palpable errors arising from the unsuccessful attempt to divide the cause of action given by the statute, one vice of this instruction is, that it positively directs the jury to measure the plaintiff's damages by a mathematical calculation, based upon the yielding power of money when invested in an annuity. It was undoubtedly proper for the jury to consider under the evidence what amount of money so in-

vested would yield the yearly amount the widow and next of kin would probably have received from the deceased if he had lived, but they were not bound to allow damages based upon that method, nor any particular method of investment of money. It would be proper for a jury, upon proper evidence, to consider what amount invested in government bonds, well-secured mortgages on real estate, or any other safe security, would yield the annual amount the injured parties would probably have received from the deceased had he lived; but it would not be the province of the court to direct them to allow an amount based upon any one of these methods of investment. Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and sound judgment. *Phillips v. Railway Co.*, 49 Law J. Q. B. 237, 238, 5 C. P. Div. 291, 293; *Rowley v. Railway Co.*, 42 Law J. Exch. 153, L. R. 8 Exch. 221; *Railway Co. v. Putnam*, 118 U.S. 545, 556, 7 Sup. Ct. Rep. 1; *Railroad Co. v. Barron*, 5 Wall. 90, 105.

The same vice runs through that portion of this instruction where the jury was directed, in case they believed plaintiff's expectancy of life was greater than that of her husband, to add to the amount that would purchase the annuity referred to the present value of any property that she would probably have received from her said husband as dower if he had not been killed. At the death of the husband the plaintiff was 20 years old, and her expectancy of life, according to the tables, was 41.53 years, while her husband was 22 years old, and his expectancy of life was 40.85 years. He was a fireman, earning \$75 or \$80 a month, and the expenses of his household during his lifetime had consumed all his wages. Under this evidence, so many chances and contingencies of life and death, of sickness and health, of accident and injury, of marriage and divorce, of the birth and rearing of children, conditioned the lives and relations of this husband and wife that no court was authorized to instruct the jury that they must allow the widow one third or one half of the present value of the husband's probable future accumulations if they were of the opinion she would probably have outlived him if he had not been killed. In the measure of damages in such an action as this the constant factor is the practical knowledge, varied experience, and sound judgment of 12 men, and to these very much must be left. The instruction we are considering was given at the request of plaintiff's counsel. It is true that, after giving it, the court, of its own motion, added the following:

"However, gentlemen of the jury, the whole matter of the amount which the plaintiff is entitled to recover as damages for the death of her husband, if you find his death was caused by the negligence of defendant, as stated in these instructions, is, in the end, left entirely to your sound judgment as to what is proper to be allowed, after taking into consideration all of the facts and circumstances of the case as shown in the testimony."

This particular portion of the charge, standing alone, is not objectionable; but general remarks of this character in the course of a charge,

while they may tend to show that the court really entertains sound views of the law, do not extract the vice of an erroneous instruction, positive in its terms, which directs the jury to allow damages on a wrong basis.

The error into which the zeal and ingenuity of counsel led the court and himself resulted from a futile endeavor to make fixed and certain that which is in its nature uncertain and indefinite. The evidence in such a case presents so many facts and circumstances to be considered,—the chances and contingencies of temporary and permanent illness, of accident, injury, and disability, familiar to the experience of every jurymen, and proper to be considered in estimating the probable future income of any man, but sometimes incapable of proof, are so many and so varied,—that human ingenuity seems incapable of formulating a rule which shall specify every circumstance, chance, and probability that a jury may consider, and none that it may not, in estimating the earnings his death has deprived his family of; but when to the facts and circumstances, to the chances and contingencies that condition the probable earnings of one individual for a series of years, are added those that measure the probability of the continuance of the domestic relations, the probability of the duration of the life of the wife, of the birth and lives of children, of the continued affection and support of the husband, of the continuance of the lives and relations of the next of kin, the establishment of any rule that will enable a jury by any arithmetical computation to arrive at absolute compensation to the widow and next of kin for their pecuniary loss is hopeless.

When, in this case, the court, after cautioning the jury that the only damages that can be allowed are such as will fairly compensate the widow and next of kin for the pecuniary loss they have sustained by the death; that nothing can be allowed for the pain or suffering of the deceased, or the grief or distress of any one; and, calling their attention to the salient points of the testimony, and some of the chances and contingencies that encompassed the lives, relations, and probabilities that must be considered in this case in such way as, in its opinion, will best elucidate the testimony, and tend to assist the jury in arriving at a just result, informs them that they may consider all the facts and circumstances in evidence, and the proximate chances and contingencies that the evidence and their experience of the lives and affairs of men show would intimately affect the probable amount of pecuniary loss the widow and next of kin have sustained; and then instructs them that, after careful and deliberate consideration of all these matters, it is their province and duty, in the light of their knowledge and experience, to fix the amount plaintiffs are entitled to recover (if they find they are entitled to recover at all) at such a sum as, in the exercise of their good sense and careful, deliberate judgment, they deem a fair and just compensation for the pecuniary injuries resulting to the widow and next of kin from this death,—it is probable that the court will have given the jury as definite a rule for the measure of these damages as will be of service to them or to the due administration of the law. This is the established practice in England. The reasons for it are forcibly pre-

mented by Lord Justice BRETT in *Phillips v. Railway Co.*, at pages 237, 238, 49 Law J. Q. B., and at pages 291, 293, 5 C. P. Div., and this practice and the reasoning of Lord Justice BRETT in support of it are commended and approved by the supreme court in *Railway Co. v. Putnam*, 118 U. S., at pages 554, 555, 7 Sup. Ct. Rep. 1, and by the supreme court of Arkansas in *Fordyce v. McCants*, 51 Ark. 514, 11 S. W. Rep. 694.

The judgment below is reversed, with costs, and the cause remanded, with instructions to dismiss the action unless within a reasonable time, to be fixed by the court below, the half-brother named in the complaint be made a party to the action, and in that event to grant a new trial.

RICHMOND RAILWAY & ELECTRIC Co. v. DICK *et al.*

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 17.

1. APPEALABLE ORDERS—CONTINUANCE.

A motion for a continuance is addressed to the discretion of the court, and its action thereon is not reviewable by the circuit court of appeals.

2. SAME—NEW TRIAL.

The action of a federal court in disposing of a motion for a new trial is not reviewable in the circuit court of appeals.

3. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTICE.

A manufacturing corporation received negotiable notes for property sold. The notes were discounted by a banking firm, in which the president of the corporation was a partner, but he had no actual knowledge as to the consideration for the notes, or of the transaction in which they were given. *Held*, that the mere fact of his connection with the two concerns was not sufficient to affect the banking firm with constructive notice of the consideration for the notes and of an alleged failure thereof.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Action by J. R. Dick & Co. against the Richmond Railway & Electric Company on certain promissory notes. Verdict and judgment for plaintiffs. New trial denied. Defendant brings error. Affirmed.

Statement by SIMONTON, District Judge:

The record discloses these facts: The defendant contracted to purchase two engines from the Phoenix Iron Works Company. The engines were to be delivered at Richmond, Va., to be paid for on arrival, one fourth in cash, remainder in notes. They were delivered at Richmond, the cash was paid, and three negotiable promissory notes were executed, payable to order of the Phoenix Company, and delivered to them. These notes bore dates and were in the amounts following: One for \$1,500, dated 23d June, 1891; one for \$1,687.50, dated 1st July, 1891; one for \$1,500, dated 15th July, 1891,—all at four months. The Phoenix Iron Company indorsed before maturity and delivered these notes to plaintiffs, who are a banking firm at Meadville, Pa. One of

them, (S. B. Dick,) at the date of the contract and of the execution and discount of the notes, was president of the Phoenix Company. The notes were not paid. J. R. Dick & Co., indorsees, brought this action against the maker. The pleas were *nil debet* and failure of consideration. At the trial the defendant produced a telegram sent two days before to the plaintiffs at Meadville, directing them to bring to the trial books showing the state of the account with Phoenix Iron Works at and before the time of delivery and indorsement of the note of the Richmond Company and to commencement of suit. "Do this to avoid delay." The telegram was signed by attorneys of plaintiffs and defendant. The books were not produced. Defendant then moved for a continuance until the evidence from the books could be produced. The motion was refused, and defendant excepted. The trial proceeding, defendant called S. B. Dick, who admitted that he was president of the Phoenix Company at the date of the contract, and at the time the notes were delivered and discounted. He denied any knowledge of any part of the transaction until this suit was brought. Defendant then offered to prove the contract made between it and one Henry Church, manager of the Phoenix Company, and in its behalf, and to show that the consideration for these notes given under this contract had failed. The court below withdrew all evidence from the jury on this point. It also refused to instruct the jury, as requested, "that, from his position as president, S. B. Dick must be presumed to have such notice of the defect in the notes as to destroy their negotiability in the hands of his firm; that actual notice was not necessary; that it was enough to show that plaintiffs had opportunities of knowledge, such as would put a prudent man on his guard." The defendant makes this refusal of the court the ground for his second and third exceptions. The jury found for the plaintiffs. Defendant moved for a new trial, which was refused. He makes this the ground of his fourth and last exception.

Wyndham R. Meredith, for plaintiff in error.

Legh E. Page, for defendants in error.

Before BOND, Circuit Judge, and SIMONTON, District Judge.

SIMONTON, District Judge. A motion for continuance is addressed to the discretion of the court below. Its action thereon is not reversible here. *Woods v. Young*, 4 Cranch, 237; *Sims v. Hundley*, 6 How. 1. In Banks' Edition of the Supreme Court Reports all the cases are quoted in a note to this case. The first exception is overruled.

Nor will this court entertain an exception because of the refusal of the court below to grant a new trial. This is wholly within its discretion. *Parsons v. Bedford*, 3 Pet. 433; *Insurance Co. v. Folsom*, 18 Wall. 237; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Cattle Co. v. Mann*, 130 U. S. 75, 9 Sup. Ct. Rep. 458; *Railroad Co. v. Winter*, 143 U. S. 75, 12 Sup. Ct. Rep. 356. The fourth exception is overruled.

The second and third exceptions have been earnestly pressed. They will be considered together. The position taken is this: S. B. Dick, one of the plaintiffs, being president of the Phoenix Company, had con-

structive notice of the consideration for which the notes were given, and of its failure. Notwithstanding that in fact he had no knowledge whatever of the transaction, still his position afforded him the means of knowledge. This affected him and his firm with such notice as to take away from them the protection afforded to *bona fide* holders of negotiable paper, and to subject them to the plea of failure of consideration. The record shows that the plaintiffs are holders of commercial paper. They are presumed, as such holders, to have taken it before maturity for value, and without notice of any objection to which it may be liable. This presumption stands until overcome by proof. *Swift v. Tyson*, 16 Pet. 1; *Lexington v. Butler*, 14 Wall. 282; *Pana v. Bowler*, 107 U. S. 541, 542, 2 Sup. Ct. Rep. 704. There is no evidence whatever tending to show that the notes were not acquired before maturity, and for value. The sole contention is that defendant had notice through S. B. Dick. He denies all actual knowledge of the transaction, and the sole inquiry is, did his position as president give him such notice, and put such means of knowledge in his power, as to defeat the title of his firm? The title of a holder of negotiable paper for value before maturity can only be defeated by showing bad faith in him which implies guilty knowledge or willful ignorance of the facts impairing the title. *Hotchkiss v. Bank*, 21 Wall. 354; *Murray v. Lardner*, 2 Wall. 110. In this case there is nothing in the record which charges, and nothing in the evidence which proves or tends to prove, fraud or bad faith on the part of the Phoenix Company. The only thing charged is its failure to perform the contract to the satisfaction of defendant,—an occurrence of any day, an occurrence of every day, with honest contractors. Were we to assume that S. B. Dick, as president, was affected with knowledge of all the transactions of the Phoenix Company, nothing appears showing bad faith or guilty knowledge. The most that can be said is that he knew that the notes were given for two engines. The last note was dated 15th July. The first complaint was made 3d August. There is no testimony showing that any of the notes were discounted after that last date. It would be an alarming doctrine were it to be established that a bank discounting the business paper of a well-known customer took the paper subject to any defense which the maker of the note could set up, showing that the goods for which the paper was given were deficient in quantity or quality or both. "When a person," says the supreme court in *Wilson v. Wall*, 6 Wall. 91, "has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence." These exceptions are overruled, and the judgment of the circuit court in every respect affirmed, with interest and costs.

SPURLOCK et al. v. STATE OF WEST VIRGINIA, to Use of SOCIETY FOR SAVINGS.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 9.

COUNTIES—LIABILITY OF SHERIFF—PAYMENT OF WARRANTS.

Under Code W. Va. c. 39, §§ 88, 89, a sheriff who refuses either to pay an order properly issued by the county court, or, in the absence of funds, to indorse thereon, "Presented for payment," and sign the same, is liable on his official bond for the amount of the order.

In Error to the Circuit Court of the United States for the District of West Virginia.

Action by the state of West Virginia, to the use of the Society for Savings, against Sanders Spurlock and his sureties upon his official bond as sheriff of Wayne county. Jury waived, and cause submitted on an agreed statement of facts. Judgment for plaintiff. Defendants bring error. Affirmed.

Malcolm Jackson, for plaintiffs in error.

F. B. Enslow, for defendant in error.

Before FULLER, Circuit Justice, and BOND and GORF, Circuit Judges.

BOND, Circuit Judge. It appears from the agreed statement of facts in this case that the county court of Wayne county, in the state of West Virginia, on the 11th day of March, 1881, entered an order on its records, which recited that it appeared from a report of a special commissioner appointed by a preceding county court that there was an indebtedness which was created by the late county court of Wayne county in accordance with the provisions of the road laws of West Virginia, then due and unpaid. It further recited that the levies for the then coming year would not be sufficient to pay such indebtedness and other expenses for like purposes. It then directed bonds of the county for \$12,000, with interest at the rate of 6 per cent., payable semiannually, to be issued, and that these bonds and interest coupons should be a charge upon the road levies of the respective districts of the county where the money derived from the sale of the bonds was expended, for a term of 10 years, when the bonds were to become due. On the 11th day of August, 1882, the county court issued another order, similar to the above, except that it authorized the issue of bonds to the value of \$19,500. The defendant in error, the Society for Savings, bought these bonds for their face value. The county court of Wayne county has paid the interest thereon up to September, 1889, and one bond of \$500. In payment of this interest the county court issued the orders sued on in this case, and delivered the same to the plaintiff below, who notified the sheriff of Wayne county that it held them, and presented the same for payment to him in the summer of 1889, again January 4, 1890, and again on May 16, 1890. The sheriff refused to pay the same in obedience to the order

of the county court, and refused to indorse thereon, "No funds," or the date of presentation. A levy was made in 1889 to pay said orders, and the levy was collected by the sheriff before January, 1891. The form of the order from the county court of Wayne is this:

"WAYNE COUNTY, W. VA., July 2nd, 1889.

"The Sheriff will pay to Society for Savings, or order, the sum of thirteen hundred and six dollars and sixty-nine cents, allowed by special order, entered on the 2nd day of July, 1889, after deducting therefrom the amount of all State, county and other taxes and levies in his hands for collection against the said Society for Savings. Third District Road Levy, 1889, with interest from July 1st, 1889, \$1,806.69.

CHAPMAN ADKINS, President.

"CHAPMAN FRY, Clerk."

There is no allegation or pretense that the sheriff had in his hands for collection any claims of the state or county against the Society for Savings, which is a corporation of the state of Ohio. This is an action upon the sheriff's bond against Sanders Spurlock, the sheriff, and the sureties on his bond, of which there are twenty-three. The parties, by agreement in writing, waived a jury trial, and submitted the case to the court upon the agreed statement of facts. The court found for the plaintiff in the amount of the penalty of the bond, which was to be released upon the payment of \$2,729, with interest from the 24th day of November, 1891, and costs.

At the January term of 1891 the county court of Wayne issued an order directing the sheriff not to pay the former orders of the court, though the money required to pay them had been collected from the taxpayers of the various districts, and was in the sheriff's hands for that purpose in 1889.

The errors assigned in the record are that the bonds upon which these orders were issued to pay accrued interest were invalid because they were issued in violation of section 8, art. 10, of the constitution of West Virginia, which requires the questions respecting the issue of such obligations to be submitted to a vote of the people of the county; and that, the bonds being invalid, the interest coupons are invalid also; that it was error for the circuit court of the district of West Virginia to hold that any indebtedness for money had and received could be incurred by the county of Wayne when it did not appear that the plaintiff purchased the coupons from the county, or when there had been no submission to the vote of that county of the questions connected with such indebtedness, required by section 8, art. 10, of the constitution of West Virginia; and that it was the duty of the sheriff to respect the order of January, 1891, forbidding him to pay the orders, the refusal to indorse or pay which constitutes the cause of action against the defendant Spurlock.

It is well to understand the legal position, under the laws of West Virginia, of the county of Wayne, which issued the orders to the Society for Savings, which took them in payment, and of the sheriff, Spurlock, when they were presented to him for payment, and the remedy at hand to which the Society for Savings might resort to compel payment. It

is the duty of the county court of Wayne county to ascertain from time to time the indebtedness of the county and to make the levies. These are, with the assessors' books, delivered to the sheriff for collection. When this is done, upon the application of any creditor, the county court issues a warrant in his behalf upon the sheriff, requiring him to pay to holder the amount specified in the warrant or order. The county court has no other mode of payment. When this order has been issued, no action will lie against the county court, except *mandamus*, to compel its payment, unless the order has ceased to be a subsisting liability, in which case the county may be sued on the original cause of action. *Ratliff v. County Court*, 33 W. Va. 94, 10 S. E. Rep. 28; *Canby v. Board*, 19 W. Va. 93.

The law of West Virginia, however, has not left its creditors remediless. Sections 38, 39, c. 39, Code W. Va., provide that no money shall be paid out of the county treasury (the sheriff is the only treasurer) except upon an order signed by the president and clerk of the county court. When an order is presented to the sheriff, and there are no funds to pay the same, the person entitled to receive the sum of money specified in such order may require the sheriff to indorse thereon or write across the face "Presented for payment," and sign the same, and the order, if it was due at the time of presentment, shall be payable, with legal interest, from the date of indorsement by the sheriff. But if the sheriff, having funds to pay the order with, fails to do so, when properly presented during business hours by the person entitled to receive the same, he shall be liable with his sureties to the person entitled to the money, for the entire amount due thereon, with interest, and 10 per cent. on the amount as damages.

The money to pay these orders had been levied by the county court of Wayne county, assessed by the county assessors upon the property liable for such tax, and was in the hands of the sheriff, Spurlock, who could appropriate it to no other purpose but to pay it out upon such orders as the county court might draw against it. At the time these orders were presented to the sheriff there was nothing for him to do but to indorse them as required by law, if he had no funds, or to pay them if he had funds. The statement of facts agreed admits that he would do neither. The plaintiff could have proceeded against the county court, on the original cause of action, because of the order of the court to the sheriff directing him not to pay the orders, or against the sheriff on his bond. The latter course was followed, as provided for by the Code of West Virginia, and no good reason has been shown by either the sheriff or the county court why the orders have not been paid. The sheriff having chosen to violate his legal obligations, and to ignore the statutes of the state of West Virginia prescribing his duties, there has been a breach of his official bond, for which he and his sureties are liable, and the judgment of the circuit court is affirmed, with costs.

CLEVELAND TARGET CO. *et al.* v. UNITED STATES PIGEON CO. *et al.*

(Circuit Court, N. D. Ohio, W. D. May 31, 1892.)

No. 1,045.

1. PATENTS FOR INVENTIONS—ANTICIPATION—MOTION FOR PRELIMINARY INJUNCTION—FLYING TARGETS.

Letters patent No. 225,261, issued March 9, 1880, to Orator F. Woodward, are for a "new and useful improvement in compositions of matter for making molded articles of manufacture," such as flowerpots, vases, cuspidores, etc. Flying targets or "birds," though not specified by the patentee, were made in large numbers under the patent. The composition consisted of gypsum and rosin mixed under heat. *Held*, on motion for a preliminary injunction against one manufacturing targets from a like compound, that the patent was not anticipated by certain previous compounds from which flying targets had never been made, and from which the patentees never contemplated that they would be made.

2. SAME—MOTION FOR PRELIMINARY INJUNCTION—ESTOPPEL.

In a suit for infringement of a patent, it appeared that defendant was formerly in the employ of complainant, and, while sustaining that relation, gave testimony as an expert in its behalf supporting the validity of the patent, and, by actual process of manufacture before the court, demonstrated the novelty and utility of the invention. *Held*, on a motion for a preliminary injunction, that he was in no position to deny the validity of the patent.

In Equity. Bill by the Cleveland Target Company and Orator F. Woodward against the United States Pigeon Company and others for infringement of a patent. On motion for a preliminary injunction. Granted.

E. A. Angell, for complainants.

J. B. Fay, for respondents.

RICKS, District Judge. The complainants file their bill in this case to secure an adjudication as to the validity of the patent No. 225,261, dated March 9, 1880, issued to Orator F. Woodward, of Le Roy, N. Y., and now ask for a preliminary injunction against the defendant, restraining it from the manufacture of flying targets or "birds," which they claim to be an infringement of the patent set forth in the bill. The patent sued upon was before this court in the case of *Peoria Target Co. v. Cleveland Target Co.*, and its scope and utility were fully commented upon in an opinion delivered on May 27, 1890, in that case. 47 Fed. Rep. 725. The complainant in that case relied upon the validity of letters patent No. 334,782, granted to Fred. Kimble, January 26, 1886, for a new and useful improvement in making targets. One of the defenses set up in that case was that the complainant's patent was not novel; that neither the process nor the article specified constituted a patentable invention; and that a process for making a similar compound had been described in a prior patent issued to Orator F. Woodward, in 1880. In the case referred to the court, in referring to the complainant's patent, said:

"The Woodward patent of March 9, 1880, was intended to produce a composition of matter which could be molded into various articles of fine texture, glazed surface, very cheap and strong. The ingredients described were gypsum and rosin, mixed under heat. The right to use pitch as a substitute for

rosin was claimed in the patent. The specifications and claims set forth in that patent cover the very product now under consideration in this patent. The ingredients are exactly the same, and the product described covers the target in this case. The only change effected is that the target produced under the Kimble patent is fragile, while the molded product of the Woodward patent is strong and substantial. A slight change in the proportions of the ingredients produced the desired result. This was not a discovery, within the meaning of the patent laws. It was not an invention. It was merely combining materials described in several earlier patents, and conspicuously in the Woodward patent; and this combination was not made on any scientific basis, or any fixed proportion, but was to be varied as the quantity of oil in the pitch might make necessary. This requires no scientific knowledge. It is 'but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice,' and comes within the rule defined by Mr. Justice MATTHEWS in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717."

With this *quasi* adjudication of the validity of the Woodward patent, the complainants now file their bill, and seek to maintain the validity of said patent, and establish an infringement on the part of the defendants. The Woodward patent, while not claiming on its face to be an improvement for the making of flying targets, or flying pigeons or black-birds, as they are sometimes called, does claim it to be a "new and useful improvement in compositions of matter for making molded articles of manufacture," specifying flowerpots, vases, cuspidores, etc., as illustrating the character of the articles to be made under the process described in the patent. But it appears from the evidence that the compound described in the Woodward patent was actually used in making flying targets. In 1882 several thousand of such targets were made under the Woodward patent, and publicly used in the state of New York and elsewhere. The defendant claims that complainants' title is not perfect, and sets forth a large number of anticipating patents, several of which it claims describe a composition out of which flying targets could be made as successfully as out of the compound described in the Woodward patent. But it is sufficient answer to this to say that none of the compounds described in these several patents were ever used for any such purpose. The articles described to be made under these several patents were all articles so entirely different in construction, form, and proportions of material from the flying targets as to make it plain that the patentees in those cases never contemplated that their compounds could be varied or should be varied, to make the peculiar structure required for the flying targets under the complainants' patent sued on in this case. In fact, in most of the patents set forth in defendants' answer and affidavits, very opposite qualities to those essential to successful flying targets were set forth in the patents as pertaining to the articles manufactured and covered by said patents. I do not think, within the meaning of *Clough v. Manufacturing Co.*, 106 U. S. 178, 1 Sup. Ct. Rep. 198, that these patents ever anticipated the complainants' device. The complainants' patent, though not describing a compound expressly

intended for the construction of flying targets, did in fact contain ingredients which, with a few changes, have made very superior flying targets, probably as successful and popular as any put upon the market. The compound described in said patent has in fact been so successfully used in the manufacture of flying targets that now some 12,000,000 are made annually. This is the highest evidence of its usefulness and adaptation to this kind of manufacture. The public have accepted and used it as meeting a general want. I think, therefore, for the purposes of this motion, that we may accept the patent as embracing a novel and useful invention. I think the complainants' title to this patent is clearly established.

But the defendant is in no position now to defend as to the question of validity. The defendant Damm, who is the promoter, principal officer, and active manager of the defendant corporation, was originally in the employ of the complainant. While sustaining such relations to it, he asserted the validity of the patent sued upon in this case, was an expert witness in this behalf, and demonstrated before this court, by actual process of manufacture, the utility of the invention, and in various ways so committed himself to the validity of this patent that I do not think he is in any position now to controvert it. There can be no question of the infringement. It is thoroughly established, and I think, under all the circumstances of the case, the complainants are entitled to a preliminary injunction, and a decree may be drawn accordingly.

THE H. E. WILLARD.

(Circuit Court, D. Maine. October 8, 1892.)

No. 42.

1. MARITIME LIENS—STATE STATUTES.

The lien given by Acts Me. 1859, c. 287, to a part owner of a vessel for debts contracted and advances made for certain purposes, is not maritime in its nature, and is therefore not enforceable through the admiralty jurisdiction of the federal courts.

2. ADMIRALTY—JURISDICTION OF FEDERAL COURTS—STATE STATUTES.

While the federal courts sitting in admiralty may enforce, according to their own rules of procedure, a right created by a state statute, which right is maritime in its nature, no subject which is not of a maritime nature can be brought within their jurisdiction by state legislation.

3. SAME—ACCOUNTING BETWEEN PART OWNERS.

Matters of account between part owners of a vessel belong to a court of equity, not to a court of admiralty. *The Larch*, 3 Ware, 23, 34, and *The Charles Hemje*, 5 Hughes, 359, disapproved.

In Admiralty.

Benj. Thompson, for libelants.

George E. Bird, for respondents.

Before GRAY, Circuit Justice, and PUTNAM, Circuit Judge.

GRAY, Circuit Justice. This was a libel in admiralty *in rem* for supplies furnished by the libelants to the schooner H. E. Willard, a domestic vessel, in her home port, and for which they claimed a lien under the laws of the state of Maine and the admiralty and maritime jurisdiction of the United States. The claim and answer of two of the part owners of the vessel, intervening for the interest of themselves and of their co-owners, alleged that the case was not within the admiralty and maritime jurisdiction of the court, because the libelants were the owners of three thirty-seconds of the vessel, and neither by the laws of the state of Maine nor by the general maritime law was there any maritime lien in favor of one part owner of a vessel for supplies, advances, or disbursements made on her account; and, further, because the accounts between the part owners of this vessel had not for a long time been adjusted, and many of the owners were indebted to the vessel, and the vessel was indebted to the other owners; and therefore the libel was in truth and in fact one for an accounting between the part owners of a seagoing vessel. At a hearing upon libel and answer, the parties assuming that the facts alleged in the answer were true, the district court dismissed the libel for want of jurisdiction. The libelants appealed to this court.

Nothing is better settled than that matters of account between part owners properly belong to a court of equity, and are not within the general jurisdiction in admiralty. The admiralty has no jurisdiction of matters of account, even when relating to maritime affairs, except as incidental to a subject of which it has jurisdiction; and accounts between part owners are not made maritime affairs by the fact that the property owned in common is a seagoing vessel. *The Orleans*, 11 Pet. 175, 182; *Grant v. Poillon*, 20 How. 162; *Ward v. Thompson*, 22 How. 330; *Kelum v. Emerson*, 2 Curt. 79; *The Larch*, Id. 427; *Davis v. Child*, 2 Ware, (2d Ed.) 78, 82; *Hall v. Hudson*, 2 Spr. 65; *Hazard v. Howland*, Id. 68, 71; *The Marengo*, 1 Low. 52, 56. Such was always the law of England, until parliament, about 30 years ago, expressly conferred on the court of admiralty jurisdiction to decide all questions arising between part owners of English ships, touching the ownership, possession, employment, and earnings, and to settle all accounts between them in relation thereto. St. 24 Vict. c. 10, § 8; *The Apollo*, 1 Hagg. Adm. 307, 313; *The Idas*, Brown. & L. 65; *The Lady of the Lake*, L. R. 3 Adm. & Ecc. 29.

The only cases cited at the bar which tend to support this libel independently of statute are two decisions of district courts. In *The Larch*, a libel by one of two part owners for his disbursements against the other's share in the vessel was entertained by Judge WARE upon the ground that the case demanded no examination of various and perplexed accounts, but only of the earnings of the vessel, and the payments made in the course of about one year. 3 Ware, 28, 34. But, as since observed by Judge LOWELL, that the account might be a very simple one is not the test of the jurisdiction; the subject-matter is not within the cognizance of the court. *The Marengo*, 1 Low. 52, 56. And the decree of Judge WARE in *The Larch* was reversed in the circuit court by Mr.

Justice CURTIS. - 2 Curt. 427. The decision of Judge HUGHES in *The Charles Hemje*, 5 Hughes, 359, rests on the overruled decision of Judge WARE.

The real question in this case, therefore, is whether the jurisdiction in admiralty can be supported by reason of the statute of Maine of 1889, c. 287, which enacts that "all domestic vessels shall be subject to a lien to any part owner or other person to secure the payment of debts contracted and advances made for labor and materials necessary for their repair, provisions, stores, and other supplies necessary for their employment, and for the use of a wharf, dry dock, or marine railway: provided, that such lien shall in no event continue for a longer period than two years from the time when the debt was contracted or advances made."

The admiralty jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislature of a state. When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, according to their own rules of procedure. *The General Smith*, 4 Wheat. 438, 443; *The Planter*, 7 Pet. 324, 341; *The St. Lawrence*, 1 Black, 522, 526, 527; *Ex parte McNeil*, 13 Wall. 236; *The Lottawanna*, 21 Wall. 558, 575, 576, 580; *The Corsair*, 145 U. S. 335, 347, 12 Sup. Ct. Rep. 949. But no state legislation can bring within the jurisdiction of those courts a subject not maritime in its nature. *The Orleans*, 11 Pet. 175, 184; *The Jefferson*, 20 How. 393; *The Capitol*, 22 How. 129; *The St. Lawrence* and *The Lottawanna*, *ubi supra*. The right given by the statute of Maine to a person furnishing supplies to a vessel in which he owns no share might be enforced in the admiralty courts of the United States, because such a contract is strictly a maritime contract, and nothing else.

But the right and lien which the statute undertakes to give to a part owner is quite different in its nature. His claim for supplies furnished to a vessel owned by himself in common with others is not against the whole vessel, nor wholly against the other owners; for he himself owns part of the vessel, and is himself liable for a part of the claim, in proportion to his share in the common property, modified by the state of accounts between himself and his associates. In order to ascertain the amount of the claim for supplies which he is entitled to enforce against the vessel, an account must first be taken of the mutual affairs of all the part owners. The taking of the entire account is the primary and principal thing, to which the amount of his claim for supplies is necessarily secondary and incidental. It was therefore rightly held by the district court that here was no independent or original cause of action, maritime in its nature, of which that court could take jurisdiction in admiralty, either by the general law or because of the local statute.

Decree affirmed, without costs.

THE WILLIAM BRANFOOT.

THE WILLIAM BRANFOOT v. HAMILTON.

HAMILTON v. THE WILLIAM BRANFOOT.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

Nos. 12, 19.

1. SHIPPING—LIABILITY FOR PERSONAL INJURIES—DEFECTIVE APPLIANCES.

A ship is liable in damages to one of a stevedore's gang who is injured while unloading cargo by the unexpected falling of a stanchion, because of defects in its fastenings, not observed by him and not apparent to the eye, but which a proper inspection by the ship's officers would have disclosed. 48 Fed. Rep. 914, affirmed.

2. SAME—BURDEN OF PROOF—*RHS IPSA LOQUITUR*.

The happening of the accident under such circumstances casts upon the ship the burden of showing reasonable care in maintaining the premises in a safe condition.

3. DAMAGES—ADEQUACY—PERSONAL INJURIES.

A stevedore's laborer received a comminuted fracture of the bones of his leg, and had the leg amputated below the knee, being treated in a free hospital. He was between 30 and 35 years old, and earned \$1.25 per day, or \$375 a year. *Held*, that an award of \$2,286 was a sufficient compensation for his pain and suffering and the permanent diminution of his capacity for work. 48 Fed. Rep. 914, affirmed.

4. COSTS—COMPENSATION OF EXPERTS.

The compensation of experts called by a party in his own behalf cannot be taxed against the losing party, under Rev. St. §§ 823, 983, either as costs or extra allowances.

5. SAME—COPYING STENOGRAPHER'S NOTES.

Money paid by a party for a copy of the official stenographer's notes for his own convenience is not taxable as costs.

6. SAME—DEPOSITIONS—TRAVELING EXPENSES.

The expenses of a journey to a distant city to attend the taking of a deposition cannot be taxed as costs on the ground that the notice was so short as to be insufficient for employing and instructing counsel there, since, if the notice was unreasonable, counsel could have had it extended, or perhaps have suppressed the deposition.

Appeals from the District Court of the United States for the District of South Carolina.

In Admiralty. Libel by John Hamilton against the British steamship William Branfoot to recover damages for personal injuries. Decree for libellant in the sum of \$2,286 and costs. 48 Fed. Rep. 914. Both parties appeal. Affirmed.

The libel averred that Hamilton was employed on board the steamship William Branfoot, then lying afloat in the navigable waters in the port of Charleston, in unloading a cargo of pyrites, and injured by the sudden fall of an iron stanchion, by reason of its defective, unsafe, and insecure condition, through the negligence of the steamship, her owners and officers, contrary to their duty in that behalf. The answer denied that the stanchion suddenly fell, or was either unsafe, defective, or insecure, and alleged that it "was in all respects and purposes, as far as could be ascertained by external examination, strong, safe, secure, and properly and safely riveted and fastened," and charged that the injuries were the proximate and immediate result of the negligence of Hamilton, his coem-

ployes, and the stevedore by whom they and he were employed, in so carelessly managing the hoisting of the cargo as to permit the iron tubs used for that purpose so to strike against the stanchion as to finally wrench it from its fastenings, and cause it to fall. Evidence having been taken, and hearing had, a decree for libelant was rendered for \$2,286 damages and costs. The opinion of the district judge will be found in 48 Fed. Rep. 914. Exceptions to the taxation of costs were taken by libelant, and overruled.

R. G. Rhett, for the William Branfoot.

Claudius B. Northrop, for Hamilton.

Before FULLER, Circuit Justice, BOND, Circuit Judge, and HUGHES, District Judge.

FULLER, Circuit Justice, (*after stating the facts.*) Treating the opinion of the learned district judge as if it formally presented findings of fact and conclusions of law separately stated, claimant assigns upon his appeal a number of alleged errors in respect of such findings and conclusions, and these have been fully argued by counsel. The real question is whether, upon the whole case, the district court erred in rendering the decree complained of; but in determining that question the opinion of the court may be considered, by way of convenience, in the light of claimant's objections, as these embody the grounds relied on as requiring a reversal, and involve an examination of the entire record.

The district judge said:

"Libelant was one of a stevedore's gang employed in discharging pyrites from the British steamship William Branfoot. While he and others were working in the lower hold, an iron stanchion supporting the between decks fell and broke his leg. Amputation became necessary. The leg was cut off about six inches below the knee. The stanchion was on the starboard side of the main hatchway, midway. It was eighteen feet high, and weighed six hundred and sixty pounds. It rested on an iron tank at the bottom of the hold, and had two flanges at its lower end, through each of which was an iron bolt, riveting it to the tank. The top of the stanchion was riveted to the iron beam upon which the between decks rested. This was by a sort of flap, pierced with two holes for rivets. After the stanchion had fallen, its upper end was examined. The concurrence of testimony is that one of the rivets originally in this part of the stanchion had broken off and disappeared. At all events, it was not in place at the time of the accident. The other was worn,—presented the appearance of an old break, which extended, some say one half, others two thirds, through the rivet. There is great divergence of testimony as to the bolts at the base of the stanchion. Libelant's witnesses say that they exhibited old breaks. Those for claimant say that one exhibited a fresh break throughout. The other may have been broken in part. The stanchion fell without warning,—unexpectedly."

In our judgment the record entirely bears out the correctness of the foregoing statement, and it may be added in this connection that there was also evidence tending to show the working of the ship on the bolt that remained at the top, as well as that it had an old break in it; that the two bolts at the bottom of the stanchion had been broken for more than a month, or long before the vessel commenced her voyage; that

stanchions frequently required repairs, being injured by the cargoes; and that it further appeared that a board had been lashed to the stanchion about midway in its height, and to a stationary iron ladder leading into the hold, manifestly before the pyrites were loaded, thereby steadying the stanchion, at least until the cargo was withdrawn. The district court was justified in concluding that—

"The libellant, lawfully at work in the hold of this vessel, was injured by the unexpected fall of the stanchion; that it fell because of defective fastenings, certainly at its upper end, probably at its base also; that these fastenings had become worn and broken from wear and tear, and were possibly originally imperfect."

The court further said:

"These defects were not visible except in one respect,—the absence of one upper rivet. * * * Libellant has proved the falling of a stanchion of the vessel, the cause of injury to him, the insecurity of some of its fastenings, and that this insecurity was not immediately perceptible. * * * There is no evidence of any inspection of the stanchion at any time by any one. The mate speaks of a cursory examination made by him at some undefined time. This cannot be called an inspection. It is very clear that neither the master nor the mate had any suspicion that one of the rivets on the upper end of the stanchion had disappeared. There is no evidence whatever as to what care was exercised, if any care was exercised at all."

Here again we concur with the views of the district judge thus expressed. There is no basis for the theory that Hamilton voluntarily assumed the risk of danger from an insecurity known to him, nor, on the other hand, is the position sustained by the evidence that that insecurity was unknown to libelee, or such as should not reasonably have been within his knowledge. The stanchion was one of some ten or twelve. The mate, in answer to the question whether he had ever made an examination of the top part of this stanchion, testified:

"I never made an examination of the tops of the stanchions particularly. When I have been down in the holds, seeing and getting the holds ready for cargo, everything seemed to be all right then. They are seventeen or eighteen feet from the floor to the top. *Question.* So your examination consisted in standing at the bottom of the stanchion, and looking up casually? *Answer.* Yes. *Q.* Have you examined the other stanchions in the hold? *A.* Just the same way."

The district court was quite right in holding that this was no proof of an inspection, and that none such was had, and we think it clear that a proper examination would not simply have disclosed the absence of one of the upper rivets, in itself a serious element of weakness, but also the fact that there were other defects which rendered the condition of the stanchion dangerous. It is true that the floor of the ship covered the flanges of the stanchion and the bolts fastening them to the tank; but the tests of an inspection are not merely those of eyesight, and, although the absence of rivets at the bottom of the stanchion may have been concealed, it must be assumed that whether the stanchion was secure or insecure could have been discovered without involving tearing up the deck to ascertain, in the first instance, the exact defects which

existed. Taking the evidence together, the reasonable inference is that not only would an inspection have disclosed the defective condition of the stanchion, but that that condition was probably known to those having the vessel in charge. If known, or if knowledge were chargeable, the duty to repair was obvious.

The defense that the stanchion was wrenched from its fastenings by negligence on the part of the stevedore in handling the hoisting machinery is thus set forth in the opinion:

"The discharge of cargo was by means of a patented automatic. A rope was passed over a crane some fifty feet above the vessel, to the end of which was attached, by hooks, an iron bucket, weighing about four hundred pounds. The bucket was let down into the hold; was disengaged from the hook by one man, who had no other duty but to disengage the buckets as they came down and to put on the hooks when they were loaded; was rolled on its wheels to the cargo; was loaded by the other hands, rolled back under the hatch, and attached to the hooks. Loaded, it weighed twenty-seven hundred pounds. Upon signal the steam hoisting apparatus was set in motion. The tub moved up slowly at first, then very rapidly; traversing the distance up in ten seconds. The theory of the claimant is that the hooks had been attached to a full tub before it got under the hatchway, and that the hoisting apparatus was prematurely set in motion. The heavy tub, thus dragged along the bottom of the hold, was dashed against this stanchion, tearing it from its rivets, and causing it to fall. For this negligence upon the part of the gang the ship is not liable, the stevedore having been selected and engaged by the charterer."

But the district judge held that the positive evidence was to the effect that the tub did not strike the stanchion, and we agree with him that there was substantially no testimony that the stanchion fell because of a particular blow of the bucket. It is urged, however, that it does appear that it was a frequent occurrence for the tubs to strike, and that this was the cause of the insufficiency of the stanchion's supports. While there is some conflict upon this branch of the case, we are of opinion that the evidence falls far short of establishing, or even creating a presumption, that the defective condition of the stanchion was the result of external force continuously applied in the process of unloading, and that not only the stanchion did not fall from the blow of the tub, but also that the defective condition of its fastenings was not attributable to carelessness in handling the tubs prior to the fall. We perceive no reason for the exoneration of the ship, in any view which can properly be taken of the evidence in this regard. The cargo consisted of some 2,200 or 2,300 tons of pyrites in bulk, of which 200 tons were in hold No. 4, and 2,000 and upwards in holds Nos. 2 and 3; 1,000 to 1,100 tons being in hold No. 2, in which this stanchion was located. At the time of the accident the discharge of the cargo was nearly completed, and the men were working upon about 100 tons remaining in this hold to be removed. We cannot resist the conviction that the fastenings of the stanchion were so insufficient that when the support afforded by the cargo was withdrawn some slight vibration, occurring in the ordinary sequence of events, changed its center of gravity and occasioned its fall. Libellant occupied the position of a person invited to

come upon the ship for the purposes of business, and was entitled to be protected from harm by the exercise of such care and prudence as would render the premises reasonably safe. There existed an obligation on the part of libelee to use such care, and a breach of that obligation was clearly made out when the defective condition of the stanchion, as the cause of the accident, was shown; and the surrounding circumstances, as disclosed, justified the inference either that that condition was known or might have been ascertained by the exercise of due care.

It is contended, however, that whether the whole case showed the breach of a legal duty on the part of libelee was a question not considered by the district judge, because it is said that he was controlled by an erroneous application of the doctrine of *res ipsa loquitur*. If this were so, it might overcome the weight which is usually conceded to the judgment of the lower court upon questions of fact; a principle, however, to which we have not adverted. Among other things the learned district judge observed:

"Libelant has proved the falling of a stanchion of the vessel, (the cause of injury to him,) the insecurity of some of its fastenings, and that this insecurity was not immediately perceptible. Does this require respondents to prove care on their part? When an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession, or control, the accident speaks for itself, is itself a witness, *res ipsa loquitur*; and, in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part."

A large number of cases in which that doctrine was expounded and applied were then cited, but it was said that the case of libelee "rests on the theory that the blow of the bucket caused the fall of the stanchion;" and the court proceeded to comment on the absence of any inspection, and the evidence indicating libelee's knowledge of the defective condition of the stanchion, or culpable negligence in remaining in ignorance of it. It is plain that in his judgment a *prima facie* case was made out, not simply from the mere happening of the accident, but because the surrounding circumstances raised the presumption that it happened in consequence of a failure of duty on the part of libelee. Undoubtedly there are cases where the very nature of an accident has been held of itself to supply the proof of negligence, but the conclusion was not rested on the mere naked, isolated fact of injury. The presumption of negligence was drawn from the fact of the injury, coupled with the circumstances surrounding its infliction, and characterizing the nature of the occurrence as attributable to want of the requisite care, or as demanding an explanation which the defendant alone could furnish.

In *Coasting Co. v. Tolson*, 139 U. S. 552, 554, 11 Sup. Ct. Rep. 653, where the plaintiff brought his action for injuries resulting from the striking of a steamboat against a landing wharf, Mr. Justice GRAY, delivering the opinion of the court, said:

"The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf, properly built, as to tear up

some of the planks of the flooring, this would be *prima facie* evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this *prima facie* evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie*, and, if unexplained, sufficient, evidence of negligence on their part, and the jury might properly be so instructed."

Applying here the rule thus laid down, there is no difficulty in the premises, and we are not only satisfied, upon a consideration of the whole case, with the result reached, but that the conclusions of the district judge were arrived at in like manner, unrestricted by any erroneous application by him of the rule of presumption in question.

Upon the cross appeal libelant insists that the court erred in not awarding greater damages, and in overruling libelant's exceptions to the taxation of costs. The learned district judge awarded a total amount of \$2,286 for the pain and suffering undergone by libelant, and the permanent diminution in his capacity for labor. Without discussing the reasoning of the court in fixing the amount, we are of opinion that the award was just, under the circumstances, and should not be disturbed.

Libelant excepted to the disallowance by the clerk in his taxation of costs of seven items, five of them being charges for expert testimony. As to two of these, the district court sustained the clerk, upon the ground that the witnesses did not come within the designation of experts, and, as to the other three, because the compensation of "experts" called by the party in his own behalf cannot be taxed against the losing party as costs or as extra allowances and disbursements, under the statute. Rev. St. §§ 823, 983.

We think the court was right, and that, as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed. Another item was for money paid for a copy of the official stenographer's notes, obtained for libelant by his counsel. This was simply for convenience, and not a copy necessarily obtained for use on the trial. The item was properly rejected. The remaining item was for the expenses of a journey to New York, for the purpose of attending the examination of witnesses for libelee, the notice being so short that libelant insists that there was not sufficient time allowed within which to employ and instruct counsel in New York, and that it therefore became necessary that his proctor should be present in person. The district court correctly held that this was not a necessary disbursement, as, "if the notice given was unreasonable, counsel could have had the time extended,—perhaps have suppressed the deposition."

The decree should be affirmed, at the costs of libelee, except the costs upon the cross appeal, which should be paid by libelant; and it is so ordered.

THE CHATHAM.

THE F. S. HALL.

MARSH v. HALL.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 23

1. ADMIRALTY—APPEALS FROM DISTRICT TO CIRCUIT COURT—DOCKETING CAUSE—CIRCUIT COURT OF APPEALS.

On an appeal in admiralty from a *pro forma* decree of the circuit court affirming a decree of the district court, the circuit court of appeals will not dismiss the cause merely because it was not docketed in the circuit court at the next term thereof held in the district, when all other requirements relating to appeals to the circuit court were complied with.

2. COLLISION—STEAM AND SAIL—ERROR IN EXTREMIS.

The schooner H., on her way to Norfolk, going under sail up Elizabeth river at night, was about half a mile below Craney Island light, where the channel is 1,200 to 1,500 feet wide, when she sighted the ocean steamer C., coming down about opposite the light. The schooner was then about the western edge of the channel, and the steamer about mid-channel, the general course of each vessel being about a point off the port bow of the other. But the schooner was yawing with the wind, and sometimes showed one light and sometimes the other. The steamer showed only her red light, until the vessels were within 50 or 75 yards of each other, when both lights appeared. The lookout and master of the schooner, both experienced seamen, became alarmed, put her wheel hard astarboard, ran two or three times her length, and collided with the steamer, which meantime had put her helm hard aport, and backed her engines. *Held*, that the schooner's change of course was an error committed *in extremis*, and that the steamer was solely liable for failing to observe the rule requiring steamers to keep out of the way of sailing vessels. 44 Fed. Rep. 384, affirmed.

3. SAME—RULES OF NAVIGATION.

The rule that a steamer must keep out of the way of a sailing vessel requires, not merely that she shall pass without striking, but that she shall give a wide berth, and, if she comes so near as to cause seamen of ordinary skill and courage to believe collision inevitable, she is liable, even though the sailing vessel commits a fault under the stress of fear. 44 Fed. Rep. 384, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Admiralty. Libel by J. W. Hall, owner of the schooner F. S. Hall, against the steamer Chatham, John S. Marsh, master, for collision. Decree for libellant in the district court, which was affirmed *pro forma* on appeal to the circuit court. The master of the Chatham appeals. Motion to dismiss appeal denied, and decree affirmed on the merits.

William W. Old, for appellant.

Robert M. Hughes, for appellee.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

SIMONTON, District Judge. Upon the call of this case the libellant (appellee) moved to dismiss the appeal. His grounds are these: The cause was heard at Norfolk, and final decree entered December 4, 1890; notice of appeal, 10th December, 1890; appeal bond, 10th December,

1890; record certified 9th January, 1891. The session of the circuit court next held in the district was at Alexandria, 4th January, 1891. The cause was not docketed at that term, but at the term at Norfolk, beginning first Monday in May, 1891. Section 631, Rev. St. U. S., declares: "From all final decrees of a district court in admiralty * * * an appeal shall be allowed to the circuit court next to be held in such district. * * *" This is imperative. *U. S. v. Specie*, 1 Woods, 14; *Insurance Co. v. Younger*, 2 Curt. 322. The appellant observed the rules of the district court in his notice of appeal and in giving the appeal bond. 2 Hughes, 596. The record was not exactly in time, but this point appellee has waived. The ground of dismissal is that the cause was not docketed at the term at Alexandria. By a rule of the circuit court, promulgated 20th May, 1885, the appellant must file a copy of the record of the cause from the district court in the circuit court before the next ensuing term of the circuit court which shall be held where the cause is pending. While admitting that the practice conforms to this rule, the appellee insists that the rule is inoperative, because it contravenes the section of the Revised Statutes. It is unnecessary to go into this question, as it has ceased to be of any practical importance. Under any circumstances, we would be unwilling to dismiss this appeal on grounds like this, as it really is an appeal from the district court to this court, the whole action of the circuit court therein being *pro forma*. But we think that the case can be retained. The appeal was duly entered, and security given, and proper steps taken to prepare the record; so the appellee was not surprised, or in any way injured. "The failure to prepare and deliver to the circuit court the appeal and record in twenty days cannot prevent the circuit court from entertaining the cause if, from any reason, this is not done. The appeal, when once made, continues during the whole of the next term of the circuit court, unless sooner dismissed by that court for want of prosecution or otherwise, in accordance with its own practice." *The S. S. Osborne*, 105 U. S. 450. No motion to dismiss was made. The cause being, in contemplation of law, in the circuit court, remained in that court, and was subject to its order. The motion to dismiss the appeal is refused.

We consider the case on its merits. The libel is filed for a collision in the Elizabeth river between the schooner John W. Hall and the steamer Chatham. The schooner is 101 feet long, and 152 tons burden. The Chatham, a seagoing steamship, is 285 feet long and 40 feet beam, drawing 15 feet. On the night of 4th October, 1889, the schooner was on her way to Norfolk, under sail, up Elizabeth river, steering south by east, about a half mile below Craney Island lighthouse. The general direction of the river is north and south. The channel is 1,200 or 1,500 feet wide. On each side of the channel there is sufficient depth of water for several hundred feet for a vessel the draught of the schooner. When the schooner was about the distance stated from Craney Island light, she saw the steamship Chatham coming down the river about mid-channel, at a speed of nine knots. She had shown her green light when a little

above the lighthouse, but, after getting almost abreast of it, she showed her red light, and continued to do so until within 50 or 75 yards of the schooner. Each vessel had the other a point—it may be, a little less—off her port bow. When the steamship got within 50 or 75 yards of the schooner, the lookout on the schooner became alarmed, swears that he saw both of her lights, abandoned his post, and ran aft to the wheel. There he found the master, under the impulse of similar fear, in the act of putting the wheel hard astarboard. The head of the schooner was quickly turned from her former course, south by east, with the wind free to east. She ran about two or three of her lengths, and came into collision with the steamship. The latter, as soon as she saw the sheer of the schooner, put her helm hard aport, and backed her engines. This threw her head to the east also, and the vessels came into collision, the port bow of the steamer with the starboard bow of the schooner, the latter having been struck about the bluff of the bow.

The district court held the steamship wholly in fault. This was affirmed *pro forma* by the circuit court.

The testimony in this case is exceedingly confusing and contradictory. The conclusion must be reached, not from the theories of, or even from strict regard to the testimony, of the witnesses, but from the controlling facts of the case, and from the logic of events. The witnesses for the libellant, with a single exception, put the schooner at the time of the collision well to the westward of the channel. All concur that the steamship was, as her draught would require her to be, in the channel, say mid-channel. The schooner put her wheel hard astarboard just before collision, crossed the channel almost at right angles, went a distance two or three times her length, and at the instant of collision, which occurred in a very short interval, she was, as they say, several hundred feet to the eastward of the channel,—210 yards. Evidently this is all a mistake.

The most probable theory is that the schooner was proceeding to Norfolk either just outside of or within the western edge of the channel. The steamer was coming down the channel near mid-channel. The general course of the two vessels was about a point off the port bow of each other. But as the master and people on the steamship say that the schooner sometimes showed one and sometimes another of her lights, she must have been yawing under the action of the tide and wind, and the relative course of the two vessels at times was much less than a point. *The City of Truro*, 35 Fed. Rep. 318. When they got within 50 or 75 yards of each other the lookout on the schooner became alarmed. He says that up to that time he had only seen the red light, but then he saw both the red and green. Fearful of imminent collision, he ran back to the wheel, and saw the master, who says that he witnessed the same thing, in the act of starboarding his wheel. If this be true, the people on the schooner had reason for alarm. Naturally they felt that they were *in extremis*, and acted accordingly. As the schooner showed to the steamer sometimes both her lights and then one light and then another, making her course in some measure uncertain to her, this tended to

make the course of the steamship uncertain to the schooner, especially as the two vessels were only a point off. When the steamship, therefore, allowed herself to come so near the schooner, she committed a grave fault. Her master might reasonably have expected that the crew of the schooner would be alarmed. He did not fear a collision himself, because he had control of his own vessel. But how could he answer for them? If the channel were so narrow as to forbid him to get away from the schooner, or if there had been any other vessel obstructing the river, it would have made a great difference. The schooner was either to the west of the channel, or on the edge of the channel. In either case the steamer had the whole width of the channel to pass her. Even if we put the schooner in mid-channel, the steamer would have had space from 600 to 750 feet on each side of her. Yet the steamer selected a course which, if no accident had happened, and each vessel had steadily kept her course, would have carried her within 11 feet of the schooner. There was no necessity for this proximity, which caused alarm on the schooner, and led to her abrupt change of direction. *The Carroll*, 8 Wall. 305. The rule of navigation is imperative. The steamer must keep out of way of a sailing vessel. *The Falcon*, 19 Wall. 76. This does not mean, must pass her without striking. The steamer must keep away. In the language of Mr. Justice GRIER, it is her duty to keep clear and give a wide berth to the sailing vessel. *Haney v. Packet Co.*, 23 How. 287.¹

These rules of navigation are obligatory upon vessels when approaching each other from the time the necessity for precaution begins. They continue to be applicable as the vessels approach each other, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable. *The Wenona*, 19 Wall. 41. It is not necessary that the collision be in fact and in the strict use of language inevitable. But it is enough if the danger be such as to induce a seaman of ordinary skill and courage to conceive it to be inevitable. Under the circumstances of this case, we think that the departure of the schooner from the rule which required her to keep her course was an error, not a fault. *The Carroll*, *supra*. Her master was an experienced seaman, 16 years master of a vessel engaged in the coasting trade, and comparatively a young man. The lookout was a young man, with 12 years' experience in navigation on these waters. It would seem as if all the conditions required by TANNEY, C. J., in *Haney v. Packet Co.*, 23 How. 287, are met in this case:

¹ NOTE. The language of Dr. Lushington in *The Colonia*, 3 Notes of Cas. 13, is not inappropriate here bearing in mind that a steamer is under obligation to do what a sailing vessel going free should do. *St. John v. Paine*, 10 How. 582. "The whole evidence shows that it was the duty of *The Colonia*, with the wind free, to have made certain of avoiding the Susan. She did not do so, but kept her course until she was at so short a distance as a cable and a half length, in the hope that the vessels might pass each other. Now, it can never be allowed to a vessel to enter into nice calculations of this kind which may be attended with some risk whilst it has the power to adopt, long before the collision, measures which would render it impossible." *The Colonia*, 3 Notes of Cas. 13, note quoted by Marsden in *Law of Collisions at Sea*, 306.

"In order to excuse an erroneous movement on the part of the sailing vessel, the proximity of the steamboat, and her course and speed, must be such that a mariner of ordinary firmness and competent knowledge and skill would deem it necessary to alter his course to enable the vessel to pass in safety. But, in order to justify this, the dangerous proximity must be produced altogether by the steamboat."

The decree of the circuit court is affirmed, with interest, the costs of the appeal to be paid by the appellant.

THE FULDA.

HARDY v. THE FULDA.

(District Court, S. D. New York. July 29, 1892.)

COLLISION—FOG—SPEED.

In a fog so dense that a vessel cannot be distinguished more than five or six hundred feet distant, 10 knots or upward is not "moderate speed;" and a steamer moving at such rate off the Grand Banks, and which ran down and sank a fishing vessel at anchor, was held solely in fault for the collision on account of her speed, the evidence showing that the fishing vessel was complying with the regulations as to fog horn and bell, although these were not heard by the steamer, probably because of the noise of her own navigation at such speed in a rough sea and strong wind.

In Admiralty. Libel for collision. Decree for libellant.

Coudert Bros., for libellant.

Shipman, Larocque & Choate, for claimants.

BROWN, District Judge. On the 14th of July, 1888, at a few minutes past 9 o'clock in the morning, the steamship Fulda, length 420 feet, while proceeding on a voyage from Bremmerhaven to New York, came in collision, during a dense fog, with the libellant's two-masted schooner Jeune Edouard, at anchor on the Grand Banks, in latitude 44 deg. 45 min. north, and longitude 54 deg. 50 min. west. The wind was strong from the southwest, and there was a considerable sea, with a heavy ground swell, so that fishing was suspended. The schooner was first seen by the lookout and by the officers on the bridge at about the same time, estimated about 500 feet distant, and nearly straight ahead, being a little on the starboard bow. The wheel was at once ordered hard astarboard and the steamers swung only about one-eighth of a point to port. Her stem, however, struck and carried away the bowsprit of the schooner, and as she went past, her anchor caught the foreshrouds and dragged the schooner some considerable distance, knocking a hole in her bow and carrying away her foremast and main-topmast. Having got clear in the fog, the steamer steamed around for an hour or more, and not finding the schooner or hearing from her

further, went on her voyage. The schooner continued to fill, despite all efforts to keep her clear, and on the second day after was abandoned by the crew, and shortly afterwards sank.

The Fulda at the time of collision was in charge of the second officer, who with the fourth officer was on the bridge. I do not find that any blame attached to the lookout, or to the other management of the steamer, except as regards her speed. On this subject the evidence shows that her full speed under 62 revolutions, in favorable weather, would be about 17 knots. About a half hour before the collision, in consequence of the increasing sea, and because, as it is said, the ship did not seem to be steering satisfactorily, the master ordered her previous half speed of from 40 to 42 revolutions, to be increased to 50 revolutions a minute. This, in favorable weather, would give a speed of about $13\frac{1}{2}$ knots. The considerable sea, to which all the witnesses testify, would undoubtedly reduce her speed some 2 or 3 knots. The second officer who was in charge of the navigation, estimated her speed at 50 revolutions under the existing conditions to have been 10 knots. It is not, however, material whether her speed was 10 knots, or 1 or 2 knots above that rate. Either was much in excess of what has been held, as respects similar vessels in repeated adjudications, to be the "moderate speed," required by law, during thick fog. *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. Rep. 122; *Leonard v. Whitwill*, 10 Ben. 638, 646; *The Penniland*, 23 Fed. Rep. 551; *The Britannic*, 39 Fed. Rep. 395; *The Normandie*, 43 Fed. Rep. 151, 155-157. In fog so dense that a vessel cannot be distinguished more than five or six hundred feet distant, a steamer like the Fulda, though keeping her full steam power in reserve, could not expect to be able to stop before running into a schooner at anchor ahead of her, if she was going upwards of six knots an hour. *The Normandie*, *ubi supra*, note 2. *The Britannic*, 39 Fed. Rep. 397. Any greater rate of speed on the Banks where other vessels are likely to be met with was, therefore, at her risk, provided the other vessel performed her statutory duty.

It is argued that the master was justified in increasing her speed enough to make her steer properly. No doubt with increasing speed the ship would go straighter and steadier; but the evidence does not show that the Fulda had become in the smallest degree unmanageable; or that any such speed as was maintained, either before or after the master's order, was necessary to keep the ship under reasonable and sufficient control for practical purposes, although not perfectly steady. It is not intimated that the Fulda was not as manageable at "slow" speed as ordinary vessels of her class; and in common experience such vessels in rough weather often go "slow" without difficulty, which for the Fulda would be about six knots. As respects manageability, see *The Normandie*, *ubi supra*, pp. 155-157.

2. It is urged that the schooner was in fault for not properly sounding her bell, being at anchor. Numerous witnesses, however, for the schooner testify most positively that the bell was rung forward, and a mechanical fog horn blown aft, every minute, and that these had been thus sounded for a considerable period before the collision. An additional reason for keep-

ing up those signals was that two of the schooner's men were adrift in a dory, whose return to the schooner it was desired to assist by signals. Of the 16 persons on board the schooner, 3 I understand are dead; and of the remaining 13, 8 have been produced as witnesses, not, however, including either of the 2 men who were sounding the bell and fog horn. A third seaman, Viel, was upon deck at the time of collision; he had been drawing molasses from a barrel, to take below where the rest of the crew were at breakfast. Viel testifies that while he was on deck the horn and bell were regularly sounded; and he and many others who were below testify to the same thing. That the men who were sounding the signals were upon watch, is shown by the fact that they gave an alarm to the men below, to the effect that the steamer was running upon them. This was done in time to enable nearly all to come on deck before collision. They reached the deck, however, only just before the steamer struck.

Upon all this testimony and the acts of the persons on board, I cannot doubt that the signals were sounded as required. That they were not heard on board the steamer, is not surprising. In the interval between the signals allowed by law, namely, two minutes, the steamer, at the rate she was moving, would pass over about 2,000 feet; and with a strong wind and a considerable sea, such as to cause the Fulda to take considerable water on deck, and at the speed at which she was moving, the noise and commotion attendant on the navigation furnish abundant reason why the schooner's signals, though properly given, might not have been heard on the Fulda, without any resort to possible abnormal conditions of the atmosphere. *The Lepanto*, 21 Fed. Rep. 651, 655-658. The fact, moreover, that after the Fulda's speed was diminished, and while she was steaming about to find the schooner after the accident, her officers did hear various signals in different quarters, although none had been heard before, is a strong indication that the previous failure to hear signals from the schooner, or from any other vessel, was due to the noise and commotion attendant on the speed of her own navigation under such circumstances, rather than to any neglect in the schooner. *The Buffalo*, 50 Fed. Rep. 630.

I must find, therefore, that the schooner was not remiss in sounding signals as required; and that the speed of the steamer, not being the moderate speed required by law under such circumstances, was at her risk; and that she is, therefore, answerable for the damages. Decree may be entered accordingly, with costs.

THE ALEXANDER FOLSOM.

MITCHELL TRANSP. CO. *et al.* v. CHISHOLM *et al.*

(Circuit Court of Appeals, Sixth Circuit. October 3, 1892.)

No. 25.

1. COLLISION—STEAMER AND TOW—SUDDEN SHEER.

The steamer D., passing down the middle channel of Lake George, where it is about 180 feet wide, met the steam barge F., with two schooners in tow. The latter three had their sails set, and a fresh southeast wind was blowing, but the weight of evidence showed that the sails were not drawing to any considerable extent, and that all three were depending on the F.'s engines. The F. signaled a desire to pass on the east side, but the D. replied that she would take that side, and the F. assented. Each proceeded to the proper side, leaving about 60 feet between them, the schooners keeping in the F.'s wake. While passing the F., the D. suddenly sheered two points to starboard. To recover her course, her engines were immediately accelerated, but, collision impending, they were reversed. She struck the first schooner, however, nearly head on, a few feet from its port bow. *Held*, on the evidence, that the schooner did not sheer or luff to windward, in obedience to an alleged tendency created by her sails; that there was little or no tendency to do so; that the claim was an afterthought with the D.'s officers, who voluntarily declined to pass on the port side, and chose to pass to windward of the tow; that the D. passed between the F. and the schooner, and struck the latter while recovering her course; and that the latter was not in fault for failing to anticipate the D.'s sheer, and being in readiness to go further to port. 44 Fed. Rep. 932, reversed.

2. SAME—NARROW CHANNEL—SUCTION.

In view of the established fact that the speed of the F. and the D. was about the same, and that the D. had three times the F.'s displacement and twice her draft, the D.'s sheer could not be attributed to suction caused by an improper speed on the part of the F. at the moment of passing. 44 Fed. Rep. 922, reversed.

3. SAME—SPEED OF VESSELS—EVIDENCE.

The positive and unimpeached testimony of a steamer's officers as to her speed at a given time is entitled to more weight, especially when corroborated by independent facts and circumstances, than the opinions and estimates of witnesses on other boats at a considerable distance ahead or astern of her.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio.

In Admiralty. Libel by William Chisholm, trustee, and others, against the steam barge Alexander Folsom and the schooner Mary B. Mitchell (the Mitchell Transportation Company being claimant of both) for collision. Decree for libelants. 44 Fed. Rep. 932. Claimants appeal. Reversed.

Frank H. Canfield, Henry S. Sherman, and Henry C. Wisner, for appellants.

Harvey D. Goulder, for appellees.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

JACKSON, Circuit Judge. The collision which gave rise to and forms the subject of inquiry in this suit took place in the natural or middle channel of Lake George, at or about 7:30 o'clock A. M., on August 13, 1890, between the propeller Devereaux and the schooner Mary B. Mitchell, which was the first of two schooners in tow of the steam barge Alex-

ander Folsom, and resulted in damage to both of the colliding vessels. The owners of the Devereaux libeled both the Folsom and the Mitchell, and, after stating their version of the facts preceding and attending the collision, alleged as faults against said vessels that they were not in charge of a proper complement of competent officers and men; that those in charge were incompetent, and inattentive to their navigation; that they maintained no proper lookout; that they did not check down; that they improperly carried sail in proceeding through the said channel; that the Folsom met and passed the Devereaux at too great speed, causing her to sheer, under the influence of suction; that the Mitchell came up to windward while the Devereaux was on such sheer; that said schooner failed to keep her own proper side of the channel; and that she failed to observe the sheer of the Devereaux, and steer out to the westward. The respondent the Mitchell Transportation Company, as the sole owner of said steam barge and schooner, in its answer, after admitting the collision, and giving its version of the facts relating thereto and causing the same, denied each and all of said alleged faults. The district court found the Folsom and Mitchell in fault for carrying sail and proceeding at too great speed, which caused the Devereaux, in meeting and passing the Folsom, to suddenly sheer, under the influence of what is called "suction;" that the Mitchell suddenly changed her course by sheering to starboard; that the tendency of the Devereaux to sheer, under the circumstances, "being well known to skillful seamen, the master of the Mitchell should have considered it possible, if not probable, on the part of the Devereaux, and have so far guarded against it as to have his own vessel in perfect control, and his wheel on the starboard, so as to have headed his vessel to port, and have been able to put her in that course promptly when the emergency made it necessary." A decree was accordingly rendered in libellant's favor for the damage sustained by the Devereaux, which was fixed at the sum of \$15,143.88, with interest. From this judgment respondent has appealed, and has assigned as error therein several matters which need not be especially noticed; the principal grounds relied on for reversal being that the Folsom and Mitchell were not guilty of any fault or negligence which caused, or contributed to cause, the collision, and that the district court erred in condemning them.

The appeal involves mainly questions of fact, to be determined, under the settled rules of evidence, from the testimony, which, as set forth in the record, presents the full average of conflict usually found in collision cases, especially in respect to matters of opinion and theory. To review the evidence in detail, or attempt to reconcile the testimony on many points, would be a useless labor. We have given the respective theories of the parties, and the proof on both sides, full and careful consideration and examination, and deem it sufficient to state briefly the material facts of the case, which, in our opinion, are established by the testimony, and the conclusions properly deducible therefrom, as read in the light of the surrounding circumstances.

The middle channel of Lake George is about two and five eighths miles in length, with its general course or direction nearly north and south. It has a current of about one mile an hour. The view from one end to the other of the channel is open and unobstructed. At the southern and northern entrances of the channels there are red can or nun buoys, numbered 26 and 46, respectively, on the government's official list of buoys and stakes. The line of the navigable channel is marked by red spar buoys on the east bank, and by black spar buoys on the west bank, thereof. The first black spar or stake buoy on the west bank, numbered 27, is about 660 feet above, and in a northwesterly direction from, the southern or lower red can buoy. The other marginal red and black spar buoys are about 1,290 feet apart, and nearly opposite each other. The northern portion of the channel, called the "cut," extending from the northern entrance, at or near the red can or nun buoy No. 46, down to the second elbow between red spar buoy No. 34 and black buoy No. 35, is artificial, having been formed or constructed by dredging, and has a navigable width of 300 feet. From said elbow, or the end of said cut, southward, the channel is natural, with a navigable width of about 180 feet. The waters of the lake on either side of the channel, both artificial and natural, vary in depth from 5 to 9 feet, presenting a broad sheet or surface of water, with the navigable channel extending through the same defined by the lines of said red and black spar buoys on either side, and which are generally located where the depth of water ranges from 9 to 12 feet. The navigable water of the natural channel accordingly varies in depth from 9 to 12 feet on the outer or buoy line to about 25 feet in the center of the channel at or near the point at which the collision took place, thereby indicating, as stated by one or more of the witnesses, that the channel bank slants off towards the center of the channel where the greatest average depth of water is found. The collision occurred between the third and fourth black spar buoys, counting from the red can buoy at the southern entrance of the channel, or between the second and third black spar buoys, counting from the second elbow south of the northern entrance, and was about three quarters of a mile northward from said red nun buoy at the lower entrance of the channel.

It is alleged in the libel, and the proof clearly establishes the fact, that, owing to its narrow width and moderate depth of water, this natural channel presents a dangerous place for vessels proceeding in opposite directions to pass each other, and required the exercise of great care and vigilance to avoid the danger of collision. This dangerous character of the channel, and the liability of meeting vessels to collide therein, was well known to the officers of both the Devereaux and the Folsom. The Devereaux is 270 feet in length and 37 feet beam. She was proceeding southward through the channel, carrying a cargo of 2,060 tons of iron ore. Her gross tonnage was about 1,618 tons. Her draft was about 15 feet (14 feet, 11 inches) fore and aft. Her speed down the channel was about four miles per hour, and was maintained until a few seconds before the actual collision. The Folsom is 185 feet long and

35 feet beam. She was proceeding northward, and had no cargo. Her draft was 3 feet forward and 11 feet aft, and her gross tonnage was about 940 tons. The *Mary B. Mitchell*, the first of the schooners in tow, is 212 feet long and 40 feet beam. The *Nelson*, the second schooner in tow, is 199 feet long and 33 feet beam. These schooners, like the *Folsom*, had no cargoes, and were both light. The towline between the *Folsom* and *Mitchell* was about 500 feet in length; that between the *Mitchell* and the *Nelson* was about 400 feet long,—making the entire length of the tow, including the *Folsom*, about 1,500 feet. The *Mitchell's* tow line was on her port side, and ran through the chock, which was about five feet from her stem. The *Nelson's* towline was on the starboard side of her bow. The *Folsom* carried her foresail and mainsail. The *Mitchell* and *Nelson* each carried the same, with the addition of one jib sail.

When the *Folsom* came into the channel at the southern entrance, and after passing the lower red can or nun buoys, and while approaching the first black spar buoy on the west bank, she blew one blast of her whistle for the *Devereaux*, indicating that she desired to direct her course to starboard, so as to proceed along the east side of the channel, that being her proper course and side, under rule 18, Rev. St. § 4233, as the two steamers were meeting end on, or nearly end on, so as to involve risk of collision if each maintained her course. The *Devereaux* did not accept this signal, but immediately replied with two blasts of her whistle, indicating that she would starboard her wheel, and take the eastern or port side of the channel. Upon the receipt of this signal the *Folsom* at once starboarded her wheel, and promptly answered with two blasts of her whistle, thus agreeing of the proposition of the *Devereaux* that the vessels should pass each other on their starboard sides, by each going to port, and the *Folsom*, under her starboarded wheel, immediately bore gradually over to the west side of the channel, and proceeded up that side, within about 25 feet of the channel bank, her tow following in direct line astern. When these two blast signals were exchanged, and the respective courses of the two vessels were thereby arranged and agreed upon, the *Folsom* was about opposite the first black spar buoy on the west bank, and the *Devereaux* was in the "cut," about three quarters of a mile from the northern entrance thereof, or about opposite the fourth red spar buoy from the northern entrance of the cut, which is about half a mile above the second elbow between red spar buoy No. 34 and black spar buoy No. 35, at or near which latter point the dredged channel or cut terminates, and the natural channel of the middle passage begins. After the signals were exchanged, the *Devereaux* proceeded down the center of the channel until within three or four times her length of the *Folsom*, when she starboarded her wheel, and gradually hauled off towards the east bank of the natural channel, which she approached within about 25 feet. When the *Devereaux* thus changed her course from the center towards the east side of the channel, the *Folsom* had previously drawn herself and tow as near the

west side of the channel as she well could do, or, as one of libellant's witnesses (Cleveland, mate of the Devereaux, in a position to see) expresses it, "she (the Folsom) couldn't starboard much more," and was occupying something less than one third of the navigable channel, with her tow following in her wake directly astern. The distance between the Devereaux and Folsom as they approached and were in the act of passing each other is variously estimated by the witnesses at from 37 to 70 feet. Considering the breadth of beam of each vessel, the respective distance of each from the east and west banks of the channel, and the navigable width of the channel, our conclusion is that they were about 60 feet apart while in the act of passing each other. This conclusion is supported by the estimates of several witnesses who were in as good position to form as correct an opinion on the subject as others who estimate the distance at from 37 to 40 feet, and is corroborated by other established facts already stated, viz., that the Folsom was distant from the west bank 25 feet, which, with her 33 feet width of beam, made her occupy about 58 feet of the navigable channel; that the Devereaux was distant from the east bank about 25 feet, which, with her 37 feet width of beam, made her occupy about 62 feet of the channel, and that the two vessels thus situated covered about 120 feet of the 180-foot channel, leaving a distance between them of about 60 feet. When in the act of passing the Folsom at said distance, the Devereaux took a sudden sheer of about two points to starboard, carrying her towards the stern of the Folsom in a direction across the channel, and across the line of the tow between the Folsom and Mitchell. The master of the Devereaux, upon discovering that she was sheering, ordered her wheel hard astarboard, and gave the engineer four bells, to work her ahead, or give her what is called, in nautical phraseology, a quick or rapid "kick ahead," in order to straighten her up in the channel again. The master of the Devereaux states that the start of a vessel on a sheer is most quickly detected or discovered by looking astern, and that he first discovered the Devereaux sheering when he happened to be looking astern. But his wheelman testifies that he saw her starting on the sheer, and had commenced turning his wheel before he received the master's order to starboard. When the four-bell signal to kick her ahead was given, the Devereaux's engine was making about 20 turns, sufficient to carry her, aside from the current, about three miles per hour. In obeying the signal the engineer increased the speed of the engine to 65 turns, under the influence of which, and her starboarded wheel, the vessel increased her speed, and regained about one point of her lost course resulting from the sheer, when, seeing that a collision with the Mitchell was imminent, the master of the Devereaux blew a danger signal, and called out to the master of the Mitchell "to let go her towline," and thereupon gave his engineer two bells to back, followed quickly by two more bells to back strong. These latter orders to his engineer were obeyed; but before the Devereaux's headway was lost or materially diminished, and before she had regained her lost course, she struck the

Mitchell nearly end on, some five or six feet from the latter's stem on her port bow, about the center of the chock, cutting the towline in the chock, and causing the stern of the Mitchell to be driven 50 or 60 feet over the west bank of the channel, a little above the third black spar buoy from the lower entrance, and carrying her bow to starboard nearly across the channel. The Nelson following in the wake of the Mitchell, and her master seeing that a collision was inevitable, ported her wheel, came up to the starboard, and struck the Mitchell with her stem a glancing blow aft of her forerigging, when she also swung over on the left bank of the channel, about 50 feet below said third black stake or spar buoy. The Devereaux, after the collision, drew up along the east bank with her stem against the port bow of the Mitchell.

On the morning of the collision the wind was S. E. or S. S. E., and struck the Folsom and her tow on their quarter. The estimates made by the witnesses as to its velocity vary greatly, ranging from 5 to 13 miles per hour. There is equal conflict in the opinions of the witnesses as to its effect on the speed of the Folsom and the two schooners in tow. The wind was not sufficient to make white caps, but produced only some ripples on the water, which tends strongly to establish the fact, as testified to by many of the witnesses, that the velocity of the wind was moderate, being what is designated as only a fresh breeze, of sufficient force to drive vessels with sails properly trimmed up against the current of said channel from three to five miles an hour. The testimony of witnesses who were in the best position to observe and to know the fact establishes to our entire satisfaction that the limited sails carried forward of the mainmast by these schooners were not drawing so as to aid in accelerating either their speed or that of the Folsom after entering the channel, and in no way obstructed or interfered with their proper management and ready handling. It is shown by the clear weight of testimony that the limited sails carried were not only not drawing to any appreciable extent, but that the sheets were hanging slack, with the booms held at the port rail by boom tackle. Considering the force and direction of the wind, the character and location of the sails carried, and the influence of the towlines in keeping the schooners directly astern of the Folsom, whose speed was controlled by her engine, rather than by her sails, we are of the opinion that there was little or no tendency on the part of the Mitchell to sheer to starboard or luff to windward, so as to carry her across the course of the Devereaux, as claimed by libelants and stated by some of the witnesses. The testimony fairly predominates against the theory that said schooner actually luffed or came up to windward as the result of carrying such sail as she had about the time or just after the Devereaux took her sheer, and thereby caused the collision. This is a manifest afterthought with the officers of the Devereaux, who, with full knowledge of said alleged tendency to luff, and of all the facts now relied on to establish such luffing, declined to pass on the port side, and voluntarily selected the windward side of the tow. Under such circumstances, it requires something more than theory or speculative opin-

ion to satisfy the court that a questionable and improbable tendency actually operated to produce luffing or such change of course to starboard as rendered the Mitchell responsible for the collision, especially when it is shown by the testimony of witnesses in position to see and know the fact that she did not change her course. The master of the Northern Queen, occupying an excellent point of observation, and watching the two vessels about to collide, could not say that the Mitchell changed her course. This is substantially confirmed by the mate of the Northern Queen, and by the positive swearing of witnesses on the Folsom and her tow. When the master of the Mitchell saw the Devereaux sheering towards the stern of the Folsom, and in a direction across the channel and the line of her tow, he starboarded his wheel, near which he was standing, so as to bear his vessel off further to port, and then ran forward to the forecabin to watch the movements of the Devereaux, and, upon reaching there, he understood, as others on the Folsom understood, some one on the Devereaux to direct him to port his wheel, and he signaled to his wheelman to do so; but before the wheel made more than two or three turns back from the starboard, (which would hardly have brought it to midship, as it required eight turns to put it from one side to the other,) he gave another order to put the wheel hard astarboard, and her wheel was hard astarboard when she was struck. The temporary and almost immediately countermanded order to port her wheel was not executed, and did not result in any change of her course to starboard. It is not material to determine whether any one on the Devereaux did call to the master of the Mitchell to port his wheel. It is admitted that the master of the Devereaux did call to him to let go her towline, which, under the circumstances, might fairly be understood to mean or indicate that the Devereaux would attempt or be forced to cross said line, and, in the view of her taking that course, the master of the Mitchell should properly have signaled his wheelman to port his wheel, so as to open a wider way for the Devereaux to cross her bow. But seeing the Devereaux straightening up instead of crossing, the order to port was immediately changed to hard astarboard before the schooner had made any change in her course. If the wheel of the Mitchell had been fully ported, so as actually to have changed her course to starboard, it would not, under the circumstances, have been a fault for which she should be condemned, because it would have been a movement or maneuver made *in extremis*, for which she should not, under well-settled rules, be held responsible. But the testimony does not affirmatively establish any such change of course on the part of the Mitchell, or sustain the charge of the libel that "she did not steer away to the westward, but came up rather towards the course of the Devereaux, thereby presenting her port bow ahead of the Devereaux."

It is established, by a clear preponderance of the proof, that the Devereaux, in the course of her sheer, passed or came between the Folsom and the Mitchell. The second mate of the Hackett, which was astern of the tow, states that he could see the Devereaux in between them.

This fact is testified to by several other witnesses, and is not directly contradicted. This change of position on the part of the Devereaux might present to a distant observer of the occurrence the appearance of some change in the course of the Mitchell. The relative positions of the vessels towards each other were changed by the Devereaux's sheer, and as she straightened up between the Folsom and the Mitchell, heading towards the port bow of the latter, nearly end on, would naturally present to persons at a distance the appearance of some change in the Mitchell's course, without any such change having actually taken place. The Mitchell was a good steering vessel, was well appointed and manned, and was violating no law or rule of navigation in carrying the sail she did, so as to impose upon her the burden of showing that her sail did not contribute to cause the collision. The positive testimony of the witnesses that she did not change her course is confirmed and corroborated by the position of the vessel in striking, the place at which the Mitchell was struck, and the positions of the vessels when they drew up after the collision. After a careful analysis of the testimony, and the facts and circumstances connected with the occurrence, we cannot concur in the conclusion reached by the district court that the Mitchell was in fault or responsible for the collision. The faults imputed to her that she came up to windward; that she failed to keep her proper side of the channel, and failed to observe the sheer of the Devereaux, and steer over to the westward, are not established by the preponderance of the testimony, and the probabilities of the case. It is said by the learned district judge "that the tendency to sheer from suction in that channel by vessels passing under the conditions of this case was so well known by skillful seamen that the master of the Mitchell should have considered it possible, if not probable, on the part of the Devereaux, and have so far guarded against it as to have had his own vessel in perfect control, and his wheel on the starboard, so as to have headed his vessel to port, and have been able to put her in that course promptly, when the emergency made it necessary."

If this proposition is correct, should not the master of the Devereaux have considered a sheer on her part possible, if not probable, and have so far guarded against it as to have had his own vessel in perfect control, and her wheel on the starboard, so as to have headed his vessel to port? Instead of doing this, he was proceeding down the channel with his wheel steadied about midships, and did not order it to starboard till after discovering the sheer. It would hardly be a fair or consistent rule to put upon the Mitchell the duty of anticipating and guarding against the Devereaux sheering, and at the same time exonerate the Devereaux from the obligation of taking precautions to prevent or counteract the alleged well-known tendency to sheer.

It remains to be considered whether the Folsom met and passed the Devereaux at too great speed, or at such undue speed as to divert her from her course, and cause her to sheer to starboard. This is the chief fault relied on to condemn the Folsom, and involves the question of her

speed, and of its tendency or effect in producing what is called "suction" of sufficient force to sheer the Devereaux from her course. The testimony as to the speed of the Folsom just preceding and at the time of passing the Devereaux consists of the opinions and estimates of witnesses, most of whom were at a considerable distance in front or astern of her. These estimates are in their very nature speculative, uncertain, and not very reliable. They have not the force and character of positive testimony, and are not entitled to as much weight and consideration as the estimates and opinions of those who were upon the Folsom, and in a better position to form a correct judgment on the subject, especially if the latter are corroborated by other established facts and circumstances. The master, mate, wheelman, and engineer of the Folsom place her speed after checking down and entering the channel at from four to four and one half miles per hour. The master and mate of the Mitchell and Nelson give substantially the same estimate. It is established by the most positive testimony of the Folsom's officers—master, mate, wheelman, first and second engineer, and fireman—that, immediately after the first signal of one blast, the engine of the Folsom was checked down, and half its steam shut off; the natural tendency and probable effect of which was to reduce her speed nearly one half, as stated by several witnesses. That persons at varying distances in front and rear of the Folsom did not hear the three whistles to check, or did not notice any checking on her part, is such negative evidence as will not warrant the court in reaching the conclusion that six or eight intelligent and unimpeached witnesses, in a position to know the fact, have testified falsely in stating that she was checked down. The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation. *The Hope*, 4 Fed. Rep. 89; *The Wiman*, 20 Fed. Rep. 248, 249; and *The Alberta*, 23 Fed. Rep. 807, etc. In the application of that rule to the testimony in this case it admits of no doubt that the Folsom did check her speed, upon entering the channel, down to about four or four and one half miles an hour. This is corroborated and confirmed by other established facts and circumstances. The distance from the can buoy in Mud lake to the place of collision is about $14\frac{1}{2}$ miles. The Folsom and her tow weighed anchor and started from the former point between 4 and 4:30 A. M. on the morning of August 13, 1890. The collision occurred about 7:30 A. M., so that the Folsom and her tow were about three hours in traveling said distance of $14\frac{1}{2}$ miles. Her speed before reaching the entrance of the channel was greater than after entering the channel and checking down; but, considering the entire distance, and the time in which it was traveled, her average speed did not exceed five miles an hour from her place of starting that morning to the place of collision; and, having checked after entering the channel, it admits of little or no question that her speed against the current was under five miles an hour. This is further con-

firmed by other established facts. When she assented to the two whistles of the Devereaux, she was about three quarters of a mile from the place of collision. The Devereaux was at that time about opposite the fourth red spar buoy from the upper entrance of the cut, or about half a mile above the second elbow from that entrance. From that position to the place of collision the distance is something over three quarters of a mile, so that after exchanging and agreeing upon signals they were nearly equidistant from the place of collision. If there was any difference, the Devereaux had the greater distance to travel. It is thus established that the two vessels were moving at about the same relative speed through the water, or so nearly the same speed that the difference was practically immaterial in its effect. The testimony, read and considered in the light of all the attendant and surrounding circumstances, fails to establish any undue speed on the part of the Folsom. It is further established to our satisfaction, by the clear preponderance of the proof, that, when the master of the Folsom discovered the Devereaux start to sheer, he promptly stopped his engine and backed his boat, and did everything that could be done to avoid the collision.

Under these conditions, is the libelants' theory that the sheer of the Devereaux and consequent collision was caused by suction from the Folsom's passing at too great speed established? We are clearly of the opinion that it is not. When passing through the water, vessels, in proportion to their size and speed, produce or give rise to displacement waves, which run out, quartering astern from their course, and affect smaller vessels within their reach. The cases are numerous in which larger vessels have been condemned for injuries caused to smaller vessels from such displacement waves. It is also shown by the testimony in this case that when vessels are passing each other in the same direction there is a tendency on the part of the smaller vessel to be drawn out of her course, and towards the track of the larger, as the latter passes.

In the case of *Nestor v. The City of Cleveland*, Mr. Justice BROWN, then district judge, said that if vessels are going in the same direction, and passing near each other, it (suction) had a very powerful effect to deflect the weaker vessel from her course, and that the suction of two vessels meeting and passing each other was not very powerful, its operation being too short to make any particular effect upon the action of the two vessels, "unless one is much larger than the other." The theory of suction in meeting and passing vessels is that the current which rushes in astern to fill the displacement of water caused by the larger or more rapidly moving vessel has a tendency to draw the other out of her course when her bow comes within its influence. When it is considered that such current has its direction in the line of the moving vessel, with its greatest force and strength directly astern, its lateral bearing as a drawing and diverting influence cannot, as suggested by Judge BROWN, be very powerful. Whatever may be its force, it is clear, from the testimony and from reason, that the smaller vessel is most liable to be affected by it. A relatively greater speed on the part of the smaller ves-

sel may counteract such influence, and may even deflect to some extent the larger vessel, if her speed is sufficiently in excess. But no such fact is established in this case, and the opinion of witnesses, based upon hypothetical statements, not supported by the weight of proof, amounts to practically nothing. That the Folsom, 185 feet long, without cargo, with an average draft of 7 feet, should have drawn or diverted the Devereaux, 270 feet long, carrying a cargo, and with an average draft, fore and aft, of nearly 15 feet, or more than double that of the Folsom, is in itself highly improbable; so much so that it would require the clearest proof to establish the proposition. The displacement of the Devereaux was nearly four times as great as that of the Folsom. When her bow passed, or was in the act of passing, the stern of the Folsom, she was drawing about four feet more of water than the Folsom's stern was displacing. This four feet of water was in no way affected by the Folsom's displacement, and, while it encompassed the bow of the Devereaux, it is difficult to understand how the latter could have been diverted from her course by the Folsom, even if the latter had been going six or seven miles an hour. After the collision the Folsom went up the channel, and passed the Northern Queen within about 30 feet at a greater rate of speed than she passed the Devereaux, with little or no effect upon her course, although the Northern Queen had less draft of water than the Devereaux, and was not working her engines. But when it is shown that the speed of the Folsom was not excessive, that it did not exceed that of the Devereaux, the theory of the latter having been caused to sheer by the former's displacement of water is exploded.

It is shown by the testimony that when vessels approach too near the bank or bottom, or "smell the land," as it is called in sailor parlance, they have a strong tendency to sheer towards deep water. Whether the Devereaux's sheer was occasioned by this influence, we are not now called upon to determine. In view of the fact, disclosed in the record, that there is now pending at Detroit a suit in admiralty by the owner of the Mitchell against the Devereaux to recover the damage sustained by the former on account of said collision, we do not deem it proper to express any opinion as to whether the Devereaux was in fault in not stopping in the wide cut above the second elbow until the Folsom and tow came through the narrow natural channel, instead of meeting and attempting to pass in the latter; or as to whether her sheering, while approaching or passing the Folsom, was due to negligent management or inattention on the part of the Devereaux; or whether her master should have anticipated her sheering, and guarded against it; or as to whether her sheering was caused by too near an approach to the eastern bank of the channel; or whether it was an unavoidable accident. These are questions involved in the suit pending against the Devereaux. For the same reason, we have not undertaken to determine at what precise point the Devereaux commenced taking her sheer, whether before reaching the Folsom or when their bows or stems were abreast of each other, or when her bow had passed the Folsom's stern; nor have we passed upon the

question whether the Devereaux, in departing from the statutory rule of passing the Folsom on the port side, took the risk of her ability to pass safely on the starboard hand, as was held in *The Titan*, 49 Fed. Rep. 479, 480; 1 C. C. A. 324. What we decide in this case is that the libelants have failed to establish, by any fair and satisfactory preponderance of proof, as the burden was on them to do, that the Devereaux's sheering, and the collision resulting therefrom, was caused by any fault of either the Folsom or Mitchell or both. We have reached this conclusion without considering the new testimony taken by the appellants since the appeal, as we entertain some doubt whether, after an appeal in admiralty to this court, new testimony can be taken, under existing provisions of law.

The decree of the district court condemning the Folsom and Mitchell is erroneous, and is accordingly reversed, and the cause is remanded to said court, with direction to dismiss the libel at libelants' costs.

THE BALIZE.

In re SURPLUS PROCEEDS OF TUG BALIZE.

(Circuit Court, E. D. Michigan. October 3, 1887.)

MARITIME LIENS—ENFORCEMENT—DISPOSITION OF SURPLUS—JURISDICTION OF DISTRICT COURT.

A tug was sold to satisfy certain maritime liens, after the discharge of which there remained in court a surplus, which was claimed by both the former owner and his creditors. The creditors who petitioned that the fund be paid to them were of two classes,—those claiming for supplies furnished to boats other than the tug, and for which suits *in personam* were pending; and those claiming for services rendered as master of the tug and of other boats, and for which judgments *in personam* had been obtained and executions returned *nulla bona*. Held, that the suits and judgments *in personam* conferred no vested right on the master of the tug or other petitioning creditors to a specific interest in the surplus, such as the forty-third admiralty rule contemplates, and that, therefore, the district court had no jurisdiction in admiralty to create liens on the surplus as against the former owner.

In Admiralty. On appeal from district court. Modified and affirmed.

Jared W. Finney, James J. Atkinson, Henry H. Swan, and Moore & Canfield, proctors for the several claimants.

JACKSON, Circuit Judge. Under admiralty proceedings in the United States district court at Detroit the steam tug Balize was sold to satisfy certain maritime liens. After paying off and discharging these liens, there remains in the registry of the court surplus proceeds arising from said sale to the amount of thirteen or fourteen hundred dollars, and the question now presented for decision relates to the proper disposition to

be made of this surplus, which is claimed by the Detroit Tug & Transit Company, as the owner of the Balize before its sale, and by several of said company's creditors, who have filed petitions praying that the fund may be paid over to them, rather than to the former owner of the tug. The petitioning creditors consist of two classes, viz.: *First*, those having claims against the Detroit Tug & Transit Company for supplies of coal, etc., furnished boats of said company other than the Balize, and for which suits *in personam* are now pending; and, *secondly*, those having claims for services rendered as master of the Balize and of other boats of said Detroit Tug & Transit Company. This latter class of petitioners have severally obtained judgments *in personam* against the Detroit Tug & Transit Company, on which executions have been issued to the marshal, and by him returned *nulla bona*. The district court ordered and decreed that Hiram Ames, master of the tug Balize, should be paid in full out of said surplus, and that the remainder of said fund should be turned over to the Detroit Tug & Transit Company as the owner thereof. The other petitioning creditors were held not to be entitled to payment out of said surplus, and their petitions were dismissed. From this decree all the claimants of said surplus have appealed to this court.

After a careful examination of the questions presented by the appeal, I am satisfied, contrary to my first impressions, that the action of the district court in allowing and directing the debt of Ames, the master of the Balize, to be paid out of this surplus, is erroneous. This allowance was no doubt made upon the authority of *The Santa Anna*, Blatchf. & H. 80, 81, where it was held that the master, as against the owner, was entitled to payment out of a surplus remaining in court. But that case has been practically overruled by the supreme court of the United States in the case of *The Lottawanna*, 20 Wall. 221, 21 Wall. 559, which held that surplus proceeds, in such cases as the present, must be paid over to the owner, unless claimed by a creditor having a specific lien thereon either by contract or statute. "The proceeds arising from such a sale, [by order of the admiralty court,] if the title of the owner is unincumbered, and not subject to any maritime lien of any kind, belong to the owner, as admiralty courts are not courts of bankruptcy or insolvency. Nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors." 20 Wall. 221. The cases relied on by the petitioning creditors, viz., *The Guiding Star*, 18 Fed. Rep. 263, and *The E. V. Mundy*, 22 Fed. Rep. 173, decided by Mr. Justice MATTHEWS, do not conflict with the principle announced in *The Lottawanna Case*. In both these cases the learned judge awarded the surplus fund to lien creditors,—creditors who held prior liens on the property or its proceeds, either by contract or by statute. Neither the master of the Balize nor any of the other petitioning creditors had any specific lien upon the Balize or its proceeds, either by statute or by contract. The district court, as an admiralty court, has no jurisdiction to create liens on this surplus as against the owner. It can only assert and enforce against the owner

prior specific liens which the owner or the law have previously created or established. The judgments which the several masters have obtained against the Detroit Tug & Transit Company *in personam*, the issuance of executions, and returns of *nulla bona* thereon, created no lien on said surplus. The suits and judgments *in personam* conferred no vested right to a specific interest in said surplus, such as the forty-third admiralty rule contemplates. The creditor who claims satisfaction out of surplus proceeds in such cases must come into court with an existing specific lien. He cannot invoke the aid of a court of admiralty to create such lien by attaching or impounding the fund. The admiralty court can only enforce or give effect to subsisting liens created by statute or contract as against the owner of surplus proceeds. It may be, and doubtless is, inequitable for the owner to assert its right to this surplus, and leave *bona fide* debts unpaid, but a court of admiralty has no such equitable jurisdiction as will enable it to correct such a wrong. The claim of the master of the Balize cannot be distinguished from that of the other creditors, and the decree of the district court allowing and directing its payment is reversed. In all other respects the decree of the district court is affirmed. The entire surplus will be paid over to the owner, the Detroit Tug & Transit Company, and the creditor petitions will be dismissed, with costs. The costs incident to the petition of the Detroit Tug & Transit Company will be retained out of the fund in the registry of the court, and the balance of said fund will then be paid over to said Detroit Tug & Transit Company or to its proctor of record.

TOMS v. OWEN.

(Circuit Court, E. D. Michigan. June 6, 1891.)

No. 3,287.

1. CIRCUIT COURTS—JURISDICTION—CONSTRUCTION OF WILL.

Where the necessary diversity of citizenship exists, the circuit court has jurisdiction of a suit for the construction of a will, the execution, validity, and probate of which are recognized, there having been no construction of the will, and no adjudication of complainant's rights thereunder, either by the probate court in which the settlement of the estate is pending, or by any other tribunal having jurisdiction of the subject and the parties. *Colton v. Colton*, 8 Sup. Ct. Rep. 1164, 127 U. S. 301, 308, followed. *Broderick's Will*, 21 Wall. 508, distinguished.

2. DEED—DELIVERY—EVIDENCE.

A husband used moneys of his wife in settling his own debts, and thereafter had the use of her funds, without ever accounting. He subsequently conveyed to her all of the property then possessed by him by a deed, reciting a consideration of \$50,000, and reserving a life use of the property. The deed, executed with all due formalities, was found after his death in his office safe, in an envelope containing other valuable papers which belonged to his wife, and of which he had charge; and in a will made shortly before his death he formally declared that he had "executed and delivered" to his wife such a conveyance. *Held*, that these facts were sufficient to establish the delivery of the deed.

3. WILLS—CONSTRUCTION—CREATION OF TRUST—INTENT OF TESTATOR.

By the second clause of his will, the husband, after stating that his reasons for making the will were to avoid all questions that might arise about the previous deed to his wife, and to express his wishes as to the use and disposition of the property conveyed to her, devised and bequeathed to her all the real and personal property of which he died seised or possessed; and by the fifth clause he expressed his desire that his wife "should make free use of all the property so conveyed and devised to her for her own use or for charitable purposes, knowing that, in case any of my immediate relatives or her sister should, by misfortune or otherwise, need any assistance, she would generously share with them; and therefore I feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein." *Held*, that no enforceable trust was created, for the desire of the testator was not imperative, as it left with the wife the power to judge both when aid was needed and the amount thereof.

4. SAME.

By the sixth clause testator provided that "it is my wish that such property as my wife may have remaining undisposed of at her death that she should previously will the same to her sister, and to my brothers and sisters, in equal proportions, leaving it entirely with her to make such disposition of her property by will as her judgment shall dictate, merely expressing my desire in the premises; and, should she prefer to retain or dispose of the property so conveyed and devised to her in a manner different from my wishes as herein expressed, she is at full liberty to do so, without having her right or motives for so doing called in question." *Held*, that no trust was created in favor of the brothers and sisters of testator enforceable against the estate of the wife, who died intestate, as the power given to her was discretionary.

In Equity. Bill by Joel P. Toms against Julia Frances Owen for a construction of the will of Robert P. Toms, deceased. Bill dismissed.

C. I. Walker, (Charles A. Kent, of counsel,) for complainant.

Wm. J. Gray, (Otto Kirchner, of counsel,) for defendant.

JACKSON, Circuit Judge. The complainant seeks by his bill to obtain a construction of the will of his brother, Robert P. Toms, deceased, and to set up and have declared in his favor a trust in and to such property as was devised to the wife of the testator, and remained undisposed of at her death. The defendant, as the heir at law of Mrs. Sarah Caroline

Toms, wife and devisee of said Robert P. Toms, in and by her answer denies that any trust was created by the will of the testator in complainant's favor; claims that the testator in September, 1875, before the execution of his will, had by deed conveyed all or most of the property referred to and described in his will to his wife; and also questions the jurisdiction of this court to entertain the suit, and afford the relief sought, inasmuch as the settlement and administration of the estate of Robert P. Toms and of said Sarah Caroline Toms are pending in the proper probate court of the state of Michigan, of which state said Robert P. and Sarah Caroline were residents and citizens at the times of their respective deaths. We think this objection to the jurisdiction of the court is not well taken. It is not the object or purpose of the bill either to amend or affirm the probate of the will of Robert P. Toms, or in any way to interfere with the proper jurisdiction of the probate court, and its proceedings, so as to bring the case within the rule laid down in *Broderick's Will*, 21 Wall. 503, and subsequent cases, holding that the United States circuit courts, as courts of equity, have no general jurisdiction for annulling or affirming the probate of a will. The complainant asserts rights under a will whose execution, validity, and probate are recognized, and, having the requisite diverse citizenship, he may seek relief in this court; there having been no construction of the will, and no adjudication of his rights thereunder, by any tribunal having jurisdiction of the subject and parties. This is settled by the case of *Colton v. Colton*, 127 U. S. 301, 308, 8 Sup. Ct. Rep. 1164.

The will of Robert P. Toms, which it is claimed charged his estate, or so much thereof as remained undisposed of at the death of his wife, with a trust in favor of complainant, provided as follows:

"In the name of God, amen. I, Robert P. Toms, of the city of Detroit, being of sound mind and disposing memory, do make, publish, and declare this to be my last will and testament, in manner following, to wit: *First*. I do will and direct that all my just debts, funeral expenses, and expenses of administering my estate be paid, as soon as practicable after my death, out of my personal estate. *Second*. I have heretofore executed and delivered to my beloved wife, Sarah Caroline Toms, a conveyance of all the property of which I shall die seised or possessed; and to avoid all accidents or questions that may arise, and for the purpose of giving expression to my wishes as to her use and disposition of the property so conveyed to her, this will is made, and I do therefore devise and bequeath to my beloved wife all the real and personal property, of every name and nature and wheresoever situated, of which I shall die seised or possessed. *Third*. It is my wish and desire that all my personal ornaments, jewelry, and apparel, watch, gun, and fishing tackle, should be given by my beloved wife to my dear brothers, or to the survivor of them, as soon after my decease as practicable. *Fourth*. It is my wish and desire that my beloved wife shall give to William J. Gray and Robert Toms Gray, sons of my dearest and best beloved friend, William Gray, Esq., my law library, safe, office furniture, and all things connected with my office as used by me, in the hopes of their becoming partners when admitted to the bar, so that no division shall become necessary of the library; and that she will attend to the education of Robert Toms Gray, furnishing him with a suitable sum for his clothing and expenses, and for his collegiate education, and until he shall be admitted to the bar. *Fifth*. It is my wish and desire

that my beloved wife, who has always been kind, affectionate, and devoted to me, should make free use of all the property so conveyed and devised to her for her own use or for charitable purposes, knowing that in case any of my immediate relatives, or her sister, Julia Frances Owen, who has always been a kind sister and devoted friend, should, by misfortune or otherwise, need or require any aid or assistance, that she would cheerfully and generously share with them; and therefore feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein. *Sixth.* As I have no children to inherit my property, it is my wish that such property as my wife may have remaining undisposed of at her death, that she should previously will and devise the same to her sister, and to my surviving brothers and sisters, in equal proportions, leaving it entirely with her to make such use and disposition of her property by will as her kind heart and good judgment shall dictate, merely expressing my desires and wishes in the premises; and if change of fortune, or other causes, shall, in her judgment, make it unwise to carry out any or all of the foregoing wishes or requests, she is absolved from carrying out the same, as my wish to suitably provide for her care and comfort surpasses all other considerations; and, should she prefer to retain or dispose of the property so conveyed and devised to her in a manner different from wishes as herein expressed, she is at full liberty so to do, without having her right or motives for so doing called in question by my executors, or by any person or persons. *Seventh.* I do hereby nominate and appoint my friends, Geo. H. Lothrop, Esq., and William J. Gray, Esq., to be the executors, and my beloved wife to be the executrix, of this, my last will and testament; and, having the fullest confidence in them, I direct that no bonds or other security be required of them for the faithful performance of their duties. In witness whereof I have hereunto set my hand and seal this fourteenth day September, 1877."

The deed referred to in the second clause of the will bears date August 7, 1875, and for the recited consideration of \$50,000, to the grantor paid by his wife, (Mrs. Toms,) grants, bargains, sells, releases, and forever quitclaims to her, her heirs and assigns, forever, "all the estate, real, personal, and mixed, of every name and nature, whatsoever and wheresoever situated, belonging" to the said Robert P. Toms, or in which he has any interest, "subject only to the right of said party of the first part to use, occupy, and enjoy the same for and during the term of his natural life." It purports to have been signed, sealed, and delivered in the presence of his subscribing witnesses. The complainant charges in his bill that this conveyance was never in fact delivered to the grantee, and was therefore inoperative to vest her with the estate then owned by her husband. This is denied by the answer. Robert P. Toms died on March 10, 1884. Shortly after his death said deed was found in his office safe in an envelope, which contained valuable papers of his wife, as well as papers of his own; and on 28th of November, 1884, it was duly recorded in the proper register's office of the county. Mrs. Toms died intestate in June, 1888, before the institution of the present suit, having in her possession and claiming as her own absolutely the property covered by said conveyance, as well as that subsequently acquired by her husband and disposed of by his will.

Robert P. Toms was a lawyer of large practice and experience. In 1857 a banking firm of which he was a member failed for about \$400,000, for the payment of which he was personally liable. In 1859 he made

a general assignment for the benefit of his creditors, and for about 10 years thereafter he was engaged in compromising, buying up, and getting releases of the banking firm's debts for which he was liable. Those liabilities were settled and discharged some time about 1869. His wife had funds of her own derived from the estates of her father and mother, which, as appears from the evidence, were used by said Robert P. Toms in settling up the liabilities against him growing out of the failure of his banking firm. It is also shown that after being relieved of his embarrassments he had the use of his wife's funds. It does not appear that he ever accounted to her for the funds so used, and it may be fairly assumed that he was her debtor, or so considered himself, on August 7, 1875, when the conveyance aforesaid was executed, and that its purpose was to repay or refund to the wife what he regarded as equitably due her. This deed, after being duly executed, was deposited in the safe where the wife's valuable papers were habitually kept, and was found in an envelope containing other valuable papers and securities belonging to her. There is no fact or circumstance disclosed by the evidence that fairly or necessarily negatives the presumption arising from the formal execution of the conveyance, and its being deposited with, and found among, other valuable papers of the grantee, that the deed was never delivered so as to become operative in the lifetime of the grantee. Again, his will, executed about two years later, expressly declares in the second clause thereof that he had previously, not only executed, but "delivered," to his wife a conveyance of all his property; and in other clauses of the will refers to the property "so conveyed to her." Robert P. Toms being a lawyer of experience, it should be assumed that he knew the force and meaning of the terms he used in reference to that conveyance. When he formally declared in his will that he had "executed and delivered" to his wife such a conveyance, the language should be given its natural force and legal meaning, and, in view of the other facts and circumstances above stated, should be held sufficient to establish the delivery of the deed. The second clause of the will, and the other facts of the case connected with the execution of the deed, and its being found with and among the valuable papers of the grantee, certainly do not tend to establish the allegations of the bill that said conveyance "was never delivered." The delivery of a deed, to make it operative, is largely a question of intention on the part of the grantor. It is not essential to its validity that the instrument should pass into the exclusive manual custody or possession of the grantee. It may become operative even while the manual possession is retained by the grantor. It is not deemed necessary to review the authorities on this subject. They are perhaps so conflicting as not to be reconciled. Each case must depend largely, if not entirely, upon its special facts and circumstances. In the present case, the grantor, as husband, was the custodian of the grantee's securities and valuable papers, which were kept in his office safe. After formally executing the deed, it is deposited, either by himself or his wife, (the proof does not establish which,) in the same place where her other valuables are kept, and two years thereafter the grantor by his will solemnly de-

clares that he had not only executed, but had "delivered," the conveyance. This formal declaration, in connection with the relationship of the parties, the way in which the wife's valuable papers were kept, and the place in which the deed was deposited and found, establishes with sufficient certainty that said conveyance of August 7, 1875, was duly delivered, and operated to vest the wife of the grantor with the title of the estate, real and personal, of which he was then seised and possessed. The will subsequently executed could, of course, create no trust in complainant's favor upon or in respect to the property thus conveyed to the grantee.

It appears, however, that Robert P. Toms, after the date of said conveyance, and before his death, in 1884, acquired other property, real and personal, to the value of about \$100,000, which was devised and bequeathed by his will to his wife; and the question which remains to be considered is whether the wife, under the provisions of the will, took this after-acquired property absolutely in her own right, or whether she took it charged with a trust in favor of complainant in respect to so much or such portions thereof as should remain undisposed of at her death. The general rules for the construction of wills are admirably set forth in *Smith v. Bell*, 6 Pet. 68, and in *Colton v. Colton*, 127 U. S. 301, 8 Sup. Ct. Rep. 1164. It is settled that the intention of the testator, as expressed in his will, is to prevail, when not inconsistent with rules of law; that in arriving at the testator's intention the whole will is to be taken together, and is to be so construed as to give effect, if possible, to the whole; and that in expounding doubtful words, and ascertaining the meaning in which the testator used them, it may be proper to take into consideration the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, such as the ties connecting him with the legatees and devisees, and the affection subsisting between them. It is insisted on behalf of complainant that, applying these rules of construction to the will of Robert P. Toms, who had no child or children when his will was executed, and did not expect any, whose wife possessed property in her own right, and whose brothers and sisters were in moderate circumstances, and between whom and himself friendly family relations existed, there is from the whole instrument, taken together, clearly manifested an intention on the "part of the" testator to create a trust in favor of the testator's surviving brothers and sisters, which complainant, to the extent of his interest, may enforce in equity against the defendant, who, as heir at law, has succeeded to the property which Mrs. Sarah Caroline Toms took under the will, and left undisposed of at her death, in 1888.

It is not, and cannot be, questioned that words of recommendation, entreaty, wish, or request, addressed by a testator to a devisee or legatee, will ordinarily make him a trustee for the person or persons in whose favor such expressions are used, unless the actual intention appear different. But it is settled by the authorities that, in order to the creation of such a trust enforceable in equity, three conditions must concur: (1) There must be such certainty of the subject-matter as to be ca-

pable of execution by the court; (2) there must be certainty as to the beneficiaries or objects of the intended trust; and (3) the expressed wish, request, or desire of the testator must be imperative in its character, and not be left so dependent upon the discretion of the general devisee as to be incapable of execution without superseding or controlling that discretion.

In Story, Eq. Jur. § 1070, the general result of the authorities is thus summarized:

"Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion and choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership,—in all such cases courts of equity will not create a trust from words of this character. In the nature of things, there is a wide distinction between a power and a trust. In the former, a party may or may not act in his discretion; in the latter, the trust will be executed, notwithstanding his omission to act."

To the same effect see 2 Pom. Eq. Jur. §§ 1014-1017, and notes.

In *Briggs v. Penny*, 3 Macn. & G. 546-554, the lord chancellor said upon this subject:

"I conceive the rule of construction to be that words accompanying a gift or bequest, expressive of confidence or belief or desire or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: *First*, that they are so used as to exclude all option or discretion in the party who is to act, as to her acting according to them or not; *secondly*, the subject must be certain; and *thirdly*, the objects expressed must not be too vague or indefinite to be enforced."

In *Williams v. Williams*, 1 Sim. (N. S.) 358-369, it is said:

"The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee (or devisee) to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not, at his discretion."

It is further said that it is doubtful—

"If there can exist any formula for bringing to a direct test the question whether words of request or hope or recommendation are or are not to be construed as obligatory."

In the earlier and well-considered case of *Knight v. Knight*, 3 Beav. 148, it was said by the master of the rolls (Lord LANGDALE) that—

"If the giver (or testator) accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request, it has been held that no trust was created."

In *Warner v. Bates*, 98 Mass. 274-277, Chief Justice BIGELOW, speaking for the court, said that the difficulties which are inherent in the subject-matter—

"Can always be readily overcome by bearing in mind and rigidly applying in all such cases the test that, to create a trust, it must clearly appear that the testator intended to govern and control the conduct of the party to whom the

language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the devisee,—the just and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity against the trustee by those in whose behalf the beneficial use of the gift was intended."

In the later case of *Hess v. Singler*, 114 Mass. 56-59, after recognizing the general rule for the interpretation of wills that the intention of the testator, as gathered from the whole will should control the courts, it is said that—

"In order to create a trust, it must appear that the words were intended by the testator to be imperative; and, when the property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence."

The foregoing authorities, and the rules therein laid down, were cited with approval by the supreme court of the United States in the cases of *Howard v. Carusi*, 109 U. S. 725-733, 3 Sup. Ct. Rep. 575, and *Colton v. Colton*, 127 U. S. 313-315, 8 Sup. Ct. Rep. 1164. In the latter case Mr. Justice MATTHEWS, speaking for the court, says:

"The question of its [a trust] existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away, the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, carrying the intention of the testator in terms equivalent to a command, and leaving the legatee no discretion to defeat his wishes, though there may be no discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary."

In the present case the subject-matter and the objects may be regarded as sufficiently definite and certain to meet two of the conditions requisite to the creation of an enforceable trust. The controverted question is whether the wish expressed by the testator that such property as his wife might have remaining undisposed of at her death should be by her previously willed and devised to her sister, and his surviving brother and sister, in equal proportions, etc., imposed an imperative duty or obligation upon her to make such disposition thereof, or created an enforceable trust in favor of the surviving brothers and sisters in respect to the property which Mrs. Toms took by the will, and which remained undisposed of at her death. The testator's will was executed September 14, 1877. Whether he had acquired any property between the 7th August, 1875, when he conveyed all his property to his wife, and September 14, 1877, when the will was executed, does not appear. He died seised and possessed of property, real and personal, other than that

conveyed to his wife by the deed of August 7, 1875, and which was disposed of by his will. But whether such additional property was acquired before or after the date of the will's execution does not appear. It is perfectly manifest that the wishes expressed by the testator as to the wife's disposition of "her property" applied and had reference as well to that which had been conveyed to her by the deed of August 7, 1875, as to what might pass by the will. If in September, 1877, he had acquired no other property, the natural and obvious meaning of the words employed by the testator in the will, read in the light of his situation and circumstances when he used them, imports and expresses nothing more than a suggestion or wish, intended only to influence, and not to control, his wife's disposition of property already belonging to her. But assume that the testator was seised and possessed of property of his own when the will was executed, and expected to acquire additional property, which would pass by the will at and as of the date of his death, his expressed wish, as to how his wife should dispose of such property as she might have remaining undisposed of at her death, was not limited and confined to the property she took by and under the will. His wish related as much to the property she had acquired by the deed as to that she took under the will. As to the former, his wish was not, and could not be, imperative, but only and merely an expression of his desire, intended to influence, by way of suggestion or advice, his wife's disposition of her own property, and as to which she had full discretion and unlimited authority. As to the property which passed by the will, is the wish, in reference to that, expressed in the same language and same connection as that relating to the wife's own estate, to be construed as imperative or as creating a trust? When a testator expresses precisely the same wish in relation to his devisee's or legatee's own property as he employs in reference to that devised or bequeathed by himself, can his language be properly construed as indicating an intention to create a trust as to the latter, when no such trust was intended or could be created by the testator in respect to the former? Under such circumstances, can it be properly said that the expressed wish of the testator is any more imperative in the one case than in the other? He certainly has the right and power of disposition in the one case, which he does not possess in the other. But when he expresses the same wish in respect to property previously conveyed by deed to the devisee which he expresses in reference to that which the devisee takes by the will, it is straining the rules of construction and interpretation to hold that the testator intended to create a trust as to the property devised, when the same language was not intended to and could not impress any such trust upon the devisee's property to which such wish equally related and applied.

By the second clause of the will, after reciting the execution and delivery to his wife of a conveyance of all the property of which he should die seised and possessed, the testator proceeds to say:

"And to avoid all accidents or questions that may arise, and for the purpose of giving expression to my wishes as to the use and disposition of the

property so conveyed to her, this will is made, and I do therefore devise and bequeath to my beloved wife all the real and personal property, of every name and nature, and wheresoever situated, of which I shall die seised or possessed."

It thus appears that the testator's intention in executing the will was twofold: *First*, to avoid all accidents or questions that might arise in reference to the previously executed and delivered conveyance to his wife; and, *secondly*, to give expression to his wishes as to the use and disposition of the property so conveyed to her. But if we leave out of view the conveyance made to Mrs. Toms in August, 1875, which, being considered in connection with the language of the will, leads strongly to the conclusion, if it does not establish the fact, that no trust was intended to be created by the testator, and consider the question solely on the provisions of the will itself, can the proposition be successfully maintained that a trust was created in favor of the testator's surviving brothers and sisters as to the property devised, and remaining undisposed of, by the devisee, Mrs. Toms, at her death? The fact that she carried out the wishes expressed by the testator in the third and fourth clauses of the will throws little or no light on the subject, and in no way goes to establish the existence of the trust as claimed and sought to be enforced by complainant. She was advised that under the will of her husband she took the property devised to her absolutely, and was under no legal or equitable obligation to carry out the testator's wishes in respect to the same. The fact that she did voluntarily comply with his wishes expressed in the third and fourth clauses of the will, relating to a portion of his personal effects of comparatively little value, has no material bearing on the question under consideration.

The fifth and sixth clauses of the will are mainly relied on to establish the trust sought to be enforced. These clauses must, of course, be read and considered in the light of, and in connection with, the second clause, which discloses the testator's reasons for making the will to have been to avoid all accidents or questions that might arise about the antecedent conveyance to his wife, and to give expression to his wishes as to the use and disposition of the property so conveyed to his wife. Such being the avowed purpose and object in making the will, the fifth clause expresses the testator's wish and desire that his beloved wife "should make free use of all the property" so conveyed "and devised to her for her own use or for charitable purposes, knowing that in case any of my immediate relatives, or her sister, Julia Frances Owen, * * * should, by misfortune or otherwise, need any aid or assistance, that she would cheerfully and generously share with them, and therefore feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein." There is clearly nothing imperative in the wish and desire thus expressed. The subject of the wish or property to which it is to attach is not certain or definite, but is left to the wife's generosity. The testator knowing that, if the designated objects should by misfortune or otherwise need any aid or assistance, his wife would cheerfully and generously share with them, she is left with the power both to judge when aid or assistance might be needed, and the quantum or amount

thereof, to be given according to her own generosity. Her "power" to carry out the wish expressed was left to her own sense of generosity, which necessarily implied the discretion to act or not to act in the event the objects named needed assistance, by reason of misfortune or otherwise. No trust arises from a wish thus expressed.

It is urged, with more confidence and plausibility, that a trust is created in favor of the testator's surviving brothers and sisters by the sixth clause, which says:

"As I have no children to inherit my property, it is my wish that such property as my wife may have remaining undisposed of at her death, that she should previously will and devise the same to her sister, and to my surviving brothers and sisters, in equal proportions, leaving it entirely with her to make such use and disposition of her property by will as her kind heart and judgment shall dictate, merely expressing my desire and wishes in the premises; and if change of fortune or other causes shall, in her judgment, make it unwise to carry out any or all of the foregoing wishes or requests, she is absolved from carrying out the same, as my wish to suitably provide for her care and comfort surpasses all other considerations; and should she prefer to retain or dispose of the property so conveyed and devised to her in a manner different from my wishes as herein expressed, she is at full liberty so to do, without having her right or motives for so doing called in question by my executors, or by any person or persons."

It will be noticed that the first sentence of this clause expresses the wish, not that the designated objects should take, under the testator's will, such property as he had devised to his wife and remained undisposed of at her death, but that she should previously (to her death) will and devise such property as she might have remaining undisposed of at her death. His wish is that the designated objects should succeed to the property of the wife remaining undisposed of, by and through her will rather than his own. But, while expressing this wish, the testator in the next sentence proceeds to say that he leaves "it entirely with her to make such use and disposition of her property by will as her kind heart and judgment shall dictate, merely expressing my desire and wishes in the premises." If the subject-matter or property to which the wish related passed to the wife by the will, does not this sentence immediately following, and qualifying or explaining the testator's wish, confer a clear discretion and choice upon his wife to act or not to act? Is not the expressed wish accompanied or followed by language which clearly implies that he did not intend the wish to be imperative? Can it be said that, in view of such an explanation of his wish, the testator meant or intended to impose an obligation on his wife to make a will in favor of the designated objects, or that she should hold or dispose of the property for their benefit? Having expressed his wishes, the context shows that the testator meant to leave it to his wife to act on them or not, at her discretion; being willing, as he declared, after merely expressing his wishes in the premises, that it should be left entirely with her to make such use and disposition of her property by will as her kind heart and judgment might dictate. No trust can arise under such language. But the subsequent sentences and expressions of

this sixth clause leave the subject free from any reasonable doubt. The testator further says, in explanation and qualification of his wish first expressed:

"And if change of fortune or other causes shall, in her judgment, make it unwise to carry out any or all of the foregoing wishes or requests, she is absolved from carrying out the same, as my wish to suitably provide for her care and comfort surpasses all other considerations."

How can the wish of the testator which his wife is expressly "absolved" from performing, if from any cause it is "unwise" "in her judgment" to carry out the same, be deemed, under the authorities above cited, to exclude all option or discretion on her part as to her acting according to such wish or not? The testator does not, however, allow his intention to rest upon the foregoing declarations, but proceeds to say:

"And should she prefer to retain or dispose of the property so conveyed and devised to her in a manner different from my wishes as herein expressed, she is at full liberty so to do, without having her right or motives for so doing called in question by my executors, or by any person or persons."

This language, conferring, as it does, upon his wife "full liberty" to either "retain or dispose" of the property so conveyed and devised to her in a manner different from the expressed wishes of the testator, without having her right or motives for so doing called in question by any one, is utterly inconsistent with the idea that he intended his wishes or requests to be imperative. On the contrary, it clearly appears that the wife was to have a discretionary power and authority to withdraw all or any part of the subject from the wish, that the testator did not intend to govern and control her conduct in respect to the property conveyed and devised to her, and that his wishes were merely designed as an expression or indication of that which he thought or considered would be a reasonable exercise of an unrestrained discretion and judgment on the part of his wife, and which he intended to repose in her. Under such circumstances, the authorities, almost without exception, hold that no trust is created; and the conclusion of the court is that the will of Robert P. Toms created no trust in favor of the complainant as one of his surviving brothers.

This conclusion being reached, it is not deemed necessary to consider whether Mrs. Toms' verbal request to the defendant to pay or donate \$10,000 each to the testator's surviving brothers and sisters, and the representatives or children of a deceased sister, and which the defendant duly complied with and performed after the death of Mrs. Toms, was not an execution, in whole or in part, of any obligation resting upon Mrs. Toms or her estate, even if a trust had been created by the will of her husband. Nor is it necessary to discuss the question whether, if Mrs. Toms was vested with the devised property absolutely or with full and unlimited power of disposition over the same for her own use, a trust could be limited thereon. The cases of *Jones v. Jones*, 25 Mich. 401, followed and recognized in later Michigan decisions, and of *Howard v. Carusi*, 109 U. S. 725-732, 3 Sup. Ct. Rep. 575, seem to hold that a valid trust could not be created under such conditions. But we do

not deem it necessary to pass upon this point, as we hold that the will of Mr. Toms created no enforceable trust in favor of the complainant, whose bill is therefore dismissed, with costs to be taxed. A decree will be entered accordingly.

NORTHERN PAC. R. CO. v. CITY OF SPOKANE *et al.*

(Circuit Court, D. Washington, E. D. September 15, 1892.)

No. 115.

1. INJUNCTION—PRELIMINARY ORDER—QUESTIONS OF TITLE.

A court of equity cannot, upon the hearing of an application for a preliminary injunction in advance of the taking of evidence, decide questions of title adversely to a party in possession of real estate, and the property should be protected from injury by his opponent during the hearing of the controversy.

2. SAME—CONTRACT RIGHTS—CITY ORDINANCE.

A city claimed the right to destroy a wooden building because it was maintained in defiance of a city ordinance and in derogation of the terms of the permit granted by the city for its erection. *Held*, that the city government had no power to enforce the terms of the permit by destroying the building without process of law, and a restraining order should not be vacated.

3. SAME.

An order restraining a city from preventing the erection of a new depot by a railroad on the site of an old one *pendente lite* gives the railroad too great an advantage while the title is in dispute, and should not be granted.

In Equity. Bill by Northern Pacific Railroad Company to restrain the city of Spokane and others from destroying an existing depot, and from preventing the building of a new one. A preliminary restraining order was granted. Heard on motion to vacate the order. Granted in part.

J. M. Ashton and Albert Allen, for plaintiff.

Geo. Turner and P. F. Quinn, for defendants.

HANFORD, District Judge. The complainant, for the transaction of its freight business at the city of Spokane, has in use a cheaply constructed wooden warehouse, situated within the limits of its right of way. This structure was only designed for temporary use, and was hastily built immediately after the conflagration which occurred on the 4th of August, 1889, and is upon the site of the freight depot theretofore in use, and which was consumed in said conflagration. There is a controversy between the railroad company and the city of Spokane as to the title to part of the ground covered by said warehouse, the railroad company claiming that its title is perfect, and the city claiming that, by act of the railroad company, part of the ground covered by it was dedicated to the public for a street; that it is an obstruction of a public street, and therefore a nuisance, and on that ground the officers of the city propose to tear it down, and also to prevent the railroad company from erecting a new freight depot covering any part of the ground within the

limits of the alleged street. The object of this suit is to obtain a decree which will determine the adverse claims of the parties respecting the title to this piece of ground, and the complainant has made application to the court for an injunction to prevent the defendants from tearing down said temporary structure, and from interfering with the erection of its proposed freight depot during the pendency of the suit. Said application was, by an order of the judge of this district, set for hearing on the 4th day of October, 1892, and at the same time a temporary restraining order was granted, forbidding the threatened destruction of said temporary warehouse and all interference by the defendants with the complainant in its possession of said ground, or work in erecting its proposed freight depot. The city of Spokane has moved to vacate said restraining order, on the ground that the same unjustly interferes with the lawful exercise of its powers as a municipal corporation, to the injury of the inhabitants of said city.

Whether the said officials have or have not lawful authority to enter upon ground in possession of the railroad company, and interfere with the transaction of its business, by the summary destruction of the only freight warehouse which it has in the city of Spokane, on the ground that the same is an obstruction of a public street, is a question which involves the determination of the issue between the parties as to the title to said ground. On the part of the defendants it is insisted that the judge has power to determine this issue upon the present hearing, and that it is his duty to do so; a similar contention has been made before me several times, and I have, after patiently hearing and considering all arguments advanced, several times reiterated the opinion that a judge cannot, upon the hearing of an application for a temporary injunction in advance of the taking of evidence, decide questions of title adversely to a party in possession of real estate; and that such a party, when claiming to have a lawful right to the possession and use thereof, and coming into a court of equity for the purpose of submitting for its determination a disputed question as to his title and rights respecting such property, is entitled to have the same protected from injury at the hands of the adverse party during the time necessary for the hearing and determination of the controversy by the court. I have heard and given due consideration to the able arguments made by counsel for defendants in opposition to this rule, but my mind has become strengthened in the belief that the rule is sound, and no sufficient reason appears for not applying it in this case.

It is claimed that the city has a right to demolish said warehouse, under the provisions of its fire limit ordinance, because the same is constructed of combustible material, and its existence is a menace to the city. I would not be willing to restrain the officers of the city from enforcing its valid ordinances, and I may conclude, upon the final hearing of this case, that the ordinance referred to does authorize the city to destroy said building as proposed. But it is claimed on the part of the complainant that this building was erected before the ordinance referred to took effect, and therefore it is no violation of the ordinance to main-

tain it. The facts as to the time when the building was constructed, and the date on which the ordinance took effect, do not clearly appear, and I am in doubt as to whether or not this building is one for the removal of which the ordinance gives authority; and it is my opinion that the restraining order should continue in so far as to forbid the invasion of the premises in the complainant's possession, and the destruction of property, and interruption of its business, until the final hearing and determination of all the questions involved. The city council of Spokane passed a resolution before the erection of this building, requiring its officers to prevent the erection of wooden buildings within limits including the ground referred to, without a permit from the council; and to construct this building a permit was obtained by the plaintiff from the council, upon an express promise, made by agents of the complainant, that the same should not be maintained longer than nine months, and that it should be removed at any time upon ten days' notice that the said city government required it. This resolution and agreement, however, are matters in the past; the resolution gives no color of authority to destroy buildings for the construction of which a permit was obtained from the council, and it is not a part of the functions of the city government to enforce the terms of an agreement by forcible measures without process of law, as proposed in this instance.

The purpose of a restraining order *pendente lite*, in all cases of this nature, is to preserve property which is the subject of controversy, in its existing condition, until a final hearing and determination of the cause; and the order should be limited so as to simply preserve the *status quo*, and should not give either party an advantage by proceeding in the acquisition or alteration of property, the right to which is disputed, while the hands of the other party are tied. I think, therefore, that the restraining order heretofore granted goes too far, in this: that it forbids interference by the city government with the erection of a building upon a site which is the subject of litigation, and in violation of an ordinance of the city requiring that, before commencing to erect the same, the plans and specifications for such building be submitted to inspection, and that a permit be obtained after the inspection.

Therefore the order heretofore granted will be modified by eliminating so much of it as forbids the hindering or obstruction of the railroad company in the erection of its proposed new freight depot, and in all other respects it will be continued until the further order of the court.

CLEVELAND STONE CO. v. WALLACE *et al.*

(Circuit Court, E. D. Michigan. May 2, 1892.)

No. 3,289.

1. TRADE-MARKS—INFRINGEMENT—EXCLUSIVE USE—SCYTHESTONES.

For 15 years prior to 1885 two companies used in common and made and sold certain patterns of scythestones. In 1876 they formed a pool, and for nine years sold their manufactures under the same labels. In 1885 they united with others to form a pool, all the members of which sold like patterns under like labels. In 1886 plaintiff company bought out one of the original companies, and it and the other original company only continued to make and sell such labels till 1890, when plaintiff bought out the other original company. *Held*, that there had been no such indiscriminate use of the patterns as would deprive plaintiff of its exclusive right.

2. SAME—EQUITABLE DEFENSE—QUALITY OF GOODS.

It is not an equitable defense to an action to restrain infringement of trade-mark that defendant's wares are equal in quality to those of plaintiff.

3. SAME—MISREPRESENTATION OF MANUFACTURER.

The difference between scythe and whet stones made and sold by plaintiff under the names of "Quinnebog," "Western Red Ends," "Star," "Diamond," etc., consisted mainly in patterns, size, and finish. Plaintiff's circulars stated that the various patterns were made at "Willow Creek Quarry," "Green Farm Quarry," etc., and "from selected Huron grit," and "from the best blue Huron grit;" but the context of the circulars showed that all were made at quarries in the same city. *Held*, that the fact that all were made from the same quarries or rock formation was not evidence of a material false statement, as the plaintiff had the right to associate one trade-mark with a name arbitrarily given to a part of his quarries, or to represent that the stones were made from "selected" or from "best blue Huron grit," so long as he furnished the same article and the same quality demanded by the preference of his customers.

4. SAME—RELIEF FOR FRAUD.

Where it clearly appears that defendants have closely imitated plaintiff's labels, patterns, and style, and have done obvious damage to his business from the business methods employed, plaintiff is entitled to relief on the ground of fraud, independently of the validity of his trade-marks.

In Equity. Bill by the Cleveland Stone Company against John E. Wallace, Lee R. Wallace, William H. Wallace, and Margaret Wallace to restrain infringement of trade-mark. Temporary injunction granted.

Elbridge F. Bacon, for complainant.

John D. Conely, for defendants.

SWAN, District Judge. This is a motion for an injunction to restrain the defendants from the selling and offering for sale scythestones under certain names and labels which are claimed by plaintiff as trade-marks. The plaintiff is a corporation organized in 1886 under the laws of Ohio, and since that date has been, and still is, engaged in the manufacture of scythestones, whetstones, and grindstones. Its quarries and factories are situate at and near Grindstone City, Mich. Upon its organization in 1886 it purchased the quarries, factories, and plant at Grindstone City, and the good will of Worthington & Sons, who had carried on business there for 15 years or more. On the 23d of January, 1890, plaintiff bought the quarries, plant, business, good will, and entire property of the Lake Huron Stone Company, at Grindstone City, where the latter company had been quarrying and manufacturing grind and scythe stones since 1869. The Lake Huron Stone Company and Worthington & Sons, up to the time of said sales to complainant, had for

many years made, among other brands of scythe and whet stones, the "Diamond," "Western Red Ends," "Quinnebog," "Star," "Clear Grit," and "Lake Huron," and others, which had taken well with the trade, and were widely known as the product of the Grindstone City quarries, which stood well in the esteem of the western trade. For some years plaintiff's vendors, the Lake Huron Stone Company and Worthington & Sons, had by agreement made and sold certain styles of scythe and whet stones under the same trade-mark or designation, except that the labels of each firm, which were in all other respects *fac similes*, truly stated the name of the manufacturer; as, for example, Worthington & Sons made and sold scythe and whet stones under the name "Quinnebog," but labeled as the manufacture of Worthington & Sons, instead of "Lake Huron Stone Co.," which was the originator and owner of that trade-mark. In like manner, the Lake Huron Stone Company labeled as "Western Red Ends" certain patterns of their manufacturers, similar in size, form, and appearance to those of that name made by Worthington & Sons, designating themselves on the labels (which were otherwise identical) as the makers, instead of Worthington & Sons. It also appears that in 1870 these two firms formed a pool or association at Chicago, Ill., to supply the western markets, under the name of the "Western Grindstone Company." This association continued until 1886, when plaintiff, as stated, bought out Worthington & Sons. The Western Grindstone Company had its warehouses at Chicago, and there received the products of the quarries of its two constituent firms, and filled the orders of its customers equally from the stones supplied by each, and used as trade names on the scythe and whet stones the words "Star," "Clear Grit," "Lake Huron," "Quinnebog," and other marks or names peculiar to each subordinate concern, or common to both, though for a time varying the form and color of the labels from those employed by the makers. Later in its history the Western Grindstone Company adopted labels on these various styles and patterns, designating either Worthington & Sons or the Lake Huron Stone Company as makers, in addition to its own name. In January, 1883, the Lake Huron Stone Company, Worthington & Sons, J. J. McDermott & Co., of Ohio, and the Berea Stone Company, of Ohio, united to form a pool under the name of the Berea & Huron Stone Company, and under that name catalogued and offered for sale the various brands and patterns of scythe and whet stones claimed in the bill to be the trade-marks, brands, and patterns of complainant. This pool continued until 1886, when it was dissolved by the sale by Worthington & Sons to complainant. The affidavits also show that Cooper, Grevey & Co., the predecessors in business of Worthington & Sons, had, in 1870, made and sold scythestones of like patterns under similar labels and of the same names with these made by the Lake Huron Stone Company, without objection by the latter. Since 1886, however, no person, firm, or corporation other than complainant and the Lake Huron Stone Company claimed, used, or simulated the labels, names, or trade-marks here in

controversy, and this is admitted by the answer. They preserved the general style and appearance of the label now in use by plaintiff, including the names applied to their various patterns of scythe and whet stones, and those names and labels, thus applied, have been known and associated to the trade for many years.

There was at one time a stone known to the eastern trade as "Quinnebaug," made from a Connecticut quarry, which was exhausted some 30 years. The name consequently fell into disuse, and at the time of its adoption by the Lake Huron Stone Company, in 1869 or 1870, there had not been for many years a stone known to the trade by that name, though some four or five years later brands known as "Premium Quinnebaug," and "Extra Quinnebaug," made from stone of obviously different character, formation, and color, were introduced into the eastern markets. The eastern "Quinnebaug" referred to were also marked by labels bearing no resemblance to those used by plaintiff and its predecessors. So far as appears from the affidavits read on the hearing of this motion, the Lake Huron Stone Company, and the Cleveland Stone Company, as the vendee of Worthington & Sons, have used the names "Quinnebog," "Star," "Diamond," "Clear Grit," "Lake Huron," and "Western Red Ends" without interference by competitors in business, certainly since 1886, and the first-named company and Worthington & Sons were the only claimants of those trade-marks and labels for 15 years before that date.

The affidavit of Robert Wallace, submitted by defendants, clearly shows that the Lake Huron Stone Company made the "Star," "Clear Grit," and "Lake Huron," "Quinnebog," "Tiger Crown," and "Harvest Queen" brands from 1868 to 1890, and for nearly as long a time the "Western Red Ends," though he disparages the exclusive right of that company to the names and labels as trade-marks, and denies that it ever claimed such right, or objected to their appropriation by others. The force of this denial is greatly impaired by the fact that the affiant is the father of the defendants; and, though he was a member of the partnership known as the Lake Huron Stone Company from the year 1868, and joined in the sale of its quarries, business, good will, and property to the plaintiff in January, 1890, and therefore much should be conceded to his means of knowledge, the fact that he now appears to depreciate his grant, when he covenanted with the plaintiff, as one of the conditions of the sale, not to engage in the business in that vicinity for 20 years, militates most strongly against the credibility of his denials. His relationship to the defendants, and the tenor of his statements, are more persuasive that, while he nominally observes his covenant, and has not personally engaged in the business from which he agreed to abstain, his interest now lies in the direction of detracting from the value of the property which he sold, and for which he received his share of the purchase money.

The formation of the Huron Grindstone Company, under which name defendants are carrying on business and offering to the trade the various brands and patterns of scythe and whet stones under the same names,

and labeled in identically the same way, (excepting only the substitution of the name "Huron Grindstone Co." for "Cleveland Stone Co.,") followed too closely on the heels of the sale by the Lake Huron Stone Company to plaintiff to entitle this affidavit to be regarded with favor, even if the facts were doubtful. The proof is undeniable that since the defendants have associated themselves in their present business they have aimed directly at the trade and customers of the plaintiff by the use of almost exact counterparts of its trade-mark, and thus sought to reap the fruits of the enterprise and outlay made by plaintiff and its predecessors. While fair and open competition is entirely proper, and of public benefit, it is not permitted to a tradesman or manufacturer to appropriate the labels, brands, and names adopted by his rivals, nor to announce to the trade his ability and readiness to supply the latter's customers with the very article, under the same name and label for which the energy and means of the owner of the trade-mark have made a market. Neither is it permitted that he should so closely simulate the brands and labels of his neighbor that the public should be misled into purchasing his goods in the belief that they are the product or manufacture of those who introduced and gave them reputation. The circular to the trade issued by defendants at the formation of their partnership announced that they were prepared to fill all orders for grindstone and scythestones, (indicating the well-known brands "Quinnebog," "Star," "Clear Grit," "Western Red Ends.") Not content with this, they have simulated the style, design, color, and exact phraseology of the printed matter of the labels used by plaintiff to designate those patterns, excepting only the manufacturer's name, for which they have substituted their own, "Huron Grindstone Company." The affidavits leave no doubt that by these means, and by cutting the plaintiff's prices on these wares, the defendants have made large inroads upon the business built up by plaintiff, and have, and still are, doing plaintiff great injury. So closely, indeed, have the defendants imitated the patterns of plaintiff, its packages, and the style and finish of its products, that Robert Wallace, in his affidavit (made *alio intuitu*, indeed, but for that reason most significant) says that, "if a box of scythestones of any such names should be brought to the city of Detroit without having upon it the name of the person by whom it was manufactured, and submitted to persons in the trade who were familiar with said scythestones, such person would be unable to tell whether the same was manufactured by the Cleveland Stone Company or by the defendants in this case." If we add to these features of resemblance between the products themselves the almost exact duplication of the labels, the likelihood of the public being deceived in the purchase of defendants' goods is almost a certainty, and may well be inferred as a corollary from the facts, even if the affidavits did not expressly establish the injurious effects of such competition.

1. The first point urged for the defense is that plaintiff has failed to show an exclusive right in the use of these names and labels as trade-marks; but the fact that the Lake Huron Stone Company and Worthington & Sons, up to 1885, used them in common, and made and sold

the patterns of scythestones involved in this suit, and that from 1876 to 1885 those firms, under the name of the Western Grindstone Company, sold their manufactures under similar labels, and put up in like packages, and during the year 1885 united with others to form the Berea & Huron Stone Company, which also offered and sold scythestones of like patterns and under like labels with those theretofore used by the Lake Huron Stone Company and Worthington & Sons, deny to brands and labels thus indiscriminately used the protection of a court of equity.

It is true that the owner of a trade-mark cannot permit its use by others to such a degree that it will lose its original significance to the public as an index and assurance of the origin, qualities, and characteristics of the article to which it is attached, and still ask the aid of the courts to prevent its use by others without the owner's consent. He should be regarded as having renounced whatever of profit and reputation the trade-mark had won for him, and as having consented to foist upon the public a spurious substitute for that to which he had given repute, and as having disclaimed his original exclusive right. There is, however, no occasion for the application of that doctrine to the plaintiff in this case. Whatever objections might have been raised to the relief here sought were the Lake Huron Company or Worthington & Sons asking preventive aid against the use of their trade-marks by Cooper, Grevey & Co. or other unlicensed appropriators, it is clear that the transactions relied on as depriving plaintiff of protection do not affect it. Those transactions are too remote in time, and their demerit, if any, is not imputable to the plaintiff. From 1885 to 1890—a period of five years before the defendant entered into this business—plaintiff and the Lake Huron Stone Company alone employed the trade-marks and labels and made the patterns of the scythestones which the defendant is now offering to the trade. Since plaintiff's purchase of the Lake Huron Stone Company's property, quarries, and good will in January, 1890, and up to the time defendants began manufacturing and selling, no person or corporation has assumed to make or vend scythestones of its patterns, or questioned its exclusive right to use the labels and trade-marks in controversy to identify its wares to the public. Since its organization, plaintiff has, in co-operation with the Lake Huron Stone Company, and latterly alone, at great expense, and by advertising and other legitimate methods, built up a large and lucrative trade, and has by its enterprise established a reputation for its manufactures which gives them a ready sale to the trade. To permit defendants to purloin the fruits of their enterprise and investments, and encroach upon their business, either on the pretext that plaintiff's predecessors in the business had years ago submitted to a like injury without complaint, or on the plea that at one time the trade-mark had been enjoyed by others than its originator, would be a denial of justice. While it is commonly said that to entitle the owner of a trade-mark to protection against infringers his right to its use must be exclusive, it is not meant thereby that no other than the originator has rightfully employed it. Such a right is property transferable and descendible, and may be the subject of ownership by two or

more, without impairing the claim of its owners to redress for its unlawful use by others. *New York Cement Co. v. Coplay Cement Co.*, 45 Fed. Rep. 212; *Kidd v. Johnson*, 100 U. S. 617; *Chemical Co. v. Meyer*, 139 U. S. 540, 547, 11 Sup. Ct. Rep. 625; *Burton v. Stratton*, 12 Fed. Rep. 696, 704. The right to protection for such property is founded on two considerations: (1) That the owner, by its adoption and use, has acquired a property which to him is valuable; (2) that the use of the symbol or device in such a manner as to mislead the public as to the origin of the article is a fraud alike upon the purchaser and the proprietor whose trade-mark is simulated, his sales thereby lessened, and his reputation perhaps discredited by the inferiority of the article substituted for his manufacture. No definite length of time is requisite to confer this right of property, provided the injured party has, by priority of adoption, appropriated the name or symbol as peculiar to his merchandise, and indicative of its place of manufacture. He meets this requirement even if he selects a name or symbol the use of which had been abandoned by others when he employed it. *O'Rourke v. Soap Co.*, 26 Fed. Rep. 576-578.

Whether, by their co-operation at Chicago under the name of the Western Grindstone Company, or their subsequent association with McDermott & Co. and the Berea Stone Company, the Lake Huron Stone Company and Worthington & Sons became partners, it is unnecessary to decide. It is fairly inferable, however, that the agreement under which they were thus associated regarded the trade-marks which each party contributed to the several concerns as reverting to their original proprietor on the termination of the pool, as might lawfully be done without detriment to the trade-mark on the dissolution of a partnership. No deceit was practiced upon the public, as the origin and place of manufacture of the brands were truly stated and catalogued. In short, these business arrangements were mere temporary licenses or assignments of proprietary rights in the names, symbols, and patterns, of which no one could complain. But, were this otherwise, the lapse of time since the expiration of the associations referred to, and the adoption and undisputed use by plaintiff and its predecessors of the designs and names affixed to their wares, has sufficed to heal the infirmity, if any, which might otherwise have been charged against plaintiff's title, even were plaintiff's predecessors asking the relief here prayed, and, *a fortiori*, in favor of plaintiff, who is a stranger to the transactions urged against its exclusive right.

2. It is next argued as an equitable defense that defendants' wares are of equal quality with the plaintiff's. Many of the defendants' affidavits are framed on the theory that the court will in this class of cases inquire into the comparative excellence of the merchandise of the parties. That issue is not material here. Where the infringer has, by the introduction, under simulated trade-marks, of greatly inferior articles, both deceived the public into their purchase and discredited the integrity and reputation of the proprietor of the trade-mark, the two considerations exist which impel courts to act at the instance of the injured party, viz.,

the protection of the public against the fraud, and redress of the private wrong done the individual. But it is not essential to the latter's relief that the deceit practiced should be actually injurious to the public. It is enough if his right has been infringed, and his business impaired, by the false colors of his competitor. *McLean v. Fleming*, 96 U. S. 252. In fact, a more permanent injury is inflicted upon the tradesmen whose goods are supplanted in the esteem of his customers by those of equal quality, offered under his trade-mark, and at lower prices; since the competition of an inferior article is likely to be ephemeral. In this view the excellence of the counterfeit intensifies the wrong done to the plaintiff, and is a cogent argument for his right to reparation, although the public have suffered no actual injury.

3. Was there any misrepresentation as to the manufacturer, or place of manufacture, of the scythestones for which the plaintiff asks protection, which ought to bar the relief it seeks? The ground on which courts deny their aid to articles thus put forth is that a party who seeks equity must come with clean hands, and, if his case discloses fraud or deception, courts of equity will not interfere in his favor. *Medicine Co. v. Wood*, 108 U. S. 218, 225, 2 Sup. Ct. Rep. 436; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Fettridge v. Wells*, 4 Abb. Pr. 144; *Seabury v. Grosvenor*, 14 Blatchf. 262. These cases, and numerous others in which the same doctrine is followed, proceed upon the ground that the complaining party, either in his trade-mark or in the business connected with it, has made material false statements to enhance the merit of his goods, by claiming for them an origin, ingredients, materials, or process of manufacture which they lack, and which, singly or together, commend them to public confidence, which is thereby betrayed. It is claimed that the case of the plaintiff is brought within the operation of this rule by its own and its predecessors' circulars and catalogues, stating that the various patterns and brands of scythestones in controversy are made at, *e. g.*, the "Willow Creek Quarry," "Green Farm Quarry," "Pt. Au Barques Quarry," etc., and "from selected Huron grit," "from the best blue Huron grit," etc., whereas the stones of various names were made from the same quarries. The context in which these statements are found makes it plain that the quarries thus designated are located at Grindstone City, Mich., and in some cases this is expressly stated. There is nothing to prevent plaintiff from thus nominally subdividing its properties at that place, or giving to these titular subdivisions such names as fancy may suggest. There is in such nomenclature no material false statement, nor is the public misled into the purchase of one class of goods instead of another. If the manufacturer chooses to associate one brand or trade-mark of his goods with a name arbitrarily given to a part of his works or quarries, no wrong is done to the public, so long as he furnishes the identical article demanded by the preference of his customers. The representation that the stones are made from "selected" or "the best blue Huron" grit are substantially satisfied if the quality of the materials used is not inferior to that which the trade have accepted as of that grade.

The points of difference between the stones made and sold by plaintiff under the names of "Quinnebog," "Western Red Ends," "Star," "Diamond," "Clear Grit," "Lake Huron," mainly consist in patterns, size, and finish. The "Western Red Ends" are distinctly marked in the manner suggested by the name. The "Quinnebog" is characterized by a peculiar finish. The fact that all are made from the same quarries or rock formation is not evidence of a material false statement. The names are employed in accordance with business usage, to signify varieties of shape, size, etc., which have acquired a reputation with the trade, and to meet its demands. It is nowhere said that there is any difference in the characteristics or quality of the material from which the different patterns are made. The source whence this is derived, the place of its manufacture, and the maker's name, are truly set forth, and, as the quality of the plaintiff's goods is not questioned, no rule of equity or public policy is violated in allowing it to style its various manufactures by as many different appellations as may be necessary in their judgment to invite and secure markets for their merchandise, if in so doing no material false statement is made.

4. The close imitation of the plaintiff's labels, patterns, and style evidenced by the exhibits of both parties and the catalogues and circulars issued to the trade, and the obvious damage to plaintiff's business from the methods employed by defendants, entitle plaintiff to relief on the ground of fraud, independently of the validity of the trade-marks in question. *Lawrence Manuf'g Co v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 402; *Burton v. Stratton*, 12 Fed. Rep. 696; *White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Societe Anonyme v. Western Distillery Co.*, 43 Fed. Rep. 416; *Avery v. Meikle*, 81 Ky. 73; *Pierce v. Guittard*, 68 Cal. 68, 8 Pac. Rep. 645; *Fillery v. Fassett*, 44 Mo. 173. The admitted facts, and the perfect correspondence of defendants' labels in size, form, color, design, ornamentation, and phraseology, and in the names of the patterns, leave no doubt of defendants' intention to make a market for their goods with the plaintiff's customers by a close imitation of its trade-mark. The means employed were adopted to accomplish the purpose, and the plaintiff has suffered damages which it is the duty of the court to arrest and redress. The motion to dissolve the restraining order is denied, and a temporary injunction will issue according to the prayer of the bill.

LEIGHTON *et al.* v. YOUNG *et al.*

(Circuit Court of Appeals, Eighth Circuit. September 20, 1892.)

No. 123.

1. EJECTMENT—OCCUPYING CLAIMANTS—FEDERAL COURTS—EQUITY JURISDICTION.

The rights given by the Nebraska law (Cobbey, Consol. St. c. 47, §§ 4386-4389) to an occupying claimant after a judgment in ejectment against him are enforceable in the federal courts, and when such court has obtained jurisdiction in equity by means of a bill to enjoin the execution of a writ of possession it will retain the cause for the purpose of enforcing all the rights given by the statute, especially as such enforcement requires the ascertainment of the value of the lands and the improvements, and an accounting of rents and profits, which matters are not exclusively cognizable in law.

2. SAME—REMEDIES—FEDERAL PROCEDURE.

In enforcing such rights, however, the federal court is not bound to follow the method of procedure prescribed by the statute, namely, the appointment of three appraisers to ascertain the value of the land, the improvements, and the rents and profits, but may refer the cause to one or more commissioners, or to a master, according to its ordinary procedure.

3. SAME—CONSTITUTIONAL LAW.

Cobbey, Consol. St. Neb. 1891, c. 47, §§ 4386-4389, providing that a successful plaintiff in ejectment shall, at his election, either pay the occupant the present value of the improvements, or convey title to him, and receive in return the value of the land as of the date at which the occupant entered thereon, is a valid exercise of the legislative power of the state.

4. SAME—CONFLICTING SECTIONS—REPEAL.

The last clause of section 4380, containing an implication that, unless the occupant pays the value of the land on demand of the owner, he must be turned out of possession, which was a part of a previous act, but is in conflict with subsequent sections of this act in amendment thereof, is superseded by such sections.

5. SAME—FORFEITURES—EQUITABLE REMEDIES.

The object of the act being to prevent a forfeiture of the interests of either occupant or owner, a court of equity should treat them as having rights in the property in proportion to the value of the improvements and the land, respectively; and, in case neither party is willing to compensate the other as provided in the act, the court, upon motion of either, will decree a sale, and distribute the proceeds in such proportion.

6. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

When a federal court construes a state statute with reference to a new question, and the state court of last resort subsequently interprets it differently, the federal court should thereafter conform to such interpretation.

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Bill by Harriet W. Leighton and Charles M. Leighton against Rowena Young, Ellis L. Bierbower, United States marshal, and James H. McMurtry, to restrain the execution of a writ of possession by the United States marshal until the value of certain improvements should be paid. Injunction granted, and decree for complainants on certain conditions. Complainants appeal. Reversed.

Statement by CALDWELL, Circuit Judge:

In 1884, Rowena Young brought suit in ejectment in the circuit court of the United States for the district of Nebraska against Harriet Leighton and Charles M. Leighton for the land which gave rise to this suit. On the trial of the ejectment suit the land was adjudged to belong to the plaintiff in that suit. The defendants were *bona fide* occupants and claimants of the land, and entitled to the rights secured to such occupants by the occupying claimant's law of that state.

In answer to an inquiry submitted to them by the court, at the request of the parties, the jury in the ejectment suit returned a special finding to the effect that the land was worth \$6,000 without the improvements, and that the improvements were worth \$11,000. The statutory mode of proceeding to ascertain the value of the land and the improvements was not observed, and the special finding returned by the jury was not made the basis of any order or judgment of the court in the case. On the 17th day of December, 1888, judgment was entered in favor of the plaintiff for the recovery of the land. See 37 Fed. Rep. 46. In this state of the record, the plaintiff in that suit, on the 19th day of March, 1889, without paying or tendering to the defendants the value of their improvements, caused a writ of possession to issue on the judgment in ejectment, and the marshal was about to put the defendants out of possession of the land, when they filed the present bill against the plaintiff in the ejectment suit and the marshal, setting up the foregoing facts, and their rights as occupying claimants, and praying that the execution of the writ of possession be enjoined until the complainants had been paid the value of their improvements on the land. The injunction was granted.

The defendant answered the bill, admitted the special finding of the jury in the ejectment suit, but denied that it was binding on either party as to the value of the land and improvements; alleged that it was merely made "for the purpose of that hearing, and for the purpose of appeal, if necessary;" that the land was worth more, and the improvements less, than was stated in the special finding; admitted the defendant had sued out a writ of possession upon the judgment in ejectment, "and that this defendant desires possession of said property, or that the said plaintiff shall proceed according to law to have the value of said property fixed, and duly tender to this defendant the value of said property."

The cause was heard on the bill, answer, and replication before Mr. Justice BREWER, then circuit judge, and it was decreed that the special verdict did not estop the parties on the question of the value of the land and improvements, and a master was appointed, with directions to ascertain and report (1) the value of the lasting and valuable improvements erected on the land by the complainants before they received actual notice of the defendant's claim; (2) the net annual value of the rents and profits received by the complainants after they received notice of the defendant's title by service of process, which amount was to be deducted from the value of the improvements; (3) the value of the land at the time the complainants went into possession thereof, or when they commenced to pay taxes thereon, as the case might be. On the 8th of November, 1890, the master reported that the value of the lasting improvements put upon the land by the complainants prior to receiving notice of the defendant's claim to the land was \$10,368; that the value of the rents since the service of the process in ejectment was \$180, leaving \$10,188 as the net value of the improvements after deducting the rents; that the value of the land at the time the complainants became the actual occupants thereof, which was on the 28th day of April, 1881,

was \$1,300. The order of reference to the master embraced only these matters, but the parties stipulated that the master might report the value of the land without improvements at different dates, which he did as follows: The value of the land March 12, 1886, the date of the verdict in the ejectment suit, was \$2,000; 12th of December, 1888, the date of the judgment in the suit, \$4,500; 27th of December, 1889, the date of the order of reference to the master, \$5,000; and at the date of the master's report, 8th of November, 1890, \$5,500. No exceptions were filed to the master's report. J. H. McMurtry, having purchased the land from Rowena Young, was, upon his own motion, substituted as defendant. The court below decreed "that the defendant has the right to elect whether he will take the value of the land or shall pay for the improvements; and, the defendant having filed in court his election to take the value of the land, and tendered his deed therefor, and placed the same in the hands of the clerk of this court for future delivery, it is therefore considered and adjudged that, unless said plaintiff within ninety days pay to said defendant the sum of five thousand five hundred dollars, with interest from the date of the master's report, November 8, 1890, at seven per cent. per annum, this injunction shall stand dissolved, and this cause be dismissed, at plaintiff's costs." From this decree the complainant appealed.

The sections of the Nebraska statute most material to the consideration of the case read as follows:

"4386. If upon the final hearing there shall be found a balance in favor of the occupant or unsuccessful claimants, the person proving the better title may either demand of the occupant or claimant the value of the real estate without improvements, as shown by the appraisement, and tender a general warranty deed for the real estate in question to such occupant or claimant, or he may pay into court the balance so found due such occupant or claimant within such time as the court shall allow in its final decree.

"4387. If the successful claimant shall elect to pay, and does pay, to the occupant or claimant the balance found due him on the final hearing within such time as the court shall direct, then a writ of possession shall be issued in his favor against such occupant, or decree shall be entered against such unsuccessful claimant, as the case may require.

"4388. If the successful claimant shall elect to receive the value of the real estate without improvements, to be paid by the occupants or claimant within such time as the court shall direct, and shall tender a general warranty deed for such real estate to the occupant or claimant, and such occupant or claimant shall refuse or neglect to pay said sum of money to the successful claimant within the time allowed by the court for that purpose, then such successful claimant shall deposit with the clerk of the court the amount found due the occupant or claimant, and thereupon a writ of possession shall be issued in favor of such successful claimant, or decree shall be entered in his favor, as the case shall require.

"4389. The occupant or claimant shall in no case be evicted from the possession, or deprived of his right in the premises, except as provided in the two preceding sections; and, in case the successful claimant shall neglect to elect to take said real estate with improvements, or to convey the same to the occupant or claimant within such time as the court shall direct, then decree shall be entered in favor of the occupant or claimant upon his paying into the court the value of the real estate without improvement. Such decree

shall have the effect to transfer and convey to such occupant or claimant the title and rights of the successful claimant." Cobbey, Consol. St. Neb. 1891, c. 47, §§ 4386-4389, pp. 933, 934.

N. S. Harwood, John H. Ames, and T. M. Marquett, for appellants.

Joseph R. Webster and R. S. Hall, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) It is objected by the appellees that the mode of proceeding adopted by the complainants does not conform to the requirements of the occupying claimant's law, and that the suit was brought out of time. Where a state statute creates a right and prescribes a mode of proceeding to enforce it in the state courts, the courts of the United States, in that state, will enforce the right, but not always in the mode prescribed for enforcing it in the state courts. The state courts may be authorized to enforce an equitable right by an action at law, or a legal demand by a suit in equity, or to confound the two jurisdictions in the same suit. But in the courts of the United States the distinction between legal and equitable rights and modes of proceeding must be observed. Those courts will enforce the right by the appropriate remedy, having regard to these distinctions. The Nebraska statute does not contemplate any proceeding to establish the occupant's claim for the improvements until after final judgment has been rendered in favor of the plaintiff in the ejectment suit. Any time after that, and while the occupant remains in possession, he may secure the benefits of the statute by applying to the court for the appointment of three appraisers, who are to assess the value of the land at the time the occupant went into possession, and the value of the valuable and lasting improvements erected thereon by the occupant prior to the time he received actual notice of the owner's claim, and to take and state an account of the rents and profits of the land received by the occupant after he had notice of the owner's title by the service of process. The title to the land is no longer in controversy. That issue has been tried to a jury. What remains to be done is to ascertain the value of the land and improvements, and take an account of the rents and profits as a basis for a decree. If these matters are solely cognizable at common law, then, as they exceed \$20 in value, they must, under article 7 of the amendments to the constitution of the United States, be submitted to a jury. But they are not, and never were, exclusively cognizable at common law. The mode of procedure prescribed by the statute which creates the right dispenses with a jury, and conforms very nearly to the established chancery practice. That the bill for injunction was well brought is indisputable. Whether the injunction should stand, and what decree should be rendered in the cause, depended upon the taking and stating of several accounts. The jurisdiction having attached on the injunction, the court will retain the cause, and take and state the accounts necessary to a final decree. *Ober v. Gal-*

lagher, 93 U. S. 199; *McMurray v. Van Gilder*, 56 Iowa, 605, 9 N. W. Rep. 903. It would be no objection to the exercise of this jurisdiction if it called for adjudication upon purely legal rights, and conferred purely legal remedies, for, where the controversy is one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved. *Preteca v. Land Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, 50 Fed. Rep. 674; *Holland v. Challen*, 110 U. S. 15, 25, 3 Sup. Ct. Rep. 495. Courts of equity always had concurrent jurisdiction with courts of law in matters of account, where they were too complex for a jury to deal with them understandingly, or where, as in this case, the stating the account is in aid of an equity or right not adequately available at law. In the course of the proceeding, orders and decrees have to be passed, which, if not within the exclusive competency of a court of chancery, are undoubtedly within its jurisdiction. It is obvious that the flexible forms and modes of proceeding of a court of equity are much better adapted to the execution of the law than is the machinery of a common-law court. This was decided by the supreme court of the United States more than 60 years ago in a similar case. *Bank v. Dudley*, 2 Pet. 491. "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. 215; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Preteca v. Land Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, 50 Fed. Rep. 674.

The case being one of equitable cognizance, the federal court, sitting in chancery, will execute the law by the customary chancery methods and modes of proceeding, and, if they are not adequate to the purpose, will devise methods that are. The equity practice in the courts of the United States is not regulated by the state statutes. Nevertheless, in the exercise of its chancery powers, the court below might have conformed to the state practice by directing the marshal to summon three appraisers, and this probably would have been the better way, as it is desirable, when a court of the United States is enforcing a right created by state statute, to follow, as near as may be, the practice prescribed by the state statute for the enforcement of the right secured thereby. But it was equally within the discretion of the court to appoint one or more commissioners, or to refer the matter, as was done, to a master. The appellees brought their suit in apt time, (*Railroad Co. v. Dobson*, 17 Neb. 457, 23 N. W. Rep. 353, 511; *Page v. Davis*, 26 Neb. 671, 42 N. W. Rep. 875,) and in the proper forum, (*Bank v. Dudley*, *supra*.)

It is now too late to question the constitutionality of statutes which secure to occupying claimants compensation for their improvements. The reasoning by which they are supported as just measures of public policy, and their constitutional validity maintained, is too trite to require or justify repetition. If authority can ever silence contention, then the validity of the Nebraska statute, as the court construes it, is not open to debate. For a list of the cases, see *Childs v. Shower*, 18 Iowa,

261, 269; *Fee v. Cowdry*, 45 Ark. 410; 10 Amer. & Eng. Enc. Law, tit. "Improvements." The cases cited by the learned counsel for the appellees have no application to the Nebraska statute. In *Green v. Biddle*, 8 Wheat. 1, an early statute of Kentucky on the subject was held to be in conflict with the terms of the compact between Virginia and Kentucky and void for that reason. Nothing was decided affecting the constitutionality of such laws. In *McCoy v. Grandy*, 3 Ohio St. 468, it was decided that an act which gives to the occupant the first option to take pay for his improvements, or to pay for the land and keep it, was unconstitutional. Under the Nebraska statute, the first option is given to the owner to pay for the improvements, and keep the property. And the complaint of the owner, in this case, is not that the statute does not give him the option to pay for the improvements and keep the land,—for it is conceded that the statute does give him that right,—but the complaint is that it does not also give him a further option to compel the occupant to buy the land at its appraised value, or forfeit his possession and all claim for his improvements. In his answers he says that he "desires * * * that the said plaintiff shall proceed according to law to have the value of said property fixed, and duly tender to this defendant the value of said property," and that, failing so to do, he be dispossessed. In the case of *Childs v. Shower*, 18 Iowa, 261, a statute which authorizes a general money judgment against the owner in favor of the occupant for the value of the improvements, and a general execution to enforce its collection, was held unconstitutional; but under the Nebraska statute the value of the improvements is simply declared to be a lien on the land, and there is no provision for enforcing it, either by general or special execution. Statutes providing that the value of the improvements may be adjudged to be a lien on the land, and that the occupant may retain the possession until he has been paid the value of the improvements, are held valid everywhere. *Childs v. Shower*, *supra*; *Fee v. Cowdry*, *supra*; *Claypoole v. King*, 21 Kan. 612; *Stephens v. Ballou*, 27 Kan. 594; *Page v. Davis*, 26 Neb. 671, 42 N. W. Rep. 875; *Dworak v. More*, 25 Neb. 741, 41 N. W. Rep. 778; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. Rep. 701. In Arkansas the land is not valued, but only the improvements,—the value of which must be paid by the owner before he can dispossess the occupant. The value of the improvements is a lien on the land, to satisfy which the land may be sold. *Mansf. Dig. Ark. c. 55, §§ 2644, 2645*. This statute, though retrospective in its operation, has always been held to be constitutional. *Fee v. Cowdry*, *supra*; *Beard v. Dansby*, *supra*. And in some states the failure of the owner to pay the assessed value of the improvements upon the land within the time fixed by the statute or the order of the court operates to extinguish his right of property in the land, and vests it in the occupant. *Flynn v. Lemieux*, 46 Minn. 458, 49 N. W. Rep. 238; *Craig v. Dunn*, 47 Minn. 59, 49 N. W. Rep. 396; *Stump v. Hornback*, 94 Mo. 26, 35, 6 S. W. Rep. 356.

Complaint is made of the clause of the act which provides that the land shall be valued as of the date of the occupant's entry. It will some-

times occur that the land was more valuable at the date of the occupant's entry than it is at the time of trial. As applied to such cases, is the provision obligatory? And is it only to be set aside when it would advantage the owner to do so? The question comes to this: Has the owner the exclusive right to fix the date for the valuation, and is this a right guarantied to him by the constitution of the state? We think not, and, if not, then it is a matter of practice and evidence resting in the discretion of the legislature or the courts. If the legislature does not fix the date, the courts must. The courts would probably differ as to what the date should be, and for the sake of uniformity, and to silence contention, it was a wise exercise of legislative discretion to make the rule uniform. The objection that the rule will not always operate equitably, if well founded in fact, cannot affect its constitutional validity; but it is by no means certain that the rule is inequitable. It is a familiar rule that the actual possession of land is notice to the whole world of the occupant's rights. In contemplation of law, the owner has notice of the occupant's entry upon the land, and his right of action accrues at that time. Having this notice, he is silent, and makes no claim. His moral obligation to speak is great. In the mean time the *bona fide* occupant, who purchased and paid for the land, goes forward, and makes valuable improvements upon it, in the honest belief that he owns it. The owner finally breaks silence, and asserts his claim. After obtaining judgment for the land, he declines to pay the value of the improvements and keep his land, but demands of the occupant the value of the land. Is there any injustice in saying to such an owner, as this statute does in effect: "You were silent while the occupant in good faith was improving the land and adding to its value, and if you now decline to pay for the improvements, made under these conditions, you must be content to have the land valued as of the date you ought, in justice and fairness to the occupant, to have made known your claim." This is but applying to this class of cases a principle as old as jurisprudence itself. The equity of the statute finds support in another view. It is the actual occupants of the lands of the country who lay out and open the public roads, build the schoolhouses, and erect and support churches; and it is these and such like public improvements that are the chief factors in increasing the value of the lands. As a rule, those who recover the lands from the *bona fide* settlers have contributed nothing towards these public improvements, and have done nothing to add to the value of the lands. As to them, the increase in value from these and such like causes is an unearned increment. But with the settlers on the lands it is otherwise. Their time and money have been expended in making and maintaining these public improvements, which, while they operate to increase the value of the lands, add nothing to the value of the improvements on the lands when they come to be valued separately from the lands. It is not very obvious, therefore, what superior equity the plaintiff has over the occupant to the increase in the value of the land, produced by the money and labor of the occupant. But the statute is impartial. It fixes as a uniform date for the valuation the date of the occupant's entry upon the

land, without regard to the question whether the land was worth more or less at that time than at another. In its practical operation it may sometimes make for the occupant and sometimes for the owner, but it probably comes as near working out just results as any other fixed general rule that could be framed on the subject. At any rate, the legislature thought so, and that concludes discussion.

The fact must not be overlooked that the improvements are valued as of the date when they are least valuable. The occupant is not entitled to their costs, nor to their value when new, but only to their value at the time of the trial, which must be measured by the benefits which the owner will receive from them in their then condition. Story, Eq. Jur. § 799; *McMurray v. Day*, 70 Iowa, 671, 28 N. W. Rep. 476; *Childs v. Shower*, *supra*. While time may add to the value of the land, it is constantly deteriorating and diminishing the value of the improvements.

The state of Nebraska has legislated twice on the subject of the rights of occupying claimants. The first act was passed in 1873. That act provided that the occupant should not be thrown out of possession until he had been paid the assessed value of the improvements, unless he refused, upon demand of the owner, to pay the appraised value of the land. Gen. St. Neb. 1873, c. 51, § 1. The owner was given the option to pay the occupant the value of the improvements or to sell the land to the occupant at its appraised value at the date of the judgment; and, if he elected to sell, and the occupant declined to pay for the land within the time fixed by the court, he forfeited his possession and his improvements. *Id.* § 819. In practice it was found this act afforded small protection to many occupants. As a rule, the settlers who improved the lands were not opulent. They were most commonly poor men, who invested all their means in the first purchase of their lands and in improving them, and when their titles failed they were without the means to purchase the lands a second time. This was the plight of most of the occupants who stood in need of the protection afforded by an occupying claimant's law, but under this act there was no protection for them, unless they had money enough to buy the land a second time, and at its increased value. This they did not have, and as a result of their poverty the act confiscated the improvements to the use of the successful plaintiff in the ejectment suit. This was the state of the law when the act of February 23, 1883, was passed. That act was obviously passed for the purpose of affording to the occupant a larger measure of protection than he enjoyed under the act of 1873. This was effected by amending the statute in several important particulars. Under the act of 1873 the land was valued as of the date of the judgment. By the amendment of 1883 it is valued as of the date of the occupant's entry. Cobbey, Consol. St. Neb. 1891, c. 47, § 4383. The first act provided there should be a judgment in favor of the occupant for the value of the improvements without defining its nature or effect. By the last act this judgment is termed a "decree," and it is declared "such decree shall constitute and be a lien on said real estate." *Id.* § 4385. By the first act, if the occupant failed to pay the value of the land upon

the owner's election to convey, he was dispossessed, and lost his improvements. By the last act, if the occupant declines to purchase the land when a conveyance is tendered by the owner, the occupant still has the right of possession, and cannot be dispossessed until the owner deposits with the clerk of the court the value of the improvements. *Id.* § 4388. By the act of 1883 it is provided that "the occupant or claimant shall in no case be evicted from the possession, or deprived of his right in the premises, except as provided in the two preceding sections. * * *" *Id.* § 4389. The two preceding sections are sections 4387 and 4388. The first provides that, if the owner elects to pay the value of the improvements, and does so, a writ of possession shall be issued in his favor; and the second that, if the owner elects to sell, and the occupant declines to buy, then the owner must deposit the value of the improvements with the clerk of the court before he can have a writ of possession. The act as it appears in the general statutes still contains a clause which, taken by itself, would indicate a different policy. Its presence in the statute will now be explained. The act is a long one. In amending it the old act was copied in the main, the amendments being effected by striking out short sentences here and there in the sections and inserting others in their place; thus making the changes we have indicated. The last clause of the first section of the act (section 4380) contains an implication to the effect that, unless the occupant pays the value of the land upon demand of the owner, he must be turned out of possession. This clause was in the original act, and was proper enough there, and in harmony with the other provisions and the policy of that act; but it is now plainly in conflict with the subsequent sections of the act as amended in 1883, and with the obvious policy and purpose of those amendments, and was superseded by them.

Briefly, then, the legal effect of the amended act is to give the occupant a lien on the land for the value of the improvements, and the possession of the land until the improvements are paid for. He does not forfeit his right of possession, or his right to receive pay for his improvements, by declining to accept the owner's offer to sell the land, as was the case under the act of 1873. Nor does the owner forfeit his land by failing to pay for the improvements. The amended act was designed to relieve the occupant from a forfeiture of his improvements upon his failure to pay for the land, and not to impose on the owner a forfeiture of his land upon his failure to pay for the improvements. The odious feature which forfeited the interest of one party in the property, if he was unable or unwilling to pay for the interest of the other, is eliminated from the statute. Their rights are reciprocal in the respect that they are nonforfeitable. The owner of the land has the election to pay the appraised value of the improvements and take the property. If he declines to do this within such time as the court shall direct, then the occupant, upon paying into court the appraised value of the land, is entitled to a decree vesting the title in him. *Id.* § 4389. Beyond this the statute in terms does not go. It makes no provision as to what shall be done when the owner declines to pay the appraised value of the im-

provements, and the occupant declines to pay the appraised value of the land. Where this is the case, a court of chancery will not decree that either party thereby forfeits his rights. Equity abhors penalties and forfeitures, and will enforce the rights of parties by more rational and equitable methods. A court of chancery may be compelled to enforce a hard bargain, but never makes one itself. Equality is equity, and, in the absence of a statute expressly giving priority to a decree for the value of the land over a decree for the value of the improvements, equity will treat the parties as having rights in the property in proportion to the value of the lands and improvements respectively, and will divide the property, or the fund derived from its sale, accordingly.

The occupying claimant's law of Iowa, which has been in force for more than 40 years, makes the occupant and owner, if neither pays the other, tenants in common in proportion to the value of their respective interests. Referring to this provision of the statute, the supreme court of that state says: "And we think the provision of the act of 1851, making the parties, if neither paid the other, tenants in common, a most equitable way of adjusting the respective rights of the innocent owner of the property and the *bona fide* improver of the same." *Childs v. Shower*, *supra*. We agree with that court that the rule mentioned is an equitable and just method of adjusting the rights of the owner and occupant in such cases. Although what are usually termed "equitable considerations" may have induced the legislature to enact the statute securing to the occupant the right to pay for his improvements, the right, when once established under the statute, becomes an absolute, vested, legal right, of equal dignity with the right of the owner to be paid the appraised value of the land. *Flynn v. Lemieux*, 46 Minn. 458, 49 N. W. Rep. 238; *Craig v. Dunn*, 47 Minn. 59, 49 N. W. Rep. 396. Neither is entitled to preference over the other. The statute makes none, and the courts should not arbitrarily discriminate. As was said by the supreme court of Arkansas in reference to the occupying claimant's law of that state: "It is a rule for administering justice, and the principle of it is that no one ought to be enriched at the expense of another." *Beard v. Dansby*, 48 Ark. 183, 2 S. W. Rep. 701.

The supreme court of Kansas, in a general discussion of the occupying claimant's law of that state, holds that, if the owner elects to take the value of the land, and tenders a deed, thereupon "the land, in law and equity, becomes the property of the" occupant, "and all the plaintiff is then entitled to is the value of the land." And the court adds:

"In just what way he may recover that value the statute, as it now stands, does not prescribe. * * * Under the statute before it was amended in 1873, if the defendant did not pay the value of the land to the plaintiff within a reasonable time,—to be fixed by the court,—the plaintiff might then have his writ of eviction to obtain possession of the land; but under the law as it now stands he is not entitled to any such writ. Under the law as it now stands the plaintiff would probably be entitled to commence an independent action to subject the land with the improvement to the payment of his claim, and to sell his land with the improvements for that purpose, for undoubtedly his claim is a lien, and a prior lien, upon the land. It is possible, however,

that the plaintiff may have some other remedy. It is not necessary, however, in this case, to determine what the plaintiffs' remedy, or their best remedy, is. * * * *Stephens v. Ballou*, 27 Kan. 594.

The priority of lien in favor of the owner for the value of the land under the Kansas statute, it would seem, if it exists at all, is obtained by making the occupant an involuntary purchaser of the land, and compelling the owner to foreclose as upon a vendor's lien. We do not think this rule is applicable to the Nebraska statute. The spirit of that statute is what the letter of the statute is in Iowa; and where the owner does not pay for the improvements, and the occupant does not pay for the land, they should be regarded, in effect, as tenants in common in proportion to the value of their respective interests, with the sole right of possession in the occupant so long as the joint tenancy continues. How is this condition of things to be terminated? In a court of chancery the solution of this question is not difficult. The court, upon the motion of either the owner or the occupant, will decree the sale of the property, and distribute the proceeds of the sale to the parties in proportion to their respective interests. We agree with the views expressed in the brief of the learned counsel for the appellees, that equity, having obtained jurisdiction, will retain it, to do complete justice, and finally settle the rights of the parties, and that to that end the court may decree a sale of the property and the distribution of the proceeds according to the rights of the parties.

We have sought to follow the view of the supreme court of the state of Nebraska in its interpretation of this statute as far as it has been called upon to construe it. We recognize the fact that the judicial department of every government is the rightful exponent of its laws, and especially its supreme law; and, should the supreme court of Nebraska hereafter put a different construction on this statute, this court will thereafter conform to that interpretation.

The decree of the court below is reversed, and the cause remanded, with instructions to the court to enter a decree confirming the master's report, and declaring that the value of the land at the date of the complainants' entry thereon was \$1,300; that the value of the lasting and valuable improvements put upon the land by the complainants prior to receiving actual notice of the adverse claim of the defendant, after deducting therefrom the net annual value of the rents and profits of the lands received by the complainants after having received notice of defendant's title by service of process, is \$10,180; that said sum constitutes a lien on the land, and that the complainants are entitled to retain the possession of the land until said sum is paid, or the land is sold as provided by the decree; that the defendant has the option to pay the value of the improvements at any time within 90 days after the entry of the decree, and upon the payment thereof into the registry of the court all right and claim of the complainants to the possession of the land and the improvements thereon shall be thereby extinguished, and the defendant shall immediately be let into the possession of said property; that, if said defendant shall decline to exercise his option to pay for the im-

provements and take the property, the complainants shall, for 90 days after the expiration of the defendant's option, have the option to pay the appraised value of the land, and upon the payment thereof into the registry of the court the defendant shall execute and deliver to the complainants, or deposit in the clerk's office for them, a deed for said land, and, failing so to do, the decree shall operate to vest the legal title to said lands in the complainants; that, if the defendant declines to exercise his option to pay the value of the improvements and take the property within the time specified, and the complainants decline to exercise their option to pay the value of the land within the time specified, then, upon the motion of either the said defendant or the complainants, the court will direct said land, with the improvements thereon, to be sold by the master, after giving the usual notice, to the highest bidder for cash in hand. The master shall make the purchaser a deed for the property, which shall have the effect to vest in the purchaser all the right, title, estate, and interest of the said defendant and the complainants in said land and the improvements thereon, and said purchaser shall be let into the possession of the same. After paying costs of the suit, the remaining proceeds of the sale of said land and improvements shall be paid to the complainants and the defendants in the proportion that the value of the improvements bears to the value of the land.

STATE *ex rel.* BAIN, Treasurer, v. SEABOARD & R. R. Co.

(Circuit Court, E. D. North Carolina. September 20, 1892.)

1. RAILROAD COMPANIES—TAXATION—CONTRACT.

The charter of the Roanoke Railroad Company, granted in 1847, (Laws N. C. 1846-47, c. 87,) provides in section 24 that all the property of the company shall be vested in the stockholders in proportion to their shares, and "the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the term of 15 years; and thereafter the legislature may impose a tax not exceeding 25 cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent." Section 38 requires the president of the company to make to the legislature an annual report of receipts and expenditures. *Held*, that the right of the legislature to impose the charge did not depend upon the taxing power, but upon the charter contract by which it granted the franchise, and that the tax was properly payable by the corporation, and not by the individual shareholders.

2. SAME—LACHES.

As the right to the tax depended entirely on contract, the fact that the state never demanded any tax until 1891 did not debar it from then assessing the tax for each year from 1866, from which time the profits had exceeded 6 per cent. per annum. If laches could be imputable to the legislature in failing to make demand for so long a time, it was excused by the fact that no report of the company's business was ever made, as required by section 38 of the charter, until 1889.

3. SAME—EFFECT OF CONSOLIDATION.

The Roanoke Railroad lay entirely in North Carolina, but terminated at Margarettsville, on the border of Virginia. At the same time there existed a Virginia corporation, the Seaboard & Roanoke Company, owning a road lying mostly in that state, but extending to Margarettsville. In 1849 the legislatures of the two states consolidated the two corporations, the North Carolina act declaring (Laws 1848-49, c. 83, § 12) that the stockholders of the Seaboard & Roanoke Company were thereby constituted stockholders in the Roanoke Company, with the same rights, powers,

privileges, and franchises as if they had subscribed an equal amount in the Roanoke Company. *Held*, that this act operated to increase the shares of the Roanoke Company by all the shares of the Seaboard & Roanoke Company, and that the latter company became subject to the burden stipulated for in the charter of the former, and was bound to pay the tax on all its shares, irrespective of the proportion of its property lying in North Carolina, or of the citizenship of its stockholders.

At Law. Action by the state of North Carolina, on the relation of Bain, public treasurer, to recover a tax alleged to be due from the Seaboard & Roanoke Railroad Company. Judgment for plaintiff.

Atty. Gen. Davidson, C. M. Busbee, F. H. Busbee, and Armistead Jones, for plaintiff.

L. R. Watts and Batchelor & Devereux, for defendant.

SEYMOUR, District Judge. This action was brought by the public treasurer of North Carolina to recover certain taxes alleged by him to be due by the defendant corporation under its acts of incorporation and under chapter 323, § 38, of the Public Laws of North Carolina of 1891. By the last-mentioned act, the general assembly imposed a tax upon defendant company of 20 cents per annum upon each share of the capital stock of the defendant for the years from 1862 to 1892, both inclusive. The Seaboard & Roanoke Railroad Company is in North Carolina the successor of the Roanoke Railroad Company, chartered in 1847. Laws N. C. 1846-47, c. 87. Section 24 of said chapter 87 contains the following provision:

"All machines, wagons, vehicles, and carriages purchased, as aforesaid, with the funds of the company, etc., and all the works of the said company constructed or property acquired under the authority of this act, and all profits which shall accrue from the same, shall be vested in the respective stockholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the term of fifteen years; and thereafter the legislature may impose a tax not exceeding 25 cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent."

At the time of the passage of this act the Roanoke Railroad Company had an actual capital of \$200,000, with the privilege of increasing the same to \$400,000; and its line of road extended from Weldon, N. C., to Margarettsville, in the same state, but on the borders of the state of Virginia, a distance of a little less than 20 miles. At the same time, there existed in Virginia a corporation owning a line of railroad from Portsmouth, in that state, to Margarettsville, about 60 miles in length. By the act of 1848-49, c. 83, (Laws N. C.,) the stockholders of this corporation, known as the Seaboard & Roanoke Railroad Company, were constituted stockholders in the Roanoke Railroad Company. Section 12 of said act reads as follows:

"Sec. 12. Be it enacted by the general assembly of N. C.," etc., "that, from and after the time when this act shall take effect, the stockholders of the S. & R. R. Co., a corporation incorporated by the legislature of Va. by an act dated Feb., 1847, and other acts, be, and they are hereby, constituted stockholders in the Roanoke R. R. Co., incorporated by the legislature of N.

C. by act dated Jan. 15, 1847, with the same rights, powers, privileges, and franchises as if they had subscribed an equal amount in the said Roanoke R. R. Co.; and all tolls, franchises, rights, privileges, powers, and profits then or at any time thereafter owned, acquired, or enjoyed by the stockholders of said Roanoke R. R. Co. shall belong to the stockholders of the said S. & R. R. Co. in proportion to the number of shares by each of them owned; and, from and after the time when this act shall take effect, all property owned, acquired, or enjoyed by either of said corporations shall be taken to be the joint property of the stockholders, for the time being, of the two corporations."

The only other statutory provision necessary to be considered is section 38 of the first-cited act, the one chartering the Roanoke Railroad Company. It reads as follows:

"Sec. 38. That it shall be the duty of the president of the said company on the first week in December of each and every year to transmit to the general assembly a correct statement of the receipts and expenditures of said company during the year preceding."

The case has been heard upon bill and answer, and certain admitted facts. The material facts admitted are the following: (1) The company did not earn 6 per cent. for the years 1862 to 1865, inclusive. (2) The number of shares in the consolidated company known as the Seaboard & Roanoke Railroad Company was from 1866 to 1868, inclusive, 8,682 shares; for 1869, 11,293 shares; for 1870, 12,314 shares; for 1871, 12,784 shares; for 1872, 12,784 shares; for 1873, 12,801 shares; for 1874, 12,998 shares; for 1875, 13,404 shares; for 1876, 13,494 shares; for 1877, 13,504 shares; for 1878, 13,504 shares; for 1879, 12,996 shares; for 1880, 12,996 shares; for 1881, 13,013 shares; for 1882, 13,017 shares; for 1883, 13,022 shares; for 1884, 13,028 shares; for 1885-1891, inclusive, 13,029 shares. (3) Of this number 261 shares only are owned by citizens and residents of North Carolina. (4) That no tax was ever imposed on the Seaboard & Roanoke Railroad Company, under the provisions of its charter, until the one in question. (5) That the Seaboard & Roanoke Railroad Company never filed with the legislature any report of its receipts and disbursements, as required by the charter, until November, 1889. (6) Since 1866 the company has earned upwards of 6 per cent. on its shares.

The contention of the defendant is (1) that the entire tax is in violation of the contract with the state created by the charter of 1847; (2) that, if defendant be liable at all for the tax, it is only liable for a *pro rata* portion thereof, proportionate to the amount of its mileage in North Carolina; (3) that the tax, the right to levy which is reserved by the charter of the Roanoke Railroad Company, is one on the stockholders of the company, and can only be levied on resident stockholders, and upon them, not for past years, but only for the year immediately preceding the levying of the tax.

It would be difficult, perhaps, to sustain the tax sued for as a property tax, under the constitution of North Carolina, or apart from its contract character as a tax on the franchise of the road. Possibly the imposition for which the state sues might be described as something due the state, but not in the nature of a tax at all. The right of the state to

collect the amount sued for does not grow out of its power to tax, but out of its power to charge a price for the franchise granted by it. It is not a tax on the property of the road or of the shareholders, because it is not measured by the value of the property or of the shares. It is an imposition annexed to the franchise as a royalty for the grant; the contract price to be paid by the company or its shareholders for the franchise granted to them. *Bank of Commerce v. New York City*, 2 Black, 620; *Attorney General v. Bank*, 4 Jones, Eq. 287. This being the nature of the plaintiff's right, no technical rules embarrass the questions in the case. They all depend on the ordinary rules relating to the construction of contracts. These questions are—*First*. Is the imposition properly placed on the company, instead of the private stockholders? *Second*. On what stock is the 20 cents a share properly chargeable? *Third*. For what years can it be charged?

1. The statute, (Acts 1846-47, c. 87, § 24,) after vesting the property of the corporation in its stockholders, and declaring it personalty, provides that "the same"—that is, the property of the corporation—shall be exempt from any public charge for the term of 15 years, and that thereafter the legislature may impose a tax "not exceeding twenty-five cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent." It is evident, in view of the above phraseology, and of the fact that the tax is upon the privilege of the franchise, that it rests upon the company as a company, and is properly chargeable upon the corporation. The rate of 25 cents per share is mentioned to fix the amount of the charge, not the persons from whom it is collectible.

2. No definite number of shares of stock is mentioned as the number which shall regulate the imposition upon the company. By the original charter, the number of shares authorized was from 2,000 to 4,000. It is reasonable to suppose that, in fixing a compensation for the franchise to be paid as a rental during the entire existence of the defendant's charter, it was contemplated that the amount to be paid should increase as the capital of the company should increase. However that may be, the contract is plain enough. The tax is upon each share of the capital stock. When the legislatures of Virginia and North Carolina consolidated the Roanoke with the Seaboard & Roanoke Railroad, it was expressly provided that the shares of the Roanoke Railroad should be increased by the shares of the Seaboard & Roanoke Railroad Company. The same act which gives the defendant immunity from all other taxation than that of 25 cents on each share of its stock places each share of that stock in the condition of the shares of the original corporation. The Seaboard & Roanoke Railroad stands in the shoes of the Roanoke Railroad Company, with its privileges and its contracts. The legal effect of the act of 1849 is the same as if it expressly provided that every share of the Seaboard & Roanoke Railroad should after the term of 15 years be liable to the tax of 25 cents a share. No other effect can be given to the whole act, and, in particular, no other construction can result from the words, "the stockholders of the S. & R. R. Co. are

hereby constituted stockholders in the Roanoke R. R. Co." The number of shares of the defendant company cannot be increased without its consent, but, when increased by such consent, the proportional rate of compensation chargeable against the company on account of the franchise is increased in accordance with the terms of the original charter. The view which the court takes of the imposition *sub lite* disposes of the contention of defendant that the tax can be imposed only on the stock of stockholders residing in the state, or only on that proportion of the stock which would equitably represent the one-fourth part of defendant's line which lies within the limits of North Carolina. As has been said, in substance, the tax is not upon the shares, but is only measured by the number of the shares. It is not upon the property of defendant. It is therefore immaterial where the shareholders reside, and what property defendant owns in North Carolina. The tax is a charge agreed upon between the parties,—the price put by the state upon the franchise purchased by defendant,—and has naught to do with anything other than the contract itself.

3. The tax is collectible for every year since 1866. No time runs against the state. No possible presumption of payment exists. If laches could be attributable to the legislature in not demanding the 25 cents for the years since 1866, as each year expired, under any state of circumstances, it could not under the facts of this case, for it is admitted that defendant never until 1889 made the report of its receipts and disbursements required by its charter, and which might have formed the basis of the tax. Some weight would be due to the objection that a past tax upon the stockholders of a corporation cannot be reasonably collected of the corporation. In such case the tax is only collected of the stockholders through the corporation. The corporation can justly be required to pay its stockholders' taxes if it has funds of theirs, which it can withhold to the extent of the tax so paid, and not otherwise. The profits of a corporation are supposed to be divided annually. The stockholders are a perpetually changing body. But this tax is not one upon the stockholders. It is one on the corporation itself. If it is said that there is injustice in collecting now, after the lapse of 25 years, the tax of 1866, when perhaps all the stock of defendant company has changed owners since that time, the answer is, *first*, the contract allows it; and, *second*, each purchaser of stock bought his shares with the unpaid burden of this charge resting on them.

The judgment of the court is that plaintiff recover the amount of the tax according to the admissions in the pleadings and facts agreed, and costs.

RICHTER v. ANCHOR REMEDY CO.

(Circuit Court, W. D. Pennsylvania. September 14, 1893.)

1. TRADE-MARK AT COMMON LAW—RIGHTS OF FOREIGNERS.

A foreigner engaged in manufacturing and selling medical preparations in his own country, under a registered trade-mark, has no common-law right to such trade-mark in the United States, such as will enable him to claim the same, on establishing a branch business here, as against a domestic firm which had an established business under a similar trade-mark, adopted in good faith, before he had sold any goods in this country.

2. SAME—ABANDONMENT—REGISTRATION.

A foreigner who registers in this country a trade-mark consisting of "a red anchor, in a white oval space or field," in connection with particular words, cannot afterwards enlarge his rights, as against persons having in good faith an established business under the symbol of an anchor, by a new registration, claiming broadly the use of the picture of an anchor.

In Equity. Suit by F. Ad. Richter & Co. against the Anchor Remedy Company for infringement of a trade-mark. Bill dismissed.

A. v. Briesen, W. Bakewell, and W. L. Pierce, for complainant.

A. H. Clarke and Barton & Barton, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. In the fall of 1887 the defendants, under the name of the Anchor Remedy Company, engaged, and have since continued, in business, at the city of Pittsburgh, as manufacturers and vendors of proprietary medicines of their compounding, marking their labels, wrappers, and bottles with their business name, and with the representation of a black anchor, and designating their compounds "Anchor Liniment," "Anchor Rheumatic Remedy," etc. In adopting this name and symbol the defendants acted in good faith, believing such use to be original with them. Their labels, wrappers, and packages have been always distinctly marked "Prepared by the Anchor Remedy Company, Pittsburgh, Pa." "Laboratory, corner Liberty and Fourth streets, Pittsburgh, Pa." The plaintiff, Dr. F. Ad. Richter, a citizen and resident of Germany, by his bill, filed November 13, 1890, seeks to restrain the defendants "from selling proprietary medicines having thereon any labels, or wrapped in any wrappers, or contained in any bottles, having printed, blown, or otherwise applied the word 'Anchor,' or the pictorial representation of an anchor, and from using the word 'Anchor' as part of their firm name, or the pictorial representation of an anchor in any connection whatsoever in their said business." In effect, the plaintiff claims an exclusive right to use in the United States the word "Anchor," and the symbol of an anchor, in connection with the manufacture or sale of medical compounds.

The bill, which describes the plaintiff as "a citizen of the empire of Germany, doing business as F. Ad. Richter & Co., in the city, county, and state of New York," sets forth that he has been engaged in the city of New York, "for a number of years last past," in the sale of proprietary medicines manufactured at his factory; and that, about the year 1869,

"your orator, being so engaged in the sale of proprietary medicines, adopted, applied, and used, as a trade-mark of certain proprietary medicines of his manufacture, the pictorial representation of an anchor, and the word symbol 'Anchor,' which trade-mark or emblem was by him applied and used by printing upon labels, blown into bottles, and otherwise;" and that the same was registered on July 23, 1889, in the United States, agreeably to the act of congress. The proofs show that the plaintiff's factory is at Rudolstadt, Germany, where his goods are and always have been manufactured, marked, labeled, and put up for the market. All the plaintiff's medical compounds—of which we have before us many specimens—are unmistakably German preparations, with printed labels, directions, etc.; thereon in that language, although having also labels in English; and they are all distinctly marked, "Manufactured by F. Ad. Richter & Co."

The bill, it will be perceived, is quite indefinite as to the length of time the plaintiff had been engaged in the city of New York in the sale of his medicines before this suit was brought. Nor do his proofs certainly fix the date when his branch saleshouse was established in that city. It was, undoubtedly, after May 1, 1887, for Charles Bernhart Drugulin, who opened that house for the plaintiff, did not leave Rudolstadt until that date. Prior to that time the plaintiff had no establishment in the United States. Neither had he ever sold any of his medical compounds in this country before he opened his New York branch house. It is true there had been previously some importations, to a limited extent, into the United States of the plaintiff's medicines, but by druggists and others who sent orders for the medicines to Rudolstadt to supply persons who had lived in Europe, and there had used them.

Prior to his engaging in business in New York the plaintiff's use of the word "Anchor" and symbol of an anchor was in the empire of Germany, and it is in evidence that he there registered the picture of an anchor as a trade-mark on May 1, 1875, for chemical pharmaceutical preparations and specialties, soaps, liquors, and other designated things; on February 25, 1876, for pharmaceutical preparations and specialties and other named articles; on February 25, 1878, for pharmaceutical preparations; on May 18, 1880, for chemical and pharmaceutical preparations of any kind, etc.; on June 7, 1880, for alcoholic drinks of any kind and other specified articles; and on March 7, 1885, for a number of things, including all kinds of toys for children, tobacco and tobacco fabrics; and the certificates before us show registered announcements at various dates of the further "retention" of the trade-mark. We have not been shown the law of the German empire in relation to trade-marks, nor have we any evidence as to what rights, if any, the owner of a trade-mark there has outside of his registration.

As stated in the bill of complaint, on July 23, 1889, the plaintiff registered in the United States patent office, under the act of congress of March 3, 1881, an anchor trade-mark for medical compounds. But, as we have seen, that registry was long after the defendants had engaged in

their said business, and, indeed, after this dispute had arisen between them and the plaintiff, and this lawsuit had been threatened. A *facsimile* of the plaintiff's trade-mark, as alleged to be used by him, accompanied his 1889 registered declaration, which latter contains the following statement:

"My trade-mark consists of the representation or picture of an anchor and the word symbol 'Anchor.' These have generally been arranged as shown in the accompanying *facsimile*, which contains, in an ornamental panel, two representations of an anchor in white upon a black groundwork, surrounded by a white border of oval shape, and the word symbol 'Anchor,' in connection with the words 'Pain Expeller,' or other words relating to the medical compounds in connection with which the trade-mark is used; but the words 'Pain Expeller,' the color of the representation of the anchor, and the color and shape of the groundwork and surrounding border are immaterial, and the words 'Pain Expeller,' and the border and special groundwork, may be omitted altogether without materially altering the character of my trade-mark. I prefer to use both the representation or picture of an anchor and the word symbol 'Anchor,' but the picture of an anchor may be used alone without materially affecting the character of my trade-mark, the essential feature of which is the picture or representation of an anchor. This trade-mark I have used continuously in my business since the 1st day of March, 1869, and it was registered for the German empire on the 20th day of May, 1875."

The said registered *facsimile*, besides the characteristics above mentioned, contains printed lengthwise along the face of the panel above the designation "Anchor Pain Expeller" the words "Genuine is only," and below said designation the words, "Of Richter's Manufactory."

The defendants never used this *facsimile*, nor anything (aside from the word "Anchor," and the symbol thereof) having the remotest resemblance to it. The plaintiff's bill rests upon his registered trade-mark of 1889, and also upon his supposed common-law right to the exclusive use upon medical compounds of the word "Anchor" and its emblem. But the proofs reveal the important fact (undisclosed by the bill) that on July 7, 1885, the plaintiff, as the sole proprietor of the house of F. Ad. Richter & Co., registered in the United States patent office an anchor trade-mark declared of record to have been "adopted" by him for his use as a "trade-mark for medical compounds," which is much more limited in its scope than the registered trade-mark of 1889. His declaration in this 1885 registration contains the following statement, which is here inserted at length for the sake of comparison between it and his statement already quoted:

"My trade-mark consists of letters and words and an arbitrary symbol. These have generally been arranged as shown in the accompanying *facsimile*, which *facsimile* is a representation of a red anchor in a white oval space or field, with the words 'Schutz-Marke' and 'Trade-Mark' on the oval border, of black or gray color, and the words 'Garantie de l'Authenticite' above the representation of the red anchor, and 'Beweis der Echtheit' below the representation of the red anchor, the whole being surrounded by a border of black or gray color, with small anchors in the corners; but the outside border may be omitted at pleasure, without materially altering the character of my trade-mark, the essential feature of which is the representation of a red anchor in the oval space or field. This trade-mark I have used continuously

in my business since the year 1869, and it was registered for the German empire on the 20th of the month of May, 1875."

It is not pretended that the defendants have infringed the rights of the plaintiff under his original United States registration. Neither can it be successfully maintained that by virtue of his second United States registration the plaintiff could acquire any new rights to the prejudice of the defendants in their previously established business. Nor do we perceive any good basis for the claim that, independently of his United States registrations, the plaintiff had acquired, as against the defendants, a common-law right to the exclusive use in the United States of the word "Anchor" and its symbol, in connection with the manufacture and sale of medical compounds. As we have seen, prior to his first registration, the plaintiff had never sold in the United States any of his medicines. Nor had he himself made any importations thereof before that registration. Having, then, no trade in this country, we do not see how the plaintiff could well have here a common-law trade-mark. Browne, Trade-Marks, §§ 46, 54. To sustain the plaintiff's present pretensions in that regard, might, indeed, prove to be an embarrassing precedent, in view of the great number and variety of articles to which his anchor trade-mark as registered in Germany applies. But, furthermore, certainly a trade-mark may be abandoned, (Id. § 674,) and what clearer evidence of abandonment of the right to the unlimited use of the anchor emblem could there be than was furnished by the plaintiff's restricted registration on July 7, 1885? He thereby gave public notice to all traders, and others, in the United States, that he adopted as his trade-mark for medical compounds, not the representation of an anchor generally, but "a red anchor in the [white] oval space or field." This limited registration was the very deliberate act of the plaintiff, and he must abide the consequences. It would be a perversion of the right to registration under the act of congress, of which the plaintiff availed himself, and would amount to a fraud on other traders, to permit the plaintiff now to assert broader rights in the anchor as a trade symbol than his public registry in 1885 disclosed. True, section 10 of the act declares "that nothing in this act shall prevent, lessen, impeach, or avoid any remedy, at law or in equity, which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed." But the act requires that the application for registration shall be accompanied by a written declaration, verified by the applicant, that the description and *facsimile* presented for registry truly represent the trade-mark; and section 10 gives no countenance to the idea that a person, availing himself of the benefits of the act, may register as his trade-mark a peculiar representation of a common emblem, exhibiting special and distinguishing features and a particular combination, and yet afterwards claim the emblem pure and simple, without regard to such features or combination. To tolerate this would be to defeat the very purpose of the act.

We have only to add here that all specimens of the plaintiff's goods before us as exhibits have impressed thereon his red anchor symbol, and

it is a conspicuous and distinguishing sign. But then, again, the defendants' medical compounds in themselves are unlike in appearance those of the plaintiff, and their labels, wrappers, and phials, in size, color, and general effect, are widely different from his. We are altogether convinced, not only by the testimony, but by our own inspection, that the defendants' goods as put upon the market are so easily distinguishable from those of the plaintiff that no purchaser or consumer using the slightest attention could mistake the one for the other. It is not shown that any one has ever been misled. The defendants' labels, indeed, point directly and unequivocally to proprietorship and origin. And, finally, we do not find in this record a particle of evidence tending to convict the defendants of any attempt or purpose to deceive the public or to perpetrate a fraud upon the plaintiff.

In *Desmond's Appeal*, 103 Pa. St. 126, the supreme court of Pennsylvania held that the appropriation, as a trade-mark applied to compound medicines, of the word "Samaritan" in one combination of words, did not prevent its being used in other combinations; and hence that the use by the defendants of the name "Samaritan's Nervine" did not violate the plaintiff's trade-marks "Samaritan's Gift" and "Samaritan's Root and Herb Juices." The same learned court in *Heinz v. Lutz*, 146 Pa. St. 592, 609, 23 Atl. Rep. 314, declared that "a court of equity will not restrain a person from using a device, on the ground that it infringes plaintiff's trade-mark, unless it is so similar in appearance that any person using such reasonable care and observation as the public generally are capable of using, and may be expected to exercise, would mistake the one for the other," citing *Gilman v. Hunnewell*, 122 Mass. 139, and *Desmond's Appeal*, *supra*. And this doctrine was distinctly approved by the supreme court of the United States in *Manufacturing Co. v. Trainer*, 101 U. S. 51, 56. Upon the whole case, then, we are of the opinion that the plaintiff is not entitled to equitable relief.

Let a decree be drawn dismissing the bill of complaint, with costs.

BUFFINGTON, District Judge, concurs.

MUNICIPAL SIGNAL CO. *et al.* v. GAMEWELL FIRE ALARM TEL. CO. *et al.*

(Circuit Court, D. Massachusetts. August 10, 1892.)

No. 2,538.

1. PATENTS FOR INVENTIONS—COMBINATION—SIGNAL ALARMS.

Letters patent No. 178,750, issued June 18, 1876, to Henry Ennis, for an improvement in telegraphic fire alarms, cover a device consisting of a hammer arm for operating a bell, a pencil for recording a message on a traveling strip of paper, and a pencil for recording the time of day on the face of a rotating clock dial, all connected by arms and pivots to the armature of an electro-magnet, so as to be simultaneously operated by an electric current. Claim 1 is for a telegraphic receiving instrument adapted to register a message and record the time of its recep-

tion, substantially as and for the purpose set forth. *Held* that, while each of the two elements covered by the claim are old, the combination is not a mere aggregation, but, on the contrary, achieves a new and useful result by co-operating action.

2. SAME—ANTICIPATION.

This invention was not anticipated by the old watchman's clocks which make a mark on a time strip when a button is pressed, or by the British patent of October 12, 1872, to Whitehouse & Phillips, for a recording apparatus for public vehicles.

3. SAME—INFRINGEMENT—EQUIVALENTS.

The claim is infringed by an apparatus having a magnet in the main circuit, whose armature controls the receiving device and time stamp as in the patent, notwithstanding that the motion is communicated by means of relays or subcircuits instead of by levers; for, both means being well known, the one is merely the equivalent of the other.

4. SAME—IMMATERIAL VARIATIONS.

Infringement is not prevented by the fact that defendants, instead of the Ennis time stamp, use, in substance, the Hinchman patent of July 29, 1873, which was old at the date of the Ennis patent; and it is immaterial that the Ennis machine is operated with two strips of paper, while defendants' machine uses only one.

In Equity. Bill by the Municipal Signal Company, licensee, and James F. Oyster, assignee, of letters patent No. 178,750, issued June 13, 1876, to Henry Ennis, for an improvement in telegraphic fire alarms, against the Gamewell Fire Alarm Telegraph Company and others, for infringement. Decree for complainants.

Fish, Richardson & Storrow, for complainants.

Charles N. Judson, for defendants.

COLT, Circuit Judge. This suit and the three following¹ relate to patents covering devices in a municipal signal system. By this apparatus signals are conveyed by electricity to a central station from boxes located at convenient places on the streets. These signals or messages range themselves into two classes,—ordinary or patrol signals, which are sent by policemen on their beats, and emergency or want signals, such as fire-alarm, police, and ambulance calls. Several things are important in the operation of a complete police signal system. Not only must the message be received at the central station, but the time of its reception should be at the same moment recorded. Again, the patrol signals sent in are very numerous, and do not require immediate attention, while the emergency signals are comparatively rare, but call for instant action, and therefore it is desirable that these should be distinguished from ordinary calls by the ringing of an alarm, in order to at once arrest the attention of the attendant at the central office. Further, it is important that the signal boxes should operate with speed and certainty, and should be so constructed as to be inaccessible to mischievous persons who might send in false alarms.

The principal parties to this suit are rivals in this line of business. In 1888 the city of Boston, being desirous of adopting an improved system of police signals, advertised for bids, and the complainant and defendant companies were competitors for this contract. The apparatus required by the city embraced the special features already mentioned,

¹ *Municipal Signal Co. v. Gamewell Fire Alarm Tel. Co.*, (No. 2,537,) 52 Fed. Rep. 468, *Municipal Signal Co. v. Gamewell Fire Alarm Tel. Co.*, (No. 2,589,) 52 Fed. Rep. 464, and *Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co.*, (No. 2,543,) 52 Fed. Rep. 471.

and the defendant company proposed in their letters and specifications sent to the board of police to furnish such a system. They also constructed a working apparatus, which was on exhibition at their office in Boston. This was seen by Mr. Martin, a person of large experience in electrical devices of this class, and he describes the apparatus in detail. One of the board of police also visited the office, and he testifies as to the operation of the system. It is necessary to state these facts to meet the position taken by the defendants respecting the first three cases under consideration, namely, that complainants have failed in their proof of a technical infringement. In view of the evidence, however, and in the absence of any evidence contradictory thereto on the part of the defendants, I must hold the proof on this point to be sufficient, and that this defense should not prevail.

The present suit has reference to letters patent No. 178,750, dated June 13, 1876, granted to Henry Ennis, for improvements in telegraphic fire alarms. The patent was duly assigned to James F. Oyster, one of the complainants. The other complainant, the Municipal Signal Company, has an exclusive license under the patent. The invention is for a receiving instrument which simultaneously registers a message, records the time of its reception, and sounds an alarm. It consists of a hammer arm for operating a bell, a pencil for recording a message on a traveling strip of paper, and a pencil for recording the time of day upon the face of a rotating clock dial, all of these parts being connected to the armature of an electro-magnet, so as to be simultaneously actuated. In the operation of the device, when the electric current passes through the magnet, the armature is attracted thereto, and, by reason of connecting arms and pivots, throws upward a pencil, marking the clock dial, and also a perforating pencil, impressing or printing the slip of paper, while, at the same time, the bell-hammer handle is thrown forward, and sounds an alarm. In this way, every time the circuit is closed by the transmitting instrument, an alarm is struck, a mark is made on the dial to indicate the time, and a mark is made on the traveling ribbon corresponding to one of the characters of the "Morse" or any other known telegraphic alphabet.

The patentee says:

"The various features of my device may be modified, and their arrangement changed, without departing from the spirit of my invention."

The first claim is the only one in controversy, and it is as follows:

"A telegraphic receiving instrument adapted to register a message and record the time of its reception, substantially as and for the purpose set forth."

It is admitted that the elements, considered separately, which compose the Ennis machine were old at the time of the Ennis invention; in other words, a contrivance actuated by electricity for marking the time of day on a slip of paper by means of a dial revolved like clock work, a register for recording messages sent by electricity, and a contrivance for sounding an alarm by electricity, were well known in the art at this time. The novelty, therefore, of the Ennis invention must

consist in the combination of two or more of these elements by means of which a new and useful result is produced. The first claim makes no reference to the bell-alarm apparatus, so that our present inquiry is limited to the combination of a message receiver and a time recorder in a telegraphic receiving instrument. While it is true that these contrivances were old, it is maintained by the complainants that they were never before so combined as to coact together and produce simultaneously the results Ennis describes.

The first ground of defense is that this invention is a mere aggregation, and consequently not patentable. But it is not true that the Ennis invention is a mere aggregation of old elements. The Ennis machine represents not only a new organization, but it produces a new result. An aggregation is where two things are used independently, and operate independently, and there is no new result; but the very essence of the Ennis invention lies in the co-operation of certain things which it is contended had never before been made to co-operate together.

This brings us to the consideration of the prior art, which is invoked to show that there was nothing patentable in the Ennis invention, or, if patentable, to limit it to the precise devices set forth in his patent. To sustain this defense, reliance is placed largely upon the old watchman's clocks which make a mark on the time strip when the watchman pushes a button at any particular place. I do think that a device which only sends a dot indicating that a button has been pressed can be considered the message sending or receiving apparatus of Ennis. These clocks are not organized for the purpose and are not designed to transmit messages. The most that can be said is that Ennis, in organizing his apparatus as a whole, made use of that part of the clock mechanism which relates to the time when a certain thing is done. The Hamblet patent of July 1, 1862, the Sheppard patent of April 9, 1872, and the Gilliland patent of October 13, 1874, relate to watchman's clocks, and they do not either anticipate or limit the real invention of Ennis; and the same may be said of the British patent to Groubman of April 10, 1874, which was an apparatus for signaling trains on railways.

Much reliance is placed by the defendants upon the British Whitehouse & Phillips patent, dated October 12, 1872, for a recording apparatus specially applicable to public vehicles. The patentee says:

"This invention is adapted to bodies in motion by making a written record of the time, speed, and distance run by such; * * * also by registering the time and place of people or passengers entering or leaving public or private conveyances or buildings; also the relative numbers of such people or passengers, and for watchman's telltales, recording not only the time of his own resting, but that at which he may pass certain points of his beat."

The description of this apparatus is crude, and the drawings insufficient, and it is doubtful if it possesses any practical utility. Briefly, it consists of three syphon pens which trace lines on a slip of paper kept in motion by clockwork. One pen marks the time upon the paper by means of a series of points; another pen is connected to a wheel or axle

of the vehicle in such a manner as to produce waves or points across the paper at definite intervals, according to the distance traveled; a third pen is intended to mark the ingress or egress of each passenger, by being deflected above or below the line. The third pen, for registering the entrance or exit of passengers, is considered to have the most important bearing on the Ennis device. The force applied in its operation may be either pneumatic or electric. When electricity is used the pen is mounted upon a post which is turned on its pivot by a magnet, and this magnet is intended to be moved to one side or the other by currents of opposite polarity sent through it, and the pen marks in accordance with the manner in which the currents are actuated by the steps of the vehicle. When a person entering an omnibus puts his foot on the lower step an angular mark is made below the line, and when he puts his foot on the upper step an angular mark is made above the line, and this is true when a passenger gets out, except that the marks come in the reverse order with respect to the line. Assuming that this device would work practically under the various conditions which surround passengers getting in and out of an omnibus, which may well be questioned, still, what does it do? It merely records by means of a mark a certain action, just the same as the watchman's clock records a certain action, and it is in no proper sense the message receiver of the Ennis device. Without further consideration I am satisfied that the Whitehouse & Phillips patent does not anticipate the invention of Ennis.

The question of infringement remains. In defendants' apparatus there is a magnet in the main circuit whose armature controls the telegraphic receiving device and the time stamp just as in the Ennis patent. The main difference between the two contrivances is that in defendants' the message receiving instrument and the time stamp are operated by electrical devices instead of mechanical, as in Ennis',—that is to say, the defendants use relays or subcircuits instead of levers, by which means the apparatus may be operated by a smaller current. The use of a relay or subcircuit is said to be analogous to the introduction of an additional lever or wheel in a machine. It has long been known that you may attach a lever or levers to the armature of an electro-magnet, and each will operate mechanically, because there is the source of power in the armature, or, instead thereof, you can use the armature to throw into or out of action a battery in a subcircuit, and so move the armature of the magnet in such subcircuit, and this will operate the same as the levers. The subcircuits of the defendants' apparatus are, therefore, the equivalent of the levers of the Ennis patent. Ennis himself recognized this in his patent where, in speaking of an additional bell alarm, he says:

"The tripping of said clock may be effected by direct mechanical action, as pulling on a wire attached to said armature and to said detent; but I prefer to close an additional circuit by the movement of armature, L, or lever, U, and thereby operate an additional electro-magnet and armature, thus tripping said detent."

The defendants do not employ the Ennis time stamp, but they use, in substance, the time stamp of the Hinchman patent of July 29, 1873,

which was old at the date of the Ennis invention. The fact that the Ennis machine is operated with two strips of paper, while the defendants' machine uses only one, I do not think of material importance.

The first claim of the Ennis patent is for an apparatus which accomplished a result unknown in the art up to that time, and the defendants' apparatus accomplishes the same result through the same, or well-known, or equivalent instrumentalities, and, therefore, their machine is within the Ennis invention. Decree for complainants.

MUNICIPAL SIGNAL CO. v. GAMEWELL FIRE-ALARM TEL. CO. et al.

(Circuit Court, D. Massachusetts. August 10, 1892.)

No. 2,589.

PATENTS FOR INVENTIONS—ANTICIPATION—MUNICIPAL SIGNAL APPARATUS.

Letters patent Nos. 359,687 and 359,688, both issued March 22, 1887, to Bernice J. Noyes, for an invention relating to a system of municipal signals, whereby, automatically, and independently of the operator's will, the reception of emergency signals is always marked by the ringing of a bell, while the reception of patrol signals on the same register is never accompanied by an alarm, were not anticipated by either the patent of July 26, 1881, to J. W. Stover, for "improvements in telegraphic relays," the Field patent of June 19, 1888, for an apparatus for recording stock quotations, or the Wilson patents of March 3, 1885, and June 9, 1886, relating to a municipal telegraph apparatus.

In Equity. Bill by the Municipal Signal Company against the Gamewell Fire-Alarm Company and others for infringement of patents. Decree for complainants.

Fish, Richardson & Storrow, for complainant.

Charles N. Judson, for defendants.

COLT, Circuit Judge. The present suit is brought upon letters patent No. 359,687 and No. 359,688, both dated March 22, 1887, issued to Bernice J. Noyes, assignor to the complainant. In a municipal signal system it is desirable to distinguish the important from the unimportant messages received at the central station from the signal boxes. The Noyes inventions are for devices by means of which the reception of emergency signals at the main station is marked by the ringing of a bell, while in the case of ordinary patrol signals no alarm is sounded. Both classes of signals are made and received upon a single register. This result is accomplished by changes in the electrical current. In the first Noyes patent the specific method of producing the current change is by reducing the strength of the current for ordinary signals, and breaking the circuit entirely for emergency signals; in other words, the selective action is produced by varying the strength of the current. In the second patent, which is for an improvement on the first, the specific method consists in using short impulses or dots for ordinary signals, and for

emergency signals, in addition to these dots, one or more long current impulses producing dashes; in other words, the selective action is produced by variation in the duration of current impulses. The multiple signal transmitter of Noyes consists of a break wheel with insulated portions on its surface. The periphery of the disk is provided with several groups of signals, so that when brought into co-operation with a contact pen one or another signal is transmitted. The action is automatic, and does not depend on the will of the operator,—that is, one class of messages will always be accompanied by an alarm, and another class will never sound a warning.

Infringement is charged as to the first claim of the first patent, and all the claims of the second patent. Claim 1 of the first patent is as follows:

“A system for transmitting signals from a substation to a central station over a main circuit, wherein are combined a multiple signal transmitter, which is located at the substation, and constructed and arranged to transmit several different signals by current changes of one or another character, a message receiving instrument at the central station, which receives the signal transmitted, and an audible alarm, also located at the said central station, which responds to the current change of one character only, whereby an audible warning may be sounded for some and not for other signals, substantially as described.”

It is unnecessary to consider specifically the claims of the second patent.

The substantial defense set up in this case is that, by reason of prior patents and the so-called “Wood device,” there was nothing patentable in the Noyes apparatus. With respect to these prior patents, it may be observed, generally, that they do not show the invention of Noyes, and that it is only by reorganizing in one way or another these old devices that they can be made to anticipate the Noyes patents. The first patent relied upon by the defendants was granted to J. W. Stover, July 26, 1881, for improvements in telegraphic relays. The object of the invention, as stated by the patentee, is “to provide a compound relay, which may be operated both by the secondary currents of an induction coil and by changes in the magnetism of the core of the induction coil itself.” This patent is for a device in which two transmitting keys and two electro-magnets may be included in the same circuit under such conditions that one electro-magnet will respond to the movement of the first key and not to that of the second, while the other electro-magnet will respond to the movement of the second key, exclusively, or to the movement of both keys. The double relay of Stover has two coils about the soft iron core, the primary coil included in the main circuit being wound outside the secondary coil, which is inside and wound directly on the core. The strengthening or weakening of the primary current through the primary coil sets up a secondary current in the inner coil, which is in local circuit, with magnets in such circuit having a polarized armature, and such induced current operates this polarized armature, and

thereby closes a local circuit through the receiving instrument. The intention of the patent is that this receiver may be operated without affecting the other receiver, which can only be operated by impulses sent over the main current of greater strength and duration. In this device no mention is made of the multiple transmitter of the Noyes combination, which is so constructed as to transmit several different signals by current changes of different character. Noyes' invention was applicable specifically to police signals, and the system works automatically. Stover's compound relay contains no suggestion of this character; he uses two transmitting devices, and actuates one or both of the receiving instruments at will. There is no suggestion of different classes of messages to be audibly distinguished, or of a multiple transmitter which must always actuate one receiving instrument, and upon which only a certain message can be recorded, depending in no way upon the will of the operator. The Stover patent relates to nothing but a receiving device, and it does not contain or describe the Noyes invention. At the most it only suggests one part of that invention.

The Field patent of June 19, 1883, belongs to the same class as that of Stover. It is for a district telegraph apparatus for recording stock quotations, and it is so constructed that the operator may accompany any message with an alarm signal. Two magnets are used, one neutral and the other polarized. The neutral or printing magnet is operated in the usual manner, by making and breaking the circuit. When, however, the operator desires to ring the alarm, he reverses the printing current, and so operates both the printing and polarized magnets, and thereby rings the alarm bell. It is clear that this is not the Noyes invention. The operator can send a message without an alarm, or he may send the same message with an alarm, depending upon his will. The essence of the Noyes invention is that every message of a certain kind must be accompanied by an alarm, while every message of a different kind shall never be accompanied by an alarm. In the Field apparatus the operator may transmit the same message on distinct occasions, and may ring the bell on one occasion and not on the other. There is no suggestion in the Field patent of a multiple transmitter adapted to send messages by current changes of different character in the sense of the Noyes patent. The Field invention would be of little, if any, value in the Noyes apparatus, and the Noyes invention is wholly unsuited for carrying out the invention of Field.

As for the Wilson patents, it is only necessary to refer to those dated March 3, 1885, and June 9, 1886. With respect to the first the inventor says: "My invention relates to a municipal telegraph apparatus, and is intended to be used in connection with apparatus of the kind shown in letters patent No. 288,536, dated November 13, 1883." After describing the apparatus he proceeds as follows:

"In accordance with my former patent referred to, it was intended that the policeman, on arriving at each box, should transmit to the main office a patrol signal showing that he was properly making his rounds, which patrol signal was recorded by the same instrument employed to record the particular wants

which it was possible for both the policeman and citizen to indicate at the main office. The reception of both patrol calls and want calls on the same instrument is objectionable, as the patrol calls require no service, and will usually greatly outnumber the want calls, and the reception at the main office, on the same instrument, of signals requiring no immediate service and those requiring immediate attention is liable to result in and foster a tendency to carelessness, whereas, if the signals demanding immediate service, or which are in answer to signals conveyed to the policeman from the main office, are the only ones which are recorded, the attendant at the main office is kept always alert whenever the recording instrument is started, knowing that each signal so recorded demands immediate service. The present system of receiving signals at the boxes from the main office enables these objectionable patrol signals to be dispensed with, because the fact that a signal may at any time be awaiting a policeman at his boxes is a sufficient inducement to cause him to go to the boxes at the prescribed times, as he knows that his failure to respond to such a signal will surely be detected and have to be accounted for, and he cannot know in advance, or until after opening the box, whether or not a signal is awaiting him."

From the foregoing language it will be observed that Wilson considered the reception of both patrol calls and want calls on the recording instrument as objectionable, and therefore the only signals conveyed to the central station and there recorded were those requiring immediate attention. It is manifest that this is not the system found in the Noyes patents. In the patent referred to as "the second Wilson patent," two registers are described, one for recording emergency signals, and the other for recording patrol signals. This plainly is not the Noyes invention, wherein only one recording instrument is used.

The defendants have also introduced a box invented by Frank B. Wood, and his abandoned application for a patent filed in February, 1877. I have carefully examined the evidence bearing upon this alleged prior invention. Taking the whole evidence, I find that the use Wood made of his invention was only experimental. Wood testifies that his box was sent to the patent office with his application for a patent. It may be presumed that this box is still in existence, and if so, why is not the original, or a box like it, properly authenticated, produced in evidence? This would show exactly its construction, and it would be far more convincing than the somewhat varied descriptions of the box given by the three witnesses called in his support. The evidence of the experimental use of the box in the New York office of the American District Telegraph Company is not satisfactory. These experiments were made surreptitiously, at night. The construction of the district telegraph apparatus was such that no proper test could be made of the Wood box without disorganizing the whole telegraph system, because that system operated by means of short interruptions of the circuit producing only dots, and therefore an apparatus designed to produce both dashes and dots, or "longs" and "shorts," like the Wood device, would not operate unless changes were made in the telegraphic apparatus. I have not lost sight of Wood's testimony as to the change he says he made in this particular, and I am aware of the language used by Wood in his rejected application. Giving due consideration to all this, I am still

of opinion that this alleged prior invention has not been established by that clear and satisfactory proof which is necessary in order to invalidate the Noyes patents. Decree for complainant.

MUNICIPAL SIGNAL CO. v. GAMEWELL FIRE ALARM TEL. CO. et al.

(Circuit Court, D. Massachusetts. August 10, 1892.)

No. 2,537.

PATENTS FOR INVENTIONS — LIMITATION OF CLAIM — PRIOR ART — MUNICIPAL SIGNAL BOXES.

Letters patent No. 844,430, issued June 29, 1886, to John C. Wilson, for an electric signal box, covers, in claim 6, a box in which a citizen's key removes an obstacle from the signaling crank, and the signal is then operated by turning the crank, whose handle projects through the door. The key, after performing its function, is entrapped so as to prevent its withdrawal by means of mechanism operated by the movement of the door, the key being held while the door is closed, and released when the door is opened. The claim is for a signal box in which the mechanism is "controlled" by a key, etc. Held that, in view of the prior state of the art, as shown by letters patent No. 157,002, issued November 17, 1874, to Z. P. Hotchkiss, and by the Wright, Holley & Miles patent of June 17, 1873, the claim cannot be construed to cover a signal box in which the transmitting mechanism is operated directly by the key, and without any further action by the operator.

In Equity. Suit for infringement of patent. Bill dismissed.

Fish, Richardson & Storrow, for complainant.

Charles N. Judson, for defendants.

COLT, Circuit Judge. This suit relates to electrical signal boxes used in a municipal signal system. It is founded upon the alleged infringement of three letters patent,—No. 157,002, dated November 17, 1874; issued to Z. P. Hotchkiss, No. 344,430, dated June 29, 1886, issued to John C. Wilson, and No. 288,536, dated November 13, 1888, issued to John C. Wilson and Milton G. Davis. As the Hotchkiss patent has now expired, it is no longer relied upon by the complainant. The date of application for the Wilson patent is earlier than the date of application for the Wilson & Davis patent. The complainant, being satisfied that both these patents contain the same invention, has elected to stand in this case upon the Wilson patent alone. In order to understand the scope of the Wilson patent, it is necessary to briefly review the state of the art at the time the invention was made. Electric signal boxes are used to convey to a central station an alarm of fire, or other like signals. Three requisites seem to be necessary: The signal should be sent with the least possible delay; it should be correct; and the sending of unauthorized signals should be prevented, as far as possible. The box is connected by a wire with the central station, and the message is transmitted by alternately opening and closing the electric circuit at the signal box. This is done by means of a key which operates a break wheel with a notched periphery, the raised portions of the wheel touching a fixed contact

spring, and so closing the circuit, while the notches in the wheel do not touch the spring, and consequently break the circuit. The break wheel transmits the number of the box, and sometimes a special message in addition. It is commonly moved by a mechanical motor, and to transmit the signal the motor is wound up and runs down again, or, where a normally wound motor is used, a detent is removed, and the motor permitted to run far enough to send the desired signal. In the last class of boxes, where the motor is wound up from time to time, the signal can generally be repeated by tripping the motor for the second time. In order to keep the public from meddling with this mechanism it was inclosed in a box. On the outside of the box there was a handle which the sender of a signal could turn, and thereby transmit the signal by winding or tripping the motor.

It is obvious that a box of the character described, if put upon the street, would be the subject of false alarms from mischievous persons turning the handle; consequently such boxes were inclosed in an outer box with a lock door; and, in order to send an alarm, the key to this outer box had to be obtained, and the door unlocked. The inner door could only be unlocked by an officer. In this form of box there would be more or less delay or possible mistake in sending in the citizen's signal, as it required several distinct operations by the sender to reach the signal crank. There was also a possible difficulty in opening the door of the box by reason of rust or ice, and, further, a person might obtain the key and send in a false alarm, and then walk off with the key. These objections were in part overcome by the Fairchild patent of October 28, 1873, whereby the lock was so constructed as to trap the key. This lock was applied to the outer door of the box, and the citizen was still obliged to open the outer door before he could operate the signal. In the Wright, Holley & Miles patent, dated June 17, 1873, the box was constructed with one door, which did not need to be opened for the purpose of sending the citizen's signal. The citizen inserted a detachable alarm key in the box, and by turning it removed a detent from a normally wound signaling mechanism, and so sent in the signal. It was not necessary in this device to unlock the door, open it, and pull a signal handle, but only to insert and turn a key in the box. In the Hotchkiss patent, dated November 17, 1874, the patentee states his invention at the beginning of the specification:

"My improved signal box is secured by a lock, the key of which is intended to be placed in the hands of the chief engineer, or other responsible public officer, a second key being issued to customers, by which key, only, an alarm can be given. The construction of the parts is such that, after the alarm key has once been introduced by a party desiring to turn in an alarm, it cannot be withdrawn until the proper functionary arrives with the key which opens the box, and rewinds and sets the alarm mechanism for future use."

In this device the alarm was turned on by the operation of the citizen's key inserted in the outer door of the box, and the key was trapped by means of a combination of locks. This device seems to combine the improvements of the Fairchild and the Wright, Holley & Miles patents.

The foregoing illustrate the state of the art at the time of the Wilson invention.

The Wilson patent is for an apparatus in which the citizen's key removes an obstacle from the signaling crank, and the signal is operated by turning the crank, whose handle projects through the side of the door. There is a keyhole in the outside of the box, in which the citizen's key is inserted, and the turning of this key permits the sending in of an alarm by removing the obstruction in the path of the signaling lever. The locking or trapping device for the key is operated by the movement of the door, which prevents the withdrawal of the key when the door is closed, and releases it when the door is open. The first five claims of this patent are for the specific devices described therein. The sixth claim upon which the defendants rely in this case is in the following language:

"A signal box having a movable door and transmitting mechanism, the operation of which is controlled by a key inserted from the outside of the box while the door is closed, and a locking device for the said key, operated by the movement of the door preventing the withdrawal of the key when the door is closed, and releasing or unlocking said key when the door is open, substantially as described."

It will be observed that this claim consists of two elements,—a signal box, the operation of which is controlled by a key, and a trapping device for the key, operated by the movement of the door. The special merit of the Wilson invention seems to lie in controlling the locking device of the key by moving the door, and this feature may have shown invention. So far as operating the signal crank, however, the Wilson apparatus is inferior to the prior Hotchkiss device. In the Hotchkiss device, the citizen's key operates directly the alarm mechanism, while in the Wilson the key only controls such mechanism; in other words, the key only removes an obstacle in the way of the operation of the signal crank, and it is necessary, after the key has been turned, that the citizen should pull downward with his hand the signal lever in order to operate the transmitting mechanism. I do not think a transmitting mechanism controlled by the key covers a transmitting mechanism operated directly by the key. In the defendants' apparatus the key operates directly the alarm mechanism, and for this reason it does not infringe the Wilson patent. The history of the prior art, as above shown, forbids such a broad construction of this sixth claim as would cover so marked a difference in the operating devices of the transmitter. Upon this ground, I must direct that the bill be dismissed, with costs. Bill dismissed.

GAMEWELL FIRE ALARM TEL. CO. v. MUNICIPAL SIGNAL CO.

(Circuit Court, D. Massachusetts. August 10, 1892.)

No. 2,543.

PATENTS FOR INVENTIONS—LIMITATION OF CLAIM—PRIOR ART—INFRINGEMENT.

Letters patent No. 164,425, issued June 15, 1875, to Stephen Chester, for an improvement in fire-alarm signal boxes, cover, in the third claim, "the combination of an independent pinion or equivalent device with a wheel, sector, or rack, and a key or equivalent implement which may pass through an orifice in a closed door, for the purpose of winding a spring or raising a weight." This claim was inserted after the rejection of a broad claim for "the winding up and preparing for action the motive force of said apparatus by turning the key, or similar device, inserted in the keyhole of a closed door or cover." *Held* that, in view of this action, and of the fact that the combination of a pinion, wheel, sector, or rack with a key or its equivalent, passing through an orifice in the door for the purpose of winding a spring or raising a weight, was old at the time of the invention, the claim must be limited to the specific devices set forth, or their equivalents, and is not infringed by a signal box in which the devices are widely dissimilar.

In Equity. Suit by the Gamewell Fire Alarm Telegraph Company against the Municipal Signal Company for infringement of letters patent No. 164,425, issued June 15, 1875, to Stephen Chester. Bill dismissed.

The issue was on the third claim of the patent, which reads as follows:

"The combination of an independent pinion or equivalent device with a wheel, sector, or rack, and a key or equivalent implement which may pass through an orifice in a closed door for the purpose of winding a spring or raising a weight."

Charles N. Judson, for complainant.

Fish, Richardson & Storrow, for defendant.

COLT, Circuit Judge. This bill in equity alleges the infringement of letters patent No. 164,425, dated June 15, 1875, issued to Stephen Chester. The invention relates to an improved form of signal box for the transmission of fire-alarm or other electro-telegraphic signals. The mechanism is somewhat complicated. It is only necessary in this case to particularly examine that part of the contrivance covered by the third claim. The Chester signal box has within the case an interior box which is described as containing a combination of gear-work capable of causing any electrical circuit closing and breaking devices to move with uniform speed, when the weight or spring necessary to produce motion shall be attached thereto and shall be wound up. The patentee further says:

"It has been customary to use clock-springs inclosed within this circular box, C, for impelling the said machinery, which, in very cold weather, are liable to fracture, or to inequality of motive force when subjected to greatly varying degrees of temperature; hence, in many parts of the country, demands have been made to have weights substituted to drive the machinery, which operate outside the box, C. The objection to this latter mode of propulsion has been that the method of winding up the machinery has been such that the weight would be raised with a sudden, impulsive motion, frequently

catching in the upper corner of the box, or its attachment to the arm, D², would be broken. This difficulty would be obviated if the method of winding were such that the weight would be raised with a steady and uniform motion."

The third claim has reference to the winding apparatus. A bell-crank lever is fixed upon the end of a shaft, and by revolving actuates the transmitting machine. One arm of this lever is attached to a weight, and the other arm is made in the form of a cogged sector or wheel, the teeth of which engage with a pinion. This pinion is so held upon a shaft that it can slide thereon in a longitudinal direction, and revolve loosely upon it. To the end of the shaft is fixed a disk, and the pinion is normally pressed towards the disk by a spiral spring surrounding the shaft. The shaft is also pressed outward by a spiral spring within its standard, which standard is fixed to the side of the box. The shaft is prevented from being thrown out from its bearing by a screw which normally rests in a longitudinal groove upon the surface of the shaft. In this position the shaft cannot be rotated, but the groove permits the shaft to be pressed backward against the force of the spring behind it until the screw is opposite a transverse groove surrounding the shaft, and when in this position the shaft can be rotated. Upon the cessation of pressure upon the spring the shaft will return to its normal position. On opposite sides of the door of the box are two plates, and held between them is a ratchet wheel which is engaged by a pawl, and so permitted to revolve only in one direction. The keyhole is cut through the plates, ratchet wheel, disk upon the end of the shaft, and into the pinion. The key is so shaped that when pressed in the proper distance it will revolve, and will turn with it the ratchet wheel, disk, and pinion, and thus permit the shaft to rotate. When the key is thus rotated the pinion winds up the transmitting mechanism, and the ratchet wheel prevents the key being rotated in the reverse direction, or withdrawn from the box, before the full rotation of the pinion and the winding up of the motor. The results accomplished by this form of apparatus are stated by the patentee, as follows:

"It is equally evident that, if the proper key be introduced and turned in the only direction permitted by the ratchet wheel, H, it will cause the weight, S, to be raised, or an equivalent effect be produced if a spring be used. Also, it is evident that the key must make an entire revolution before the pin, e, can escape from the transverse groove, d, into the longitudinal groove, c, of the shaft, F. When, however, this revolution has been performed, precisely as one would lock or unlock a lock, if no severe pressure be made upon the key at that moment it will be thrown out by the recovery of the spring under the shaft, F, and so soon as the points of the key escape from the slot or keyhole of the pinion, the latter, being entirely free, will be caused to revolve in the opposite direction by the descent of the weight, S, and consequent movement of arm, D¹, and the key cannot re-engage in the said slot or keyhole until the revolution of the pinion has again brought the keyholes opposite to each other. * * * When the key has once been turned and thrown out, as above described, it is impossible to reintroduce it, or in any way interfere with the evolutions of the interior machinery, until it has completed the functions assigned to it."

Fig. 1.

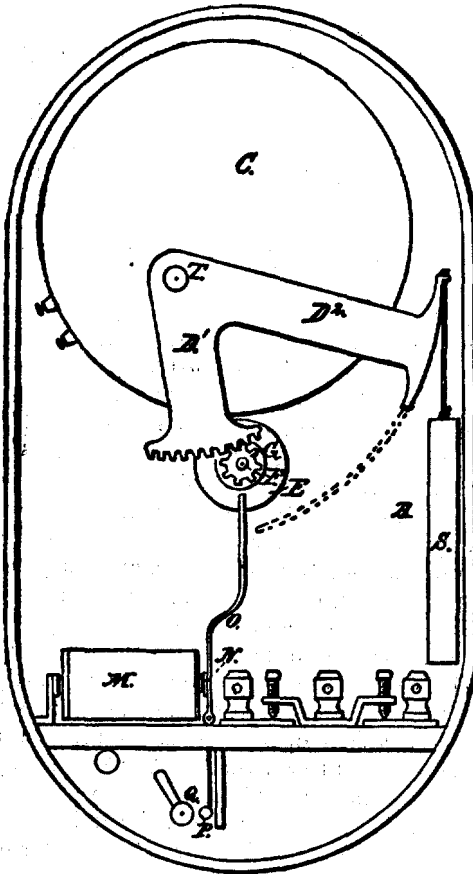


Fig. 2.

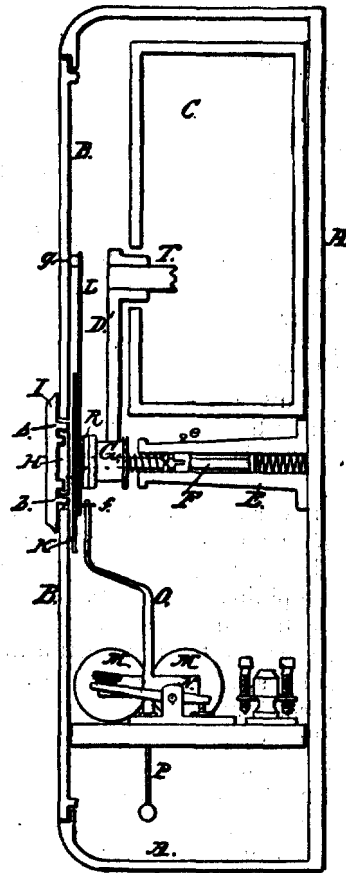


Fig. 3.

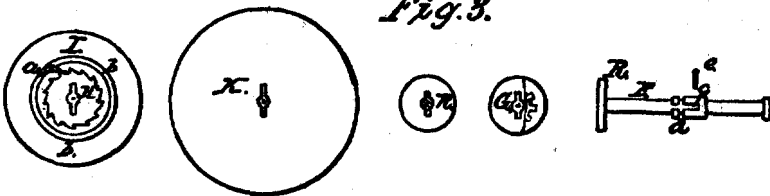


Fig. 4.

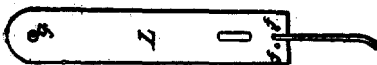


Fig. 5.



The utility of this ingenious contrivance seems to consist largely in preventing persons making mistakes in sending in an alarm. When the key is once inserted, and the turning begins, it cannot be turned backwards, and so send in a partial signal, but it must be turned until its rotation is completed. When the signal has been transmitted, the citizen is prevented from again turning the key around in the keyhole, as the spring behind the shaft tends to throw it out. By this method of winding up the machinery by means of the key and the pinion engaging the cogged sector upon the winding lever, a method of winding is provided whereby the weight is raised with a steady and uniform motion, and sudden jerks avoided.

The patentee originally sought, as shown by the file wrapper and contents, to obtain the following broad claim:

"In combination with any signaling apparatus, the winding up and preparing for action the motive force of said apparatus by turning the key or similar device inserted in the keyhole of a closed door or cover."

This was rejected, and claim 3, which embraces specifically the pinion, wheel sector, and key as elements in the combination, substituted.

The defendant's signal box does not, it seems to me, contain the specific devices, or their equivalents, covered by the third claim of the Chester patent. To be sure, it has a transmitting mechanism composed of a break wheel actuated by a spring, which was old at the date of the Chester patent, but the structure has not the peculiar shaped key, or the pinion for winding up the transmitter, or the cogged sector attached to the winding shaft, of the Chester patent, and which are the special features of the third claim thereof, nor does it accomplish the useful results specified by Chester. The key in defendant's box can be partly turned, and then turned back; it is not thrown out at the end of its revolution; nor does the winding mechanism operate so as to produce a steady and uniform motion. On the contrary, the key is turned only for a short distance, and moves the winding shaft at constantly increasing speed. In this apparatus an ordinary key is inserted through a keyhole, the barrel fitting upon a post, and upon being turned a quarter of a circle its bit engages with a projection upon an arm, and upon being further turned this arm pulls down a slide. This slide has a stud upon it, which lies upon the upper side of another arm attached to the winding shaft. When the slide is pulled down by the operation of the first arm actuated by the key the winding shaft is rotated.

A comparison of the defendant's signal box with the Chester box, with respect to the devices covered by the third claim, shows such dissimilarity that there can be no infringement, unless a very broad construction should be given to the claim. This is unwarranted in view of the proceedings which took place in the patent office, and of the state of the art at the time. I do not think it necessary to enter upon an examination of the prior art as disclosed in the record. It is sufficient to say that the combination of a pinion, wheel, sector, or rack, with a key, or its equivalent, passing through an orifice in a door for the purpose of winding a spring or raising a weight, was old and well known at the time of the

Chester invention. It follows that the third claim of the Chester patent should be limited to the devices, or their equivalents, set forth in that claim, and these are not found in the defendant's structure.

Bill dismissed, with costs.

ATWOOD *et al.* v. W. G. & A. R. MORRISON CO.

(Circuit Court, D. Connecticut. September 30, 1892.)

PATENTS FOR INVENTIONS—ANTICIPATION—INFRINGEMENT—APPARATUS FOR DRIVING SPINDLES.

Letters patent No. 296,377, issued April 8, 1884, to John E. and Eugene Atwood for an improvement in the means of driving spindles by bands, so as to permit the use of narrow spindle frames, consist of the combination of a drive pulley and a guide pulley having parallel axes, and arranged one above the other, two spindles on opposite sides of said pulleys, and two driving bands, each encircling both pulleys and the whirl of the spindle, and each consisting of three parts, two of which pass horizontally between the whirl and the adjacent sides of the pulley, and the third passing directly from one pulley to the other between the horizontal portions. *Held*, that the patent was not anticipated by a machine alleged to have been constructed and used continuously from 1877 by the W. G. & A. R. Morrison Company in its factory at Willimantic, Conn.

In Equity. Bill by John E. Atwood and Eugene Atwood against the W. G. & A. R. Morrison Company for infringement of patent. Decree for injunction and accounting.

Fish, Richardson & Storrow, for plaintiffs.

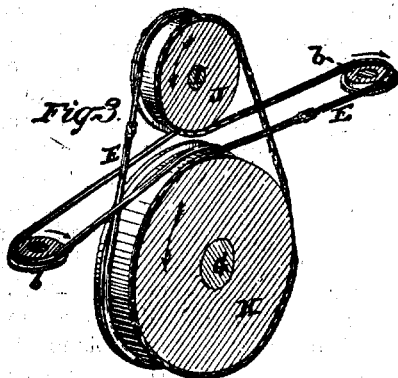
Charles L. Burdett, for defendant.

SHIPMAN, Circuit Judge. This is a bill in equity, which is based upon the infringement of the first three claims of letters patent No. 296,377, dated April 8, 1884, to John E. Atwood and Eugene Atwood for an improvement in the means for driving spindles by driving bands. The application was filed July 19, 1879. A spinning frame is a long frame having at each side a row of spindles rotating in vertical axes. A single shaft, extending lengthwise of the frame, drives all the spindles of the frame. This shaft was formerly provided with a drum, or with single separate pulleys, one for each spindle. In the Atwood patent of 1874 two driving drums were used, which were "arranged side by side, lengthwise of the frame, each driving, by separate bands, the row of spindles at the further side of the frame. In this arrangement the drum on the side next one row of spindles acts as a guide for the bands running from said spindles to the drum at the other side, which drives them, and in this manner the portions of the band approaching and leaving the whirl of the spindle are in the plane of rotation of the whirl," which is an important consideration, because, if, as in preceding inventions, the band approached and left the whirl at an angle to its plane of rotation, unnecessary friction was increased. The two drums placed side by side made a wide frame, and the same fault existed in the earlier inventions, which had also wide frames, because the spindle must be at a distance from the drum, so as

to make the angle between the parts of the band from the drum to the whirl sufficiently acute. The spinning room often contains thousands of spindles, and narrow frames are very important to save floor space and material. To accomplish this beneficial result, and also to increase the length of the band, thereby increasing its durability, the invention of the patent was conceived. The inventors say in the specifications:

"An important object of our invention is to provide, in an extremely narrow spinning frame, having a row of spindles on each side, for driving each spindle with a separate and independent driving band, which shall have sufficient length to give it durability, and all parts of which shall be free from liability to rub and chafe against each other while running. To this end the invention consists in the combination of a driving pulley and a guide pulley having parallel axes, and arranged one over the other, a spindle arranged at one side of said pulleys, with its whirl in a horizontal plane about midway between said pulleys, and a driving band encircling both of said pulley and said whirl, and comprising two portions extending horizontally between the whirl and adjacent sides of the two pulleys, and a portion extending directly from one pulley to the other, and passing between the said horizontal portions, as more fully hereinafter described. The invention also consists in the combination, with the two pulleys arranged as above described, of two spindles, arranged on opposite sides of the two pulleys, with their whirls in a horizontal plane about midway vertically between said pulleys, and two driving bands, each encircling both said pulleys and the whirl of a spindle, and each extending as above described. The invention also consists in providing the guide pulleys above described with flanges, whereby the portion of each driving band which passes from one pulley directly to the other is prevented from rubbing and chafing against the two horizontal portions between which it passes, as more fully hereinafter described."

In the patented device, the driving shaft, which carries the driving pulleys,—one for two opposite whirls,—occupies the usual position between the two rows of spindles. Above the shaft, and parallel with it, is another shaft for carrying the guide pulleys, which are directly over and which correspond with each of the driving pulleys, and are directly between the opposite spindles on the two sides of the frame, and are flanged on each side. The whirl of the spindle is about opposite the space between the two pulleys. The band encircles the driving and guide pulleys and the whirl of a spindle, and after leaving the driving pulley, and before passing around the guide pulley, passes around and from the whirl in a nearly horizontal plane, while the portion which passes from the guide pulley to the driving pulley passes between the horizontal portions in a nearly vertical plane. Chafing between the vertical and the horizontal portions of the band is prevented by the fact that the space between the flanges of the guide pulley is less than the diameter of the whirl, and therefore the flanges cause the vertical portions to swerve



from the lines in which they would come in contact with the horizontal portions.

The three claims which are said to have been infringed are as follows:

"(1) The combination of a driving pulley and a guide pulley having parallel axes, and arranged one over the other, a spindle arranged at one side of said pulleys, having its whirl in a horizontal plane about midway vertically between said pulleys, and a driving band encircling both of said pulleys and said whirl, and comprising two portions extending directly from one pulley to the other, and passing between the said horizontal portions, substantially as described.

"(2) The combination of a driving pulley and a guide pulley having parallel axes, and arranged one over the other, two spindles arranged on opposite sides of said pulleys, with their whirls in a horizontal plane about midway vertically between said pulleys, and two driving bands, each encircling both of said pulleys and the whirl of a spindle, and each comprising two portions extending horizontally between the whirl around which it passes and the adjacent sides of said pulleys, and a portion extending directly from one pulley to the other, and passing between said two horizontal portions, substantially as herein described.

"(3) The combination of a driving pulley, H, and the flanged guide pulley, J, and their shafts, arranged parallel with each other, the spindle, D, and its whirl, b, arranged as described, and the driving band, E, encircling both of said pulleys and said whirl, and comprising the horizontally extending portions, SS, and the portion, S', passing between the portions, SS, substantially as herein described."

The single driving pulley and the guide pulley directly over it made a narrow frame, while the band approaches the whirl, as in the 1874 patent, in its plane of rotation. The result which was previously accomplished by two drums side by side is attained by two pulleys, one above the other, in the same vertical plane, with an economy of room. A long, and therefore durable, band is also gained.

The defense is that the defendant constructed and used in the summer of 1877, and continuously thereafter, in its factory in Willimantic, Conn., a testing machine for spindles, which was "banded," in accordance with the patented method, by two pulleys, one above the other. The history of this machine, as given by the defendant's vice president and secretary, is that in 1877 a testing machine was made, for the purpose of testing spindles which were being put into machines made for the Springfield Silk Company; that it was kept and used until about 1880 in the attic of the defendant's shop. An addition to the factory was then built, and the machine was placed in the third story, where it remained for some months, and was then moved down stairs to the first floor. It had two wooden pulleys of about the same size, until 1883 or 1884, when a smaller iron flanged pulley was substituted for the upper wooden pulley, and a groove upon the lower pulley was turned off, but it is said by the defendant that the same method of banding was used continuously from 1877. The Springfield machines were banded in the old "two-cylinder" method. The patented method of banding is ingenious; and speedily attracted attention when brought before the public. It is remarkable that the defendant hit upon this method in

1877, in a crude machine merely for testing spindles, when the spindles to be tested were banded in the old-fashioned way, and a new system was not needed. It is furthermore remarkable that in a small shop the attention of the mechanics should not have been attracted to a new method, which, when presented to other manufacturers, quickly excited interest. That an invention which bore marks of intelligent ingenuity, whose claims to superiority were promptly acknowledged by the public, should have been produced in 1877, and should have been continuously used till Atwood's invention became known, without the consciousness of any one that this testing machine contained a novelty, is singular. Six witnesses who were actually engaged in 1877 in the defendant's shop—one as a partner, one as a foreman, two as machinists, and two as wood workmen—testify as follows: They did not see the machine in the attic. They, or some of them, did see it on the third floor in 1889, where it was used for testing spindles. The Atwood method of banding was a novelty to them when it was introduced. Two of them, one the foreman, say that when it was in the third story it had two horizontal cylinders side by side, and was not banded in the new way. The foreman says that when it was removed to the basement "the thing [was] set up on end," the upper cylinder was removed, the iron band wheel was substituted for it, and the present style of "banding" was introduced.

My examination of the testimony brings me to the conclusion that a testing machine was built in 1877, was placed in the dimly-lighted garret of the shop, was used for testing the Springfield Company's new spindles, and was removed to the third floor in 1880, where it was in plain sight, and was noticed by the workmen, but that its two cylinders moved in a horizontal plane, and were side by side, and its banding was the "two-cylinder method," and the one which was then needed for testing purposes; that subsequently, when the Atwood method became public, the change was made in the upper cylinder, and the position of the machine was changed. The fact of these changes in the life of the machine may easily have escaped the memory of the officers of the defendant company, who now believe that the machine in its important features has existed since 1877; but the fact that they are mistaken is far more probable than that the Atwood banding was produced by one of them in that year.

There is no suggestion that other pre-existing devices trenched upon the right of the invention to the claims of the patent, but it is claimed in the argument that infringement was not proved. In the *prima facie* testimony the complainants introduced a model, which respondent's counsel admitted, for the purposes of the case, was a "correct illustrative representation of machines for spinning silk, which respondent made and sold at Willimantic, Conn., between the date of the patent in suit and the time of filing the bill of complaint." This model was "banded" by the Atwood patented method. Complainants' witnesses thereupon testified that the machine illustrated by the model was an infringement. Respondent's witnesses did not deny the infringement, or deny that its machines, when sold, were banded. It is now said that

the stipulation admitted the construction of the spinning frames, but did not admit that they had sold machines with bands, and that such a machine can be banded in different ways, and that there is no evidence that the complainants had banded their machines in any way. Without discussing the effect of the defendant's silence after the testimony of the complainants, which was based upon the supposed extent of the stipulation, I think that the respondent positively admitted the fact of making and selling machines with the Atwood mode of banding. Mr. W. G. Morrison, the defendant's vice president, in reply to cross question 96, "When did you first employ such a way of banding [in the 1877 frame] in the frames which your company sent out from its shop?" and to question 97, to give the date as nearly as he could recollect, said, "Between 1881 and 1884." In reply to cross question 127, which inquired whether the end of 1884 or the beginning of 1885 was the time when he first produced spinning frames with the method of banding shown in the exhibit, Mr. Morrison said: "Some time prior to this date, I made a trial frame containing a continuous tin cylinder. I had never made any frames, and sent out prior to this date." He certainly implied that after that date he had sent out frames with the method of banding shown in the model. This testimony leaves no room for reasonable uncertainty upon the question of infringement. Let there be an injunction against infringement of the 1st, 2d, and 3d claims, and for an accounting.

THE CHATFIELD.

SHELDRAKE v. THE CHATFIELD.

OCEAN S. S. Co. v. SAME.

(District Court, E. D. Virginia. March 14, 1892.)

SALVAGE—TOWAGE—STEAMSHIP WITH BROKEN SHAFT.

On the night of the 26th of October, 1891, the steamship Chatfield, of 1,904 tons register, and loaded with 7,400 bales of cotton, when about 53 miles out from Cape Henry, broke her shaft and lost her propeller. A strong wind was blowing at the time, which increased during the next day to a gale. There is also a strong current in that part of the ocean, setting south, and the Chatfield was carried to a point some 70 miles from Cape Henry, and off soundings. On the following morning she set signals of distress, and about 11 o'clock was approached by the cargo steamship Brixham, of 400 tons net register, and loaded deep with iron, which with great difficulty got hawsers to her, and in 9 hours towage against the wind, her hawser parting 3 times, brought her within 43 miles of Cape Henry, and into 16 or 17 fathoms of water, where the Chatfield anchored. The Brixham remained with her all night, and in the morning, the gale increasing, the Chatfield signaled the Brixham to go to port for additional help, with which request the Brixham complied. Thereafter the passenger steamship City of Augusta came up, to which the Chatfield exhibited signals of distress; she at this time dragging her anchor and drifting towards the coast. The City of Augusta, with great difficulty, and danger of fouling her propeller and disabling herself, got hawsers to the Chatfield, and towed her into Hampton Roads; the service lasting about 12 hours. The Chatfield, with her cargo and freight, was worth about \$435,000, the Brixham

\$30,000, and the City of Augusta \$440,000. Each of the salving vessels was damaged to the extent of some \$5,000. *Held*, that the Brixham should recover \$12,500, and the City of Augusta \$15,000; the same to cover both salvage and damage claims.

In Admiralty. Salvage.

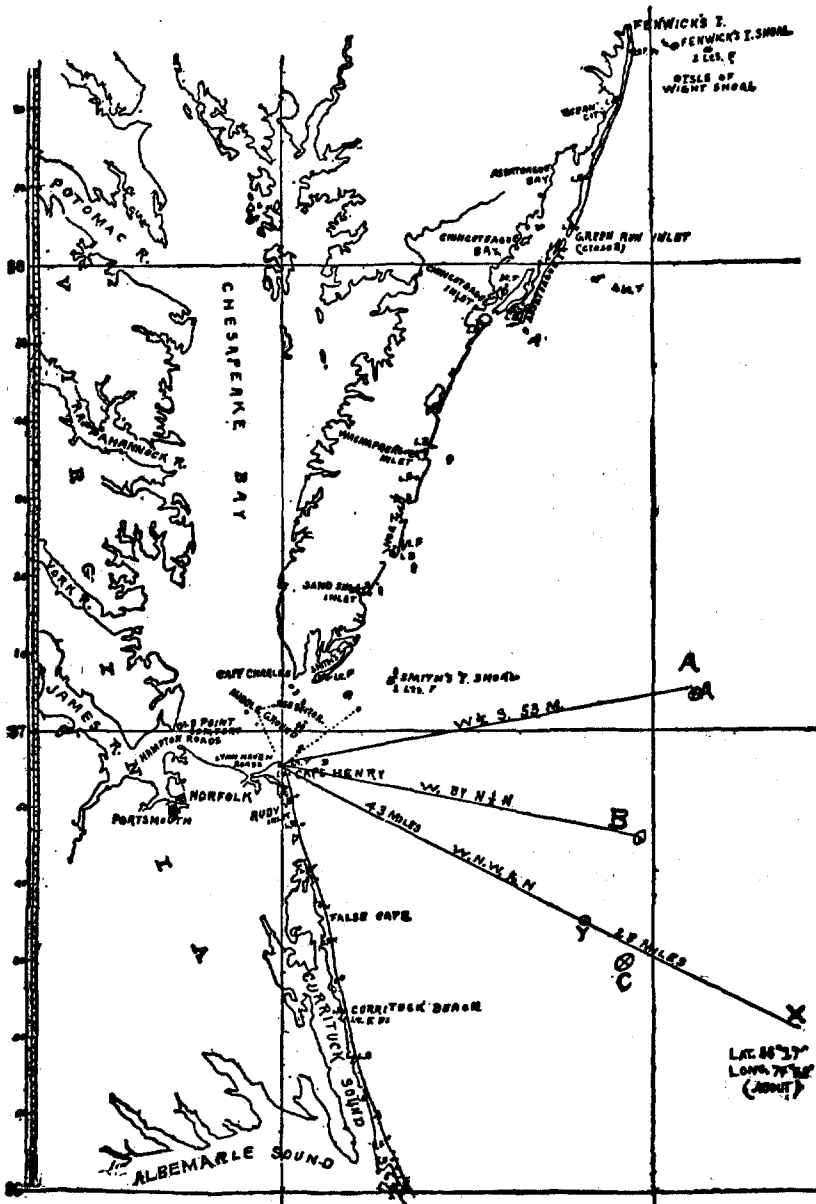
EPITOME OF THE EVIDENCE.

First. In the Case of the Brixham. The British steamer Chatfield, bound from Galveston to Liverpool with cotton, put in at Newport News for coal in October last. On the night of the 26th of that month, she proceeded from the coaling port on her voyage, and had made about 53 miles out from Cape Henry, when, at 11 o'clock, she broke her shaft and lost her propeller. She was then at the place on the chart marked "A." She was under sails during the rest of that night, and in the morning hoisted signals of distress. McFee, master of the Chatham, fixes the position of the steamer that morning at the place on the chart marked "B." She was taken in tow by the steamer Brixham, bound from Philadelphia to Velasco, Tex., which had her in tow for 9 hours, and brought her within 43 miles of Cape Henry. She then cast anchor in 17 fathoms of water, and continued at anchor during the night of the 27th; the Brixham remaining near her. On the morning of the 28th, she gave signals to the Brixham to go into port for another tug, with which request the Brixham complied. McFee declares that the Chatfield was then at the place marked "C" on the chart. She again put out signals of distress, and between 10 and 11 o'clock on the morning of the 28th was taken in tow by the freight and passenger ocean line steamer City of Augusta, bound on schedule time from Savannah to New York, and towed into Hampton Roads. Two libels against the Chatfield for salvage have resulted from these occurrences, — one of them brought in behalf of the Brixham, and the other in behalf of the City of Augusta. The two cases have been heard together, as the libels are against the same ship for services, one of which was in immediate sequence of the other, and as the evidence taken is in part common to both cases.

First, as to the libel of the Brixham. The master and two mates were examined in behalf of the Chatfield. Her engineer also testified, but on points not controverted. In substance, the testimony was as follows: The Chatfield is a steel steamer, 1,904 tons in measurement, 314 feet long, 40 feet in beam, schooner rigged, with two masts, no topmasts, a foresail, a mainsail, and fore and main staysails, and with triple expansion engines. She had on board upwards of 7,400 bales of cotton, weighing 2,000 tons, and a supply of coal for her voyage; the ship and cargo probably weighing about 4,000 tons. The value of the ship was \$130,000; of the cargo, \$297,000; and she had earned one third of an aggregate freight of \$20,863. It does not appear how numerous her crew was, only three of whom testified on the disputed facts of the case.

McFee, master, says:

"After the accident at 11 P. M. on the night of the 26th of October, there being no wind, we let the sails lay, and waited till morning. Sighted the Brixham at half past 10 to 11 A. M., and the Brixham came up about noon. We were then about 48 miles from Cape Henry. There was a fresh N. N. W.



breeze and moderate sea. In the early part of the night before, the wind had been light from S. W.—very light—and the sea smooth. At noon, when the Brixham came up, the depth of sea was 17 fathoms. The mate says 21 fathoms. As to hawsers, the Chatfield had the full requirements of Lloyds. On the morning before the Brixham neared us, the wind came a fresh breeze, and continued that way, once a little stronger, throughout the towing; at no time more than a moderate sea. The place where our shaft broke was at 'A,' marked on the chart exhibited in this case. Upon the Brixham coming up, it was settled by signals that services were to be left to arbitration."

McFee gives no description of the preparations for towing, but his log says: "We got lines to him, and he commenced towing; also got his wire hawser fast to us, and we set sails." All three of the Chatfield's witnesses say that the towing began at 1 p. m. McFee says that at that time Cape Henry bore W. by N. half N.; that at 7:30 p. m. he let go all sails, and split a good many of them. He says the hawsers parted three times,—first about 3 p. m., then next about 4, and the last about 7:30, p. m. After this the Chatfield let down her anchor. At the parting of hawsers about 4 p. m., the Brixham came up on the lee of the Chatfield, when there was a collision, inflicting trifling damage upon the Chatfield. McFee ascribes the partings of the hawsers to the bad steering of the tug, in veering first to one side, and then to the other, which put undue strain alternately upon one and the other hawser. On the night of the 27th, after the Chatfield went to anchor, the Brixham remained, steaming around her all night. On the morning McFee signaled her to go to Norfolk for another tug, thinking the Brixham unable to bring her into port. McFee says: "My object in sending him was to have all means possible to get the ship in in case he would send a tug which would come. If I got anything to tow me in, I thought certainly I should meet him coming out." McFee considered himself safe when the Brixham was sent in for a tug. At that time the City of Augusta had come in sight. Cape Henry then bore N. W. by W., and was 48 miles distant.

Logan, the second mate of the Chatfield, testified very much in accordance with the master. He was the only one on the Chatfield who took soundings. Of the weather and sea, he says:

"The whole time from the morning of the 27th to the morning of the 28th the direction of the wind was N. N. W. It was a fresh breeze, blowing about the same the whole time, with the wind and sea nothing at all. The night of the 27th was a beautiful, clear, starlight night, with not the slightest appearance of a squall. When the Brixham came up on the morning of the 27th, the weather was fair, with a fresh breeze and clear, and with a moderate sea."

Burn, the first mate of the Chatfield, says:

"There was an ordinary breeze from N. N. W. The weather throughout the whole towing was just an ordinary fresh breeze. With the wind that way, the sea cannot rise, because the wind is off the land, so there cannot possibly be any sea. In our ship there was hardly a motion of her. The passing of hawsers could have been done easily, by lowering a boat,—very easily. The Brixham was very badly handled, for first she was down broad

on the port bow, and then up to starboard again. It was impossible for us to keep after her."

It is stated in evidence that the Chatfield's free board was 17 feet; that is to say, that she presented above the water that much surface to the wind. The Brixham had only 19 inches of free board.

On the part of the Brixham, the master, the two mates, the engineer, the fireman, two seamen or deck hands, and the cook,—eight in number,—constituting, I suppose, the entire crew, were examined. This ship was of 628 gross and 400 net tons; in measurement was 193 feet long and 27 feet beam. She was worth \$60,000, had on a cargo of iron valued at \$20,000, and was under charter for a freight from Philadelphia to Velasco, Tex., of \$3,200. She left Philadelphia shortly after 10 o'clock on the morning of the 26th October, passed out of the capes of Delaware after nightfall, and passed Fenwick Island light on her starboard beam at 9:45 P. M. Sheldrake, master, testifies that his course from there was about due south, that his steamer's speed was 9 miles, and that he went along with a current and the wind in his favor, making 10 to 10½ knots an hour. The wind was 30 to 38 miles an hour from sundown on the 26th to 10 at night, and afterwards increased to 40 to 42 miles, becoming, on the morning of the 27th, a stiff gale, causing a high sea, which overflowed his decks. He sighted the Chatfield at 9:30 A. M., about 6 miles to eastward, and got to her a few minutes after 10. Chatfield asked by signals what he expected, and he answered "Arbitration." He then came close to the ship, and was told to take her hawser. He backed up under her lee side, heaving her a line from his steel hawser, and she heaving him a line from her Manilla hawser. Both were fortunately caught. One was run from her starboard bow to his starboard quarter, and the other, in like manner, from port bow to port quarter. He passed them through his stern chocks to big iron bits in the bow, but could not place them just as he would have liked, because of the sea breaking over his deck. He had taken soundings with a 30-fathom line at 4 A. M., and again at 8 A. M., and found no bottom. He started ahead for Norfolk, towing on the two hawsers, at probably about 20 minutes to 11. As he was moving, while towing about N. N. W., moving up towards N., which put him within about three points of the wind, he took in his sails, and the Chatfield took in hers also, following suit. The Chatfield sheered so much from her bad steering that it caused his steamer to veer, and put too great a strain upon the hawsers,—first upon one, and then upon the other. His steel hawser parted about 1:30 P. M., and he went ahead on the Manilla hawser, which also parted about 4 P. M. When this happened, he went up on the lee side of the Chatfield, and was in collision with her, by her coming down against him, causing very considerable damage to his steamer. Having again succeeded in making fast the Manilla hawser, he again went ahead, and continued the towing until 7:30 at night, when this hawser again parted, in consequence of the sheering of the Chatfield. The Chatfield then went to anchor in 16 or 17 fathoms water, and the Brixham steamed around her all night. In towing he moved from 3 to

3½ miles an hour, and made a distance in all of about 28 miles, bringing the Chatfield to within 43 miles of Cape Henry. The towing lasted nine hours, less one hour consumed in the trouble with the parted hawsers. This witness marks "Y" on the chart exhibited with this opinion as the place where he left the Chatfield. He had and has no doubt that he could have taken her into port on the 28th.

Henze, the cook, besides giving other testimony corroborating that of the master, says:

"The Brixham had the Chatfield under tow by 11:20 A. M. on the 27th. The sea was pretty rough that morning. The main deck was full of water all the time. It was a very high sea, and continued so until next day about 10. While the towing was going on, the sea was very high, and, by coming down with sea on, parted the hawsers. The Chatfield was high up above the water, and we low, and deep loaded. When the collision happened, she smashed right down upon our stern; smashed the cabin in. Her starboard stern smashed the side in," etc.

Thompson, seaman, says, among other things:

"We got a hawser out about between 10 and 11 o'clock of the 27th. We got her in tow about 11. We towed her till about 25 minutes past 7 at night, when the rope broke. The wind was northerly and northwesterly on our starboard quarter,—pretty heavy wind, and pretty heavy sea on. The wire hawser parted first, after dinner some time, and then the Manilla hawser parted. When we first met the Chatfield in the morning, she had fore and aft sails on. She took them down when the captain spoke to her, and did not put them up again while we had her in tow. It was a heavy sea on, and, through the night of the 27th, snowy and squally. The speed of the Brixham during the towing was three and a half to four knots, after my own way of judging."

Olsen, seaman, says, among other things:

"I went on at 12 M. on the 27th. We were towing the Chatfield when I went to the wheel. The wind was to north and west, and there was a pretty heavy sea in the morning. The decks were full of water, which was going into cabins and everywhere. The Brixham had much difficulty in towing the Chatfield, on account of the weather and heavy sea on. The wire hawser parted after dinner, and we were called out on deck. Some time in the afternoon the Manilla hawser parted. We passed ropes again, and towed her until between 7 and 8 o'clock, when the hawser parted again. The wind was blowing pretty hard, and a heavy sea on; raining in the afternoon. We laid around the Chatfield all the night of the 27th, and left about 8 in the morning for port."

Tibland, fireman, says:

"After we got our dinner that morning [27th] at half past eleven, I went on deck. We then had the Chatfield in tow. There was a heavy sea and a gale of wind."

Currie, engineer, says, among other things:

"When we stopped the engines on nearing the Chatfield, it was half past 10 in the morning of 27th. We proceeded ahead at 11 o'clock. We stopped again about 4 in the evening, and was in tow again at 4:30, and towed till a quarter to 8 that night. We were running around the Chatfield all that night, working the engines, as ordered from deck. Next morning at about 8 went

ahead, with engines at full speed. From Philadelphia down to where we stopped, near the Chatfield, our speed had been $8\frac{1}{2}$ to 9 knots. While towing the Chatfield we were going through water at a speed of about $3\frac{1}{2}$ knots. The wind was pretty bad. The sea was washing right over us. The Chatfield had her sails up when she was flying signals in the morning. She took her sails down when she was in tow. The average speed of Brixham through the water in ordinary weather is $9\frac{1}{2}$ to 10 knots."

Allen, first mate, says, among other things:

"We had Fenwick Island light abeam at 9:45 on night of 26th. Course south all night, till 8 o'clock in the morning, when it was S. quarter W. She made an average of 9 knots during the night. Called captain's attention to Chatfield about 9:30 A. M., on the 27th. She was about 6 knots from us, southward and westward, four or five miles west from our course. She had up three balls, as signals of distress, calling for help. She had her sails up before we took her in tow. She hauled them down afterwards, and did not hoist them again during the towing. We had her in tow about half past 10 to quarter to 11. The weather was nasty, blowing a northwest gale of wind; sea running very heavy, filling us with water fore and aft, all through the towing. I took soundings that morning close to 8. Didn't find any bottom with 30 fathoms of line. Soundings were again made about the time the Chatfield was taken in tow, and got no bottom. About noon, made soundings myself, and yet no bottom. I took an observation then, and found latitude $36^{\circ} 23'$ N. During the towing the Brixham made two and a half to three miles an hour. I attribute the bad towing to the bad steering of the Chatfield. The hawsers were nearly parallel, and she ought to have steered straight after us; otherwise, the strain would be all on one hawser or the other, which made it more liable to part than if the strain was kept on both. The effect was, from the Chatfield being five times larger and heavier than the Brixham, that the ship towed took the tug in charge. If she had followed the tug, I have no doubt that the Brixham would have taken her right in out of the storm. The failure to do so was owing to the bad steering of the Chatfield, and the bad state of the weather, wind, and sea. The weather and sea were both very violent, with heavy squalls of wind, and rain, snow, and sleet during the night of the 27th. The Chatfield did not have sails hoisted at any time during the towing. She let go her anchor at the end of towing, in soundings varying from 16 to 17 fathoms. During the towing our progress was $2\frac{1}{2}$ to 3 miles an hour, to the N. N. W. There was no drifting during the towing. During the whole of the 26th, we were running to the southward in a northwest gale of wind. There was also a northwest gale of wind on the 27th. Statements in our engineer's log to the contrary are not true. Engineers' logs are not authority in regard to weather. The Brixham is considered a fast boat for a small one, and very strong and staunch, which is proved by her breaking the hawsers on the occasion of the towing without tearing her bits out or straining herself. The wind moderated on the morning of the 28th, but, as it had blown a gale all during the night, with very heavy sea, and continued to do so up to daylight, the sea had not gone down, and was still very rough. There is never any trouble in passing hawsers in a light breeze and moderate sea. It was the gale and the high sea on the 27th that made the difficulty with us. It was out of the question to think of lowering a boat. I have been in a boat a good deal myself, and in a good many kinds of seas,—I have been whaling for three years,—and I would not have taken one of those whale boats, which are better than almost any ship carries out of New York,—I wouldn't have done that on that day for the Chatfield nor the Brixham combined, and their cargoes chucked in. When we parted the Manilla hawser, our only chance was to go to leeward of the Chatfield to get to her;

she being a larger ship than we, showing more side out of the water, and the wind blowing very strong. At that time it was blowing her two miles to our one. If we had gone to windward of her, we wouldn't have got anywhere near her. The leeward was the proper side for our small tug."

The signal service report of the weather at Cape Henry on the 27th and 28th October last shows the wind to have been as follows:

Oct. 27th, 12 M. to 6 A. M., average of 24 miles an hour.

" 7	to 8 A. M.	" 19	" "	" "
" 8	to 9 A. M.	" 33	" "	" "
" 9	to 10 A. M.	" 34	" "	" "
" 10	to 11 A. M.	" 40	" "	" "
" 11 A. M.	to 12 M.	" 38	" "	" "
" 12 M.	to 1 P. M.	" 37	" "	" "
" 1	to 2 P. M.	" 37	" "	" "
" 2	to 3 P. M.	" 38	" "	" "
" 3	to 4 P. M.	" 41	" "	" "
" 4	to 5 P. M.	" 46	" "	" "
" 5	to 6 P. M.	" 45	" "	" "
" 6	to 7 P. M.	" 46	" "	" "
" 7	to 8 P. M.	" 42	" "	" "
" 8	to 9 P. M.	" 47	" "	" "
" 9	to 10 P. M.	" 42	" "	" "
" 10	to 11 P. M.	" 39	" "	" "
" 11 P. M.	to 12 M.	" 40	" "	" "
Oct. 28th, 12 M.	to 1 A. M.	" 36	" "	" "
" 1	to 2 A. M.	" 35	" "	" "
" 2	to 3 A. M.	" 35	" "	" "
" 3	to 4 A. M.	" 34	" "	" "
" 4	to 5 A. M.	" 31	" "	" "
" 5	to 6 A. M.	" 31	" "	" "
" 6	to 7 A. M.	" 31	" "	" "
" 7	to 8 A. M.	" 31	" "	" "
" 8	to 9 A. M.	" 30	" "	" "
" 9	to 10 A. M.	" 27	" "	" "
" 10	to 11 A. M.	" 27	" "	" "
" 11 A. M.	to 12 M.	" 25	" "	" "
" 12 M.	to 1 P. M.	" 22	" "	" "

The signal service classification of winds is as follows:

Light wind,	-	-	-	-	-	1 to 2 miles an hour.
Gentle wind,	-	-	-	-	-	3 to 5 " " "
Fresh,	-	-	-	-	-	6 to 14 " " "
Brisk,	-	-	-	-	-	15 to 24 " " "
High or strong,	-	-	-	-	-	25 to 39 " " "
Gale,	-	-	-	-	-	40 to 59 " " "
Storm,	-	-	-	-	-	60 to 79 " " "
Hurricane,	-	-	-	-	-	80 to 150 " " "

Sheldrake's judgment was, on hearing the signal service report of the velocity of the wind at Cape Henry read to him, as above, that the wind was stronger out to sea than at the cape. This report, reinforced by the testimony of Sheldrake, shows that all through the night of the 26th a high or strong wind prevailed; that it increased to a gale about 11 o'clock A. M. on the 27th; that it blew a gale throughout the towing

of the Brixham, and through the night of the 27th, and abated only by slight degrees, and very gradually, between 1 A. M. and noon on the 28th, at which last hour it was still 25 miles an hour. The Brixham files bills for repairs, damages, and outlays resulting from her service, amounting to \$5,000.

Second. As to the City of Augusta. The Chatfield was taken in tow by the City of Augusta about 10:40 A. M. on the 28th. The latter ship was of 2,870 tons measurement, was worth \$300,000, had on a cargo worth \$134,000, and had aboard 19 passengers. Her speed is 14 miles an hour. Her master, Catharine, says that in passing Hatteras, early on the morning of the 28th October, 1891, he encountered a northerly gale of 40 to 45 miles an hour, with a strong sea; so much so that it was necessary to put a governor on the engine. As he came north, the sea increased, and he could make only seven miles an hour. About breakfast time he discovered a vessel four points on his star-board bow, and on using his glasses found that she was giving out no smoke or steam, and was flying signals saying she wanted a tow, and showing three balls saying they had no command of the steamer. On nearing the Chatfield, he found she was lying at anchor, and sheering heavily from one side to the other. Though he used a great deal of caution, yet, in getting her heaving lines aboard, she took a heavy sheer, striking him abaft the main rigging, port side, doing him considerable damage, although the blow was lessened by his giving the jingle bell, and going ahead at full speed. He had great difficulty, attended by much danger to his ship, in getting a hawser properly adjusted. Tried heaving lines twice without success, and succeeded finally by using a buoy, and having it caught from the Chatfield by grappling hooks; the wind and sea being such during the time as to put him in risk of fouling his propeller with the hawser, which would have been fatal to both ships in the condition in which they were. During the time of getting out the hawser, the wind was blowing 35 miles an hour, with quite a high sea,—so high that the Chatfield, riding at anchor, was pitching her shaft hole entirely out of the water, so that we could see it. It took two hours to get the line on board. The wind was N. by E.; and, after getting the hawser, he had to tow a considerable distance around by a long circle to get on his course. After towing into within a mile of Cape Henry, and after the Chatfield had taken on a pilot, the hawser parted, subjecting him again to the risk of fouling his propeller. He again had a good deal of difficulty in getting his hawser to the Chatfield, owing to the strong tide, but succeeded, and brought her into Hampton Roads. When he picked up the Chatfield in the morning, she bore N. W., a little W. from Cape Henry, and was distant about 53 miles. She must have been drifting, from the way she was sheering about; it being evident the anchor was not holding the ship. The anchor was of a kind he had never seen before,—a long shank, with a little claw on the end of it, not more than two feet long; and it was evident to his mind that in a sandy bottom it was impossible for that anchor to keep that ship from running ashore. She was drift-

ing, and, if she had received no help, would have gone upon the beach anywhere between Nags' head and Hatteras. She was then 40 miles from Nags' head and 47 from Wimble shoals. With the wind blowing as strong as it did that morning, the current there being two miles an hour, she would have drifted with that anchor down at least a mile or two an hour, and five miles if the anchor had not held. She would have gone upon the beach in eight hours. The depth of water where he took the Chatfield in tow was scant 18 fathoms. The manner in which she sheered, first on one side, and then on the other, when he first neared her, proved that she was dragging her anchor. When he first came up to the Chatfield the wind was blowing 30 to 35 miles an hour; so hard that he could not keep his ship in position ahead of her. No attempt was made to pass hawsers by lowering a boat; it would have been too dangerous to be attempted, and was not thought of. To the same effect was the testimony of other members of the crew of the Augusta who were examined. The bills of lading and insurance policies of the Augusta at the time of this service gave her the right to assist ships in distress.

The three officers of the Chatfield, heretofore mentioned, testify in substance as follows: McFee, master, says, as of the time on the morning of the 28th when the City of Augusta neared the Chatfield, that there was not a heavy northerly gale, nor anything approaching it, but only a strong to fresh wind and a moderate sea. The Augusta came up to him about 9 A. M., on his weather side. They missed getting the line the first time, and also the second time, but the third time she came up under the bow, and he got his hawser aboard of her, and, as soon as the hawser was fast, he tripped his anchor, and she slewed around and towed away. He could have passed his hawser by a small boat, but there was no necessity for it. The Augusta was handled in a most seamanlike manner, and there was no trouble in getting the hawser on board. The towing commenced at 11:30, and they made about 8 knots an hour, and came into the capes, arriving at half past 5, the towing having lasted about 6 hours. The hawser appliances which he gave to the Augusta was a large wire hawser, attached to his chain cable, which veered out about 45 fathoms of cable with the wire. The Augusta started ahead, after he got the pilot on board off Cape Henry, with a little too much speed, and carried away his wire hawser at the point where it was fast to her stern. He thereupon let go his anchor, and gave out 15 fathoms of cable, to hold the ship in position. He then hauled in his hawser, put another bend on it, to make fast with, whereupon the Augusta came around again, and steamed up and passed her line, and took his hawser again, and, after some trouble with his chain cable and anchor, proceeded on and went into Hampton Roads. Half an hour after first taking him in tow, the Augusta signaled him to put up his sails, and, the wind being N. N. W., allowing the sails to draw well, he did so. The service of the Augusta lasted between 9 A. M. and 8:30 P. M. of the 28th. The towing commenced at 11:30. There was no peril or danger to her in the service over the ordinary peril of taking a ship in tow at

sea. There was no extra risk. The danger was very small. If there had been extra danger, the Augusta would have lowered a boat to run the lines. The mates of the Chatfield testify substantially in accordance with the testimony of McFee, the master. The City of Augusta files claims for costs, losses, and damages resulting from her service, amounting to about \$5,000.

Whitehurst & Hughes, (William W. Goodrich, of counsel,) for the Brixham.

Sharp & Hughes, for the City of Augusta.

Richard Walker, for the Chatfield.

HUGHES, District Judge. *First. As to the Brixham.* It seems plain that the evidence of witnesses of the Chatfield taken in this case is disproved on all contested points. The direction of the wind when she was approached and taken in tow by the Brixham was N. N. W., and remained so, or nearly so, all through the day and night of the 27th. That is conceded. But the wind was not a mere fresh breeze of 6 to 14 miles an hour, as stated, and iterated by master and mates. All the other witnesses say otherwise, and the signal service record of the wind at Cape Henry contradicts their testimony, and corroborates, with singular completeness, the testimony of Sheldrake, master of the Brixham. In fact, from 11 o'clock, the time the towing began, till midnight of the 27th, the wind was blowing a gale. All the witnesses of the Brixham concur substantially in saying so, and all the circumstances of the occasion corroborate their statements. If the sea and wind were "nothing at all," as one of the Chatfield's witnesses testifies, when the two ships came first into proximity, why did not the Chatfield lower a boat, and enter quietly into a settlement of the terms of the towing? Why did the two vessels stand off at cautious distances, and communicate solely by means of dumb signals? The weight of evidence proves that, after being taken in tow by the Brixham, the Chatfield took in her sails; but if, as McFee states, they were spread, how could a mere fresh breeze split the new sails of a new ship in pieces? And of what avail could sails have been at all to a ship moving within three points of the wind? The Chatfield, showing a surface 17 feet above water, was indeed a great mark for the wind, but would have been easily steadied by her own rudder and by the two hawsers of the Brixham, moving 3 miles an hour over the water, if the wind had been only a 6 to 14 mile breeze. The fact that she sheered beyond control of so stout a tug as the Brixham is conclusive of the fact that she was breasting a gale; otherwise, why did the strong hawsers by which she was drawn part, and continue to part, while she was under tow? And, as to soundings before the Chatfield was taken in tow, no one took or reported them but Logan, the second mate,—the man who testified that the night of the 27th was a bright, starlight night, and that there was no sea, and only a fresh breeze, during a period when the official report shows that the wind was blowing a gale. It is hard to believe that a witness who is discredited on every other point on which he testifies spoke truly as to the soundings. Burn, the other Chatfield mate, says, *arguendo*, that there could have been no sea, because the wind was off

shore,—a reason which would probably have been conclusive if his ship had been a small distance off shore, but is of no validity as to a ship 50 to 75 miles out to sea.

No one of the three witnesses of the Chatfield pretends that she let go her anchors in the interim between losing her propeller, at 11 on the night of the 26th, and sighting the Brixham, in the forenoon of the 27th. McFee, her master, says, there being no wind, he let his sails lie, and waited till next morning. Certainly, without sails and without wind, it would have been necessary for the ship to let go her anchors if the bottom could be reached. That they were not let down is proof that the ship was out at sea, beyond reach of the line of 30 fathoms. McFee's statement, however, that there was no wind, and that he let his sails lie, is not credible. The weight of testimony is conclusive that there was a high wind all the night of the 26th, and the signal service record of the velocity at Cape Henry confirms the preponderant testimony. It is impossible to believe but that there was a strong wind on the night of the 26th, and that the Chatfield's sails were all set. McFee subjects rational belief to too great a strain when he affirms that during all the night of the 26th, after 11 o'clock, he made no use of his sails; and yet that when he was in tow of the Brixham next day, moving within three points of the wind, he had them set before a wind that split them. It is just as incredible that, when sighted on the 27th by the Brixham, the Chatfield was at the point "B" which he marks on the chart. The mathematics of the case renders this statement very wide of the fact. The Brixham set out from Philadelphia at 10:30 A. M. on the 26th, moving at her usual speed of about 9 miles an hour. The distance to the capes is 96 statute or 81 nautical miles, and the distance on to Fenwick Island light 25 nautical miles further,—or about 106 miles from Philadelphia. If we allow that the favorable wind on her stern helped her engines a quarter to half a mile an hour, she was abreast of Fenwick Island light in 11½ hours from the time of leaving Philadelphia, or at 9:45 P. M., as stated by her log. From this light she took and continued on a course due south till about 9:45 next day, a period of about 12 hours; the longitude of her course being about 74° 42'. The speed of her engines was 9 knots an hour; some of her crew stating it to be 8½ to 9, and some 9 to 10. The current of the ocean was more than a mile in her favor, and there was a strong wind behind her, helping her engines. It is therefore just to infer that she made 10 miles an hour, which, by 9:45 o'clock on the morning of the 27th, would have brought her a distance of 120 miles, or 2 degrees of latitude, from Fenwick Island light, which is in latitude 38° 27', and placed her at that hour in latitude 36° 27', longitude 74° 42'; that is to say, would have placed her at the letter "X" on the chart, marked by Shel-drake. If the Chatfield was then at McFee's point "B," marked by him on the chart, she would have been 30 miles away from the Brixham, and out of sight. McFee and his mates say that they first sighted the Brixham at about 11 o'clock, or after, and were not under tow till 1 o'clock. The first of these statements cannot be true, and the second must fall with

it. If the Brixham had gone on her course for an hour and a quarter longer than her own crew testifies, and as the Chatfield's officers insist, before she sighted the Chatfield, then she had got 132 miles south from Fenwick Island light, or to latitude $36^{\circ} 15'$, and would have been 42 miles from point "B," where McFee claims that the Chatfield was. To insist that the Brixham was not sighted till 11 o'clock on the 27th is to present a case mathematically impossible. The point "B" cannot be accepted as the position of the Chatfield at either 9:45 or 11 o'clock on the 27th. At the earlier hour, she was within a few miles of the point marked "X,"—say five miles west; and it was from that point that she was towed by the Brixham. The wind was within about three points of being dead ahead during the towing, and the sails of the Chatfield, even if hoisted, could have been of no avail. The great weight of the Chatfield, and the large surface which she presented to the wind during the towing, caused the sheering of which both crews complain—each of the other—so much in the testimony. The steering was not at fault. The sheering was the result of the *vis major* of the gale. Against a gale of wind on her starboard quarter, the Chatfield's own rudder and the taut hawsers of the Brixham were unable to steady the great ship. She sheered continually, and put so great a strain upon the hawsers that, under the vigorous towing of the Brixham, they parted, one after the other. In face of the gale, the larger ship seriously interfered with the steady course of the tug, veering it from side to side, and presenting the spectacle, described by the Brixham's first mate, of the towed vessel taking charge of the tug; or, in other words, realizing the idea expressed by the popular paradox of the tail wagging the dog.

Despite of this embarrassing state of things, the Brixham persisted stoutly in her work, moving 3 miles an hour, making a distance of 28 miles, on a course about W. N. W., between 10:45 in the morning and 7:45 in the evening; towing the Chatfield from a point a few miles west of point "X" to one marked "Y" by Sheldrake on the chart. At that time the wind had nearly reached its highest velocity, and, the hawsers having broken three times, it was a proper determination of the Chatfield, acquiesced in by the Brixham, to come to anchor. When the Chatfield let go her anchors, the wind was blowing a gale of 47 miles an hour, which was too strong to admit the towing of a large ship 17 feet out of water, weighing 4,000 tons, by a tug low in the water, and of only a fifth her size and avoirdupois, especially by night. The chart shows the movements of the two ships before and during the towing. The Chatfield had moved—whether by drifting or under sail was not definitely shown—from a point, "A," 53 miles E. half N. from Cape Henry, between 11 o'clock on the night of the 26th to 10 o'clock on the morning of the 27th, to a point a few miles from the place marked "X," which is 72 miles E. S. E. from Cape Henry, where there were no soundings. There she was taken in tow by the Brixham. She was thence towed, in the face of a gale of wind, and against a current of the ocean setting south, with great labor and difficulty, but with considerable courage and resolution, by the Brixham, on a course W. N. W.,

to the point "Y," where there were soundings of 17 fathoms, and where, in the height of the gale, she anchored for the night. She was attended there all the boisterous night of the 27th by the smaller vessel, and was still safe in the morning, but had probably dragged her anchor for six or seven miles southeasterly, to a point marked "C" on the chart. At 8 o'clock, the City of Augusta having been sighted in the offing, the Chatfield directed the Brixham to proceed into port, to obtain the assistance of another tug; her master's object being, in sending her on this mission, to get the Brixham out of the way, in order that the approaching vessel might not be deterred from answering his signals of distress, soon afterwards hoisted, by the presence of the first salving vessel. This proceeding of her master would seem to show that he felt himself so much in danger as to desire to provide two chances of rescue, at the expense of resorting to a subterfuge in dealing with a salvor who had saved him from the dangers of the gale of the preceding day and night, during which he had moved or drifted some 40 miles from the place where he had lost his propeller. The danger of the Chatfield, from which she was rescued by the Brixham, consisted in her being far out at sea, beyond 30 fathoms soundings, without power of locomotion except four small sails, wholly inadequate for so large a vessel, so heavily loaded, and drifting upon a very strong current, setting southward, and before a wind blowing, for the 10 hours anterior to her being sighted by the Brixham, at the rate of 20 to 40 miles an hour, on a coast proverbially dangerous in the pendency of heavy winds. That a strong current does set to the south on this coast is abundantly known to all mariners, and is in the judicial cognizance of the court. While this case is under consideration, the three-masted schooner Freddie Heniken broke from her anchors off Lynnhaven bay, was borne by the current out to sea through the capes of Virginia, in the face of a northeastern storm of wind, and carried south by the current, until she went ashore at Gull Shoal light station, 18 miles short of Hatteras. It was on this current and on this coast that the Chatfield drifted on the night of the 26th of October, from point "A," marked on the chart, for about 40 miles, to a place a few miles westward of point "X," marked on the chart. If the three officers of the Chatfield were sincere in their testimony, then their vessel was in the additional danger of being in control of mariners who were in unconscious ignorance of the situation of their vessel, believing her safe when she was in circumstances of extreme danger. The service rendered by the Brixham consisted in suspending her voyage when moving before a favorable wind and current, and coming to the assistance of the vessel in distress in a wind and sea which rendered the attempt very difficult and dangerous; in taking hold of that vessel, thus drifting, in a gale on a heavy sea, and not only holding her safe during the worst of the gale for 9 hours, but in towing her some 28 miles towards port, from a position 70 miles out at sea, where there were no soundings, to within 43 miles of Cape Henry, to a place where there were only 17 fathoms of water, and where she was able to anchor safely, watching her there during the night. The probabilities are great that

on the next morning the Brixham could have taken the disabled ship into harbor under a wind diminishing all day gradually from 35 miles an hour in the morning; and it is certain she was desirous to undertake the enterprise, and would have done so, but for being sent by the Chatfield's master for another tug. Obedience to this instruction does not impair the Brixham's right to salvage in this case, as there was no intention on her part to abandon the enterprise,—a fact which was shown by her prompt return, in company with another tug, to resume the towing of the Chatfield at the place where she was left in the morning.

Second. As to the City of Augusta. Coming now to the claims of the City of Augusta, it is to be remembered that her service was none the less meritorious from the fact that the Chatfield had still a chance of being taken safely into port by the vessel which had first had her in tow. The flying of signals of distress on sighting the Augusta estops the Chatfield from such a pretension. What, then, was the danger of the Chatfield at 9 o'clock on the morning of the 28th, when the Augusta, responding to urgent signals, came to her relief? She was drifting, with dragging anchor, from the point marked "Y" on the chart, where she had been at 8 o'clock on the night before, and had made seven or eight miles southeasterly, to point "C," when she was taken in tow by the Augusta. The state of the wind and sea made the attempt of the Augusta to get lines from her very hazardous. The unmanageable condition of the Chatfield, pitching and sheering heavily upon a dragging anchor, made it dangerous for the other vessel to approach near enough to pass lines for the hawsers. In this attempt there was an actual collision. But the great risk to the Augusta after getting hold of a hawser was in fouling her propeller with it,—a danger which would in all likelihood have been disastrous to both ships.

It is useless here to go into the details of the evidence on these points. The signal service report of the velocity of the wind at Cape Henry on the morning of the 28th is in singular coincidence with the testimony of Catharine, master of the Augusta, and discredits that of the three Chatfield officers. Contrary to the statement of these latter, the wind and sea were so bad that it was impracticable to pass lines between the two ships by casting them with the hand; several attempts to do so having failed. A line was not successfully passed until a buoy was used to float it from the Augusta, when it was taken up by the Chatfield with grappling hooks. An ordinary ship's boat could not have been used for the purpose, and could not have lived in such a wind and sea. The Chatfield officers' asseverations to the contrary are not credible. The Chatfield was dragging her anchor slowly and surely, by force of a current which would have landed her in time on that graveyard of so many ships,—the coast stretching from out where she was to Hatteras. It was not shown that any other steamer passed in the usual track of steamers off that coast on that day, and the only chance of the Chatfield for rescue from her peril, except from the Augusta, was in the return of the Brixham, upon which she had practiced a ruse. The service of the Augusta consisted in her having rescued the Chatfield from a sim-

ilar, though not so great, danger as that from which she had been rescued by the Brixham the day before.

As to the amount to be awarded. In determining the amount of salvage which ought to be awarded to the Brixham and to the Augusta in these cases, I cannot consent to be restricted by the awards of the admiralty courts of New York city in salvage cases. The dry-land court rule of *quantum meruit*, so long controlling in those decisions, under the powerful influence of great and wealthy insurance companies located in that city, who are the real litigants in salvage cases, has proved to be inadequate to the requirements of the salvage service. The New York decisions discourage, rather than encourage, salvage daring and enterprise. To give, besides what is earned, an award for successful risk and daring, is of the essence of salvage service. The great ocean steamers, which are the most efficient salvors of vessels in distress, are unwilling to deviate from their scheduled courses, and to encounter the risks of difficult and hazardous salvage enterprises, for the lean compensation so generally awarded by the New York courts; often after dilatory litigation, further protracted by the delay of appeals. On the coast between Cape Henry and Charleston the difficulty and danger of salvage services are exceptionally great, requiring more liberal awards for those which prove successful than services rendered in other and safer waters, on other and safer coasts. I feel doubly warranted, therefore, in pursuing a more liberal policy in awards for salvage than the New York precedents are held to justify. Still it must be conceded that the cases now under consideration cannot be classed as of the highest grade of merit. It is shown in the evidence that the actual cost to each of the vessels filing the libels under consideration, due chiefly to collisions which they had with the saved ship in the act of rescuing her, has been in the neighborhood of \$5,000. It is with a general reference to this fact that I will estimate the amounts awarded in these cases. The whole value saved was about \$435,000. The whole put at hazard in the case of the Brixham was about \$80,000, and in that of the City of Augusta about \$440,000. I will sign a decree in favor of the Brixham for \$12,500, and in favor of the City of Augusta for the sum of \$15,000. These amounts are intended to cover and include all claims of the respective vessels for the amounts reported by the commissioner as actual damages and expenses.

NOTE. There was no appeal from the foregoing decision, and the amounts awarded were paid as decreed by the court.

Against part of the award in favor of the Brixham, a petition was filed by the Merritt Wrecking Company, and elaborate evidence taken in respect to the claim set up by the petition. The decision of the district court on the case presented by the petition follows.

SHELDRAKE v. THE CHATFIELD.

In re Petition of THE MERRITS.

(District Court, E. D. Virginia. July 18, 1892.)

1. SALVAGE—PROCEDURE—CONTRIBUTION BETWEEN SALVORS—JURISDICTION.

Under the admiralty rules, a salvage suit must be brought against the thing saved, or the person at whose request and for whose benefit the service was performed. Hence a proceeding by a salvor against a fund in court already decreed to another salvor, to secure contribution thereof under an alleged contract, cannot be maintained in admiralty.

2. SAME—SUITS BETWEEN SALVORS—CONTRACT.

The ship B. had rendered salvage services to the ship C., and employed petitioner's vessel to assist her in completing the work. The master of the B., in engaging petitioner's vessel, acted as agent for the C., and the terms of the contract of employment were disputed. Petitioner's vessel rendered no assistance, the service having been completed by a third vessel. This court having granted salvage to the B. for the work performed by her, petitioner commenced this proceeding, claiming a share of the sum awarded the B. on the alleged contract. *Held*, both on the evidence as to the alleged contract, and also on the fact that a salvage proceeding must be brought against the vessel saved or the person requesting the service, that the petition should be dismissed.

In Admiralty. Salvage. *Ex parte* the Merritt Wrecking Organization, on a petition claiming half of a salvage bounty, which had been sued for as a chose in action by the libellant.

T. S. Garnett, for petitioner.

Whitehurst & Hughes, for the Brixham.

HUGHES, District Judge. The case in chief was decided by this court on the 14th of March last.¹ This petition had been filed on the 25th of February preceding. Upon the facts shown by the record, this court awarded the sum of \$12,500 to the Brixham for salvage services rendered to the steamship Chatfield, of which \$5,500 was intended in remuneration for expenses and damages incurred by the Brixham, and \$7,000 as bounty for a meritorious salvage service. This sum of \$7,000 is now in the registry of the court. The service was rendered by the Brixham to the Chatfield on the 27th of October, 1891, in taking hold of her when well out to sea, with a broken propeller, in a heavy gale, towing her the greater part of the day to an anchorage 40 miles southeastwardly from Cape Henry, and lying by her all night of the 27th, until the next morning, when the wind had abated, but the sea was still running high. The service of the Brixham to the Chatfield was completed on the morning of the 28th, and was never resumed. For this service the award of salvage which has been described was made by this court. On the morning of the 28th, Capt. McFee, master of the Chatfield, deputed Sheldrake, master of the Brixham, to come into Norfolk for the purpose of engaging a strong tug to go out for the Chatfield, and to give aid in towing her into port. Capt. Sheldrake came to Norfolk with the Brixham, in pursuance of these instructions of Capt. McFee, and engaged the Rescue, a strong

¹ 53 Fed. Rep. 479.

tug, owned by the Merritt Wrecking Organization, to go to the assistance of the Chatfield. What was said between Capt. Sheldrake, agent of the Chatfield, and Thadeus Gray, agent of the Merritts, in Norfolk, in the negotiation which secured the Rescue's services, is hereafter detailed.

The petition of the Merritts, now to be considered and passed upon, claims, on the basis of that negotiation, one half of the salvage bounty which should be received by the Brixham; that is to say, as matters have turned out, one half of the \$7,000 now in the registry of this court. As a matter of fact, the expedition of the Rescue in search of the Chatfield was fruitless. An hour or two after Capt. Sheldrake left the Chatfield off Cape Henry, on the morning of the 28th of October, another steamship, coming in sight, was signaled by the Chatfield, took her in tow, and brought her into Hampton Roads, where they arrived before the Rescue and Brixham had set out from Norfolk, on the night of the 28th, in search of the Chatfield; and the Rescue, in point of fact, rendered no beneficial service to the Chatfield whatever, either in the nature of salvage or of simple towing. As already stated, this petition is brought to subject half of the salvage bounty, which, since its filing, has been awarded to the Brixham, to the payment of the Merritts for the intended service of the Rescue to the Chatfield, as described; which half is claimed under an alleged agreement between Gray, agent of the Rescue, and Sheldrake, agent of the Chatfield, on the night of the 28th, whatever that agreement was. On that subject the testimony is substantially as follows: Capt. Sheldrake came to Norfolk on the Brixham, as instructed by the master of the Chatfield. He arrived in port on the afternoon of the 28th, and at once sought the office of William Lamb, shipping merchant, who had acted on a previous occasion as agent of the Brixham. Col. Lamb being absent, Capt. Sheldrake requested his clerk or cashier to advise him in procuring a tug of the kind he was in search of. This clerk's name is Hugo Arnal. Through him, Thadeus Gray, agent of the Merritts, was sent for, with whom, after some conversation, it was agreed that the tug Rescue should forthwith set out, in company with the Brixham, to the assistance of the Chatfield. The two steamers did accordingly set out at once, and reached the point at which the Brixham had left the Chatfield early on the morning of the 29th. As a matter of course, they failed to find her; the Chatfield, as before stated, having been brought into Hampton Roads on the 28th by another vessel. The two steamers, therefore, had nothing else to do, after a day's useless search, but to return to Norfolk without the Chatfield.

As to the agreement that was made between Sheldrake and Gray, the following, somewhat abridged, is what the latter says on the subject:

"A message came to me from Col. Lamb's office that Captain Sheldrake of the Brixham wanted to employ a tug to go to the assistance of a steamer outside, forty miles off the capes of Virginia. On going to Col. Lamb's office, Captain Sheldrake stated that, through authority of the captain of the steamer outside, he came in to get a tug to aid him in towing her in, and he asked me what I would go for. I couldn't give him any reply to that, and I asked him then what he would give. He made an offer of half of what he would get for

towing her in from the position where she was. 'Well,' I says to him, 'Captain Sheldrake, a vessel lying out there anchored, though you may think she will stay there until you get back, it is very unlikely she will do so; for some coasting vessel will come along and pick her up;' and I didn't make him any answer for some time, and discussed the situation with him, and was about to take my leave, and he then spoke up, and, said he, 'Well, I'll throw in the twelve hours' towing that I have done.' Then I said, 'In consideration of that, I will do it.' Then I started out of the door. We met Captain Nelson in the hall, and I remarked to Captain Sheldrake that he was to go in full halves in all that *he* got, and called Captain Nelson's attention to it, and Captain Sheldrake says, 'Yes; in full halves of all *we* get.'"

In regard to this interview, Capt. Sheldrake says:

"We there and then made the agreement that they would send a tug with me to the assistance of the Chatfield; that they should receive half of what we might earn. It was distinctly stated that what I had already earned was mine. I also informed them that I was sent there, and was acting solely and entirely as the agent for the captain of the Chatfield, and entirely under his instructions. Under these circumstances, they accompanied me, and we went in search of the Chatfield, but didn't find her."

Capt. Nelson, who went out on the Rescue, says, in regard to the occurrence in the hall of Col. Lamb's office in his presence, that "it was stated by Gray that the Merritts were to have full half of what Sheldrake was to get, and Sheldrake replied 'full half;'" but Capt. Nelson does not say, and did not seem to know, what it was that was to be halved; whether it was what was to be earned by their joint services, or what had already been earned by the Brixham alone, added to what should be earned jointly.

Two witnesses, who should have been indifferent between the parties to the controversy, testify in the case. Baker, in his testimony, relates what he heard in one room of a conversation between Sheldrake and Gray in another. He is so inaccurate in what he says of matters in that conversation known to the court as to render what he testifies as to the compensation which the Rescue was to receive unreliable in point of accuracy. The relation of Hugo Arnal to the case, and the partisanship manifested by him in behalf of the petitioners, and in prejudice of the party who had gone to him as an adviser and friend, divest his testimony of any special weight with the court.

The issue stands as between Gray's understanding and Sheldrake's; as between Gray's claim that his employers were to receive half of what the Brixham should receive for its whole service to the Chatfield, and Sheldrake's averment that it was to be half of what they should jointly earn in the service which they were about to undertake. It is an issue upon the credibility of Gray and Sheldrake. The extraordinary reason given by Gray for insisting upon the extraordinary bargain which he claims to have made with Sheldrake makes it incredible that Sheldrake could really have intended to enter into such a bargain. Gray says that, because it was feared the Chatfield would be brought in by some coasting vessel, it was for that reason that Sheldrake threw in half of the

salvage which he had already earned, to pay the Rescue for doing what was likely to be nothing at all; that is to say, because the Rescue was not likely to render any service to the Chatfield at all, therefore Sheldrake agreed to pay more than the most beneficial salvage service would be worth.

In the case in chief, *Sheldrake v. The Chatfield*, 52 Fed. Rep. 479, Capt. Sheldrake impressed the court, by what he was shown by the evidence to have done in saving the Chatfield, and by his own testimony under severe cross-examination, as a skillful mariner, a truthful witness, and a sensible, practical man of business. The court knows nothing of Gray, except by his testimony now under review, in connection with a contract he claims to have secured, extraordinary in its terms, paradoxical in respect to the reason on which it is claimed to have been based, and unprecedented in its character. On an issue of fact between these two men touching such a contract, I am not disposed to credit Gray and to discredit Sheldrake. As it requires two to make a bargain, it is plain to me that the minds of these two contracting parties did not meet in common agreement, and that there was really no bargain made that was mutually assented to.

Another very singular feature in this claim is that it is asserted against the Brixham, although the service was for the benefit of the Chatfield. Whatever agreement was entered into on the evening of the 28th of October was made by Gray, the agent of the Rescue, with Sheldrake, the agent of the Chatfield, for assistance to be rendered to the Chatfield in the nature of salvage. The contract of the Rescue was made with the Chatfield, at the request of the Chatfield, for the benefit of the Chatfield, and impliedly at the charge of the Chatfield. It constituted a lien *in rem* in favor of the Rescue against the Chatfield, and entitled the owners of the Rescue to come into this court to assert that lien against the Chatfield, either by original libel or by petition under the forty-third rule in admiralty. The proof is conclusive that this was a valid maritime claim against the Chatfield. Gray's testimony, already quoted, is explicit to the effect that Sheldrake was acting as agent of the Chatfield, charged with the mission to procure assistance for that steamship, and that Gray negotiated with him in that character. Hugo Arnal says that Gray thoroughly understood that it was at the instance of the captain of the Chatfield, and by his express order, that Sheldrake had come to Norfolk to get further assistance for the Chatfield. The petition of the Merritts, now under consideration, alleges that the master of the Chatfield had directed Sheldrake to "depart for Norfolk, and employ a tug, and return to his relief, and had repeated his request; and that, in performance of this request, the Brixham had left the Chatfield, steamed to Norfolk, and immediately employed petitioners to go to the assistance of the Chatfield." It was not only known to Gray and Arnal, but to all bystanders, that the character in which Sheldrake was acting was that of the Chatfield's agent. It follows that whatever compensation was stipulated to be paid for the service which the Rescue was to render was a compensation payable by the

Chatfield. Upon the facts thus presented by the record, a variety of questions arise for consideration.

This proceeding is anomalous in seeking to enforce against one vessel a claim for service rendered to another vessel. It is not shown how the Brixham could be, or was expected to be, benefited by the service which was to be rendered to the Chatfield. That is left wholly to inference. The consideration for which the Brixham was to pay for such a service is not shown in the evidence. On the pleadings and proofs, if there is any agreement shown to have been entered into by the Brixham to pay for services to the Chatfield, it is *nudum pactum*. Nor is there any evidence that the credit in the transaction was given by the agent of the petitioners to the Brixham. That ship was hardly mentioned at all in the conference between Gray and Sheldrake. If credit was given to other than the Chatfield, it was to the salvage money which the Brixham was believed to have earned on the day and night of the 27th of October, which was yet but a chose in action. If given on the faith of this chose in action, for which the Brixham afterwards filed a libel in the suit in chief, it was not given to the ship herself, and, as against the Brixham, is not a maritime claim, enforceable in this court. If Sheldrake had acted, in his negotiation with Gray, as master of the Brixham, and not as agent of the Chatfield, it might have been competent for him to have made a contract for such a service as that under consideration on the faith of his own ship; in which case an express stipulation to that effect would have been necessary. But in his negotiation with Gray his character as agent of the Chatfield was constantly asserted and unqualifiedly recognized. Under these circumstances, is it competent for this court to imply an obligation upon the Brixham, and to ignore altogether, as the petitioners have done, the obligation of the Chatfield to remunerate the Rescue for whatever is equitably due for the trip in search of her, for which the Rescue was employed by Sheldrake?

But the most important question in this case is whether a proceeding like this is within the cognizance of the admiralty court. To be so it must fall within the purview either of rule 19 or 43 of the rules in admiralty. The first provides that "in all suits for salvage the suit may be *in rem* against the property saved, or the proceeds thereof; or *in personam* against the party at whose request and for whose benefit the salvage service has been performed." In the case of the Rescue no salvage service was rendered, and therefore no claim for salvage can be entertained. But if it could be, this is not a proceeding *in rem* against the Chatfield, or the proceeds of the Chatfield, nor is it a proceeding *in personam* against Sheldrake or McFee, at whose request the service was rendered. The proceeding of these petitioners, therefore, is not within the purview of rule 19. Rule 43 provides that "any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him." This rule was plainly intended to allow persons, like mortgagees, part owners, or other persons having an interest in a vessel libeled in admiralty, to come into the main suit, and get the

remnants of the proceeds left after satisfying the libelant. Under this rule, it is not competent for one having a mere personal claim against the owner of the vessel libeled to come in and liquidate such claim. In order that a third person may come in by petition, he must have an interest of some sort in the ship libeled, or in the proceeds arising from her sale in the registry of the court. Claims of any third person, not against the ship, but only against her owner, must be the subject of an independent suit at common law, with the privilege of jury trial, if it be not within the cognizance of admiralty, or of an independent proceeding *in personam* in admiralty, if it be a claim over which admiralty has cognizance. The petition under consideration is not brought against the ship that was libeled in the chief suit, nor against its owners, nor against any proceeds of the Chatfield in the registry of the court. It is not brought on the maritime contract which petitioners had with the Chatfield. It is brought against a fund in court that has been decreed in favor of the Brixham, the libelant in chief, upon an allegation that the Brixham owes the petitioners money which she had contracted to pay them.

It was never contemplated by the framers of rule 43 to allow any person asserting no interest in a ship libeled in an admiralty court to file a petition claiming an interest in what the court may decree in favor of the libelant, and to have his claim litigated by the summary method of admiralty between himself and the libelant. If this petition of the Merritts could be entertained, then, if John Doe should have a claim against them, and should file a petition to be paid what the court should decree to the Merritts, it would be competent for the court to entertain that petition also; and then, if Richard Roe should have a claim against John Doe, aforesaid, he could file his petition, claiming to be paid out of what the court should decree to Doe; and so on *ad infinitum*; and one admiralty suit would be made the mother of a brood of petitions, without number and without limit, in endless catenation. If the first petition could be entertained, then, on the same principle, all would have to be entertained. The absurdity of such a principle is apparent. Under rule 43, none can file petitions except such as have an interest in the vessel libeled, or in such surplus proceeds of the sale of her in the registry of the court as shall remain after satisfying the original libelant. If that libelant himself owes debts, it is not competent for the admiralty court to adjudicate upon them between him and his creditors. Such claims must be litigated in original and independent suits, either at common law or in admiralty, according as the claims are civil or maritime.

On all the grounds suggested, this petition must be dismissed, with costs, but chiefly on the ground that the petitioners cannot litigate in this proceeding in this court any claim they may have against any other debtor than the ship Chatfield. I will so decree.

THE MICHIGAN.

PRINGLE *et al.* v. THE MICHIGAN.

(Circuit Court, E. D. Michigan. December 8, 1891.)

1. COLLISION—BURDEN OF PROOF—VESSEL AT PIER—ST. MARY'S CANAL.

It is not negligence or an obstruction to navigation for a vessel which has passed through the St. Mary's canal, and is necessarily detained at its western entrance awaiting towage, to tie up to the north pier, where the canal is 300 feet wide, at a place designated by the canal superintendent, in pursuance of the authority given him by rules 8 and 12 of the regulations prescribed by the secretary of war for the government of the canal; and if, while thus moored, she is struck by an incoming vessel, the presumption is that the latter is in fault, and the burden is on her to show that she is free therefrom, or that the collision was the result of inevitable accident.

2. SAME.

It appearing that incoming vessels usually moor to the south pier, and that in order to do so safely, and avoid a prevailing tendency to sheer towards the north pier, they customarily come in slowly, and send out their lines for the south pier when abreast of the lighthouse at its western end, a vessel which moves in at the rate of 4 or 5 miles an hour, and does not send out its yawl until it has passed 750 or 800 feet beyond the lighthouse, is negligent; and if she sheers so as to prevent the line from reaching the pier, and is thus carried against a vessel properly moored at the north pier, she must be held liable for the collision.

In Admiralty. Libel by Thomas Pringle and others, owners of the schooner Delaware, against the schooner Michigan, for collision. The district court found that the collision was the result of inevitable accident, and dismissed the libel. Libelants appeal. Reversed.

H. C. Wisner, for libelants.

R. T. Gray and *F. H. Canfield*, for respondents.

JACKSON, Circuit Judge. In this case libelants and appellants seek to recover the damages sustained by the schooner Delaware from a collision with the schooner Michigan, which occurred about 2:40 or 3 P. M. on April 30, 1890, at the westerly entrance of the St. Mary's Falls canal. It is alleged in the libel, and established by the proof, that the schooner Delaware, having no cargo aboard, was bound on a voyage from Buffalo, N. Y., to Ashland, in the state of Wisconsin; that on the 29th April, 1890, she was locked through the St. Mary's Falls ship canal at Sault Ste. Marie, Mich. That, upon getting through the canal, she was weather bound, and unable to proceed on her voyage without the aid of a tug or steamer to tow her; that the only assistance she could obtain was from the steamer Ohio, which also came through the canal about the same time, having in tow the schooner Sheldon, on which her cargo had to be lightered in order to get through; that being unable to proceed alone, and having to await the departure of the steamer Ohio, which was detained the greater part of April 30, 1890, transferring her cargo from the schooner Sheldon, the Delaware lay moored to the north pier of the west end of the canal, nearly abreast of the Dummy or Skeleton light, and just astern of the steamer Ohio, which had her tow (the Sheldon) outside and alongside of her; that the Delaware tied

up to said north pier, at the place designated and directed by the canal superintendent, who, under the rules and regulations established for the use and government of the canal, had the authority, not only to permit the Delaware to moor to the pier, but to designate the place of mooring, the eighth rule for the government of the canal, established by the secretary of war under the act of congress approved July 5, 1884, being as follows: "Vessels or boats may be moored to the piers only when specially permitted by the superintendent, [of the canal,] and then only in such places and for such times as he may direct." By the twelfth rule it is provided that "no vessel or boat shall in any way obstruct the canal or delay in passing through, unless permitted to do so by the proper authority. The neglect of any lawful order shall be construed as obstructing the free navigation of the canal." The proof establishes that it was usual and customary for boats and vessels coming through the canal from the east to be tied up or moored, by permission and under the instruction of the canal superintendent, along the north pier thereof, at the westerly entrance, and extending down said pier to near the bridge crossing. The canal, at the point where the Delaware lay moored by the permission and direction of the superintendent, was 300 feet in width, and the navigable space between the port side of the Delaware and the south pier of the canal, along which vessels coming in from the west usually passed, was about 300 feet, was entirely free and unobstructed, and afforded ample passage way or room for all boats using the canal.

While the Delaware was thus lying at said north pier, on the afternoon of April 30, 1890, the propeller J. Emery Owen, towing the schooners Michigan and Nicholson, came down the river from the west, with a strong northwest wind, blowing at the rate of from 20 to 35 miles per hour; and the schooner Michigan, failing to get a line to the south pier of the canal to check or hold her, from some cause sheered to the windward or northward, and struck the Delaware at her mooring, and greatly injured her. The libel charges that the Michigan's failure to obtain the assistance of a tug, or to get her line or lines to the south pier, where snubbing posts or piles were placed to enable descending vessels to check and control their movements, was careless and negligent navigation and management, and further alleges that the Michigan was negligent in not having her head sails ready and in position for use, so as to pay her off with the wind when the sheer towards the north pier commenced. The collision and damage thereby resulting to the Delaware it is charged was occasioned solely by the negligence, unskillfulness, and carelessness of the persons navigating the schooner Michigan.

The respondent admits the collision, and that it occurred at the time and place stated, and while the Delaware was moored at the north pier, but sets up, by way of defense—*First*, that the officers of the Delaware, in so mooring their vessel, were obstructing the free and proper navigation of the canal, and were guilty of great carelessness and want of skill and prudent judgment, and that no permission or direction of the canal superintendent to moor at that point could operate to relieve said schooner

from the consequences of such want of skill and prudent care on the part of her officers, and that any damages the Delaware may have sustained while so lying at said pier, from vessels entering said canal, were the direct and immediate results of the carelessness and want of skill and proper navigation of said vessel by her master; and, *second*, that the Michigan was in no fault, and guilty of no neglect, in failing to use her head sails or employ the assistance of a tug or in getting her line to the south pier in the usual way. It is alleged by the respondent that the strong northwest wind prevailing at the time—

“Caused an unusually strong current, and set back towards said north pier, which rendered the handling of said schooner Michigan extremely difficult; that said wind created a very heavy swell, breaking directly on the southerly pier of said canal, preventing the men sent in a yawl for that purpose from affecting a landing and getting out a line to snub said schooner Michigan, and bring her alongside of said southerly pier; that a line was sent from said schooner Michigan by its yawl at the earliest moment possible, but the men so sent in said yawl, using all possible skill and care, were unable to get said line to the piles on said southerly pier, and were unable to bring their said yawl alongside of said south pier, so that the men could land thereon; that although the wheel of the Michigan was placed hard aport as early as prudently could be, and was in that position when said schooner Michigan was abreast of the lighthouse, on the extreme west end of said south pier; that, although the wheel remained in that position, yet said schooner Michigan, after passing the propeller Ohio, took a sheer, caused by the action of the current, wind, and swell, and struck said schooner Delaware.”

The district court made no finding or ruling as to whether the Delaware was lying or moored in an improper or exposed situation, so as to charge her with fault or negligence, but having reached the conclusion that the schooner Michigan was not guilty of any want of care or proper navigation and management, and that the collision arose from inevitable or unavoidable accident, dismissed the libel. From that judgment or decree the libelants have appealed.

The first question to be considered and determined is whether the Delaware was chargeable with fault in being tied up or moored at an improper and exposed place. This court is clearly of the opinion that, under the facts and circumstances of the case, as shown by the undisputed proof, no fault or negligence can properly be imputed to the Delaware in mooring where she did. She tied up by the permission of the canal superintendent, and at the place designated by him. She tied up there when only a fresh wind was prevailing. She was unable to proceed alone. She became weather bound, and was compelled to await the movements of the steamer Ohio, who was lawfully detained while transferring her cargo from the Sheldon. It was usual and customary for vessels and boats, under permission and direction of the superintendent of the canal, to tie up where the Delaware was moored. She in no wise obstructed the free and proper navigation of the canal while thus lying at her mooring; there being, at least, 300 feet of open, navigable water between her port side and the south pier of the canal opposite her position. When witnesses for respondent say that her position was a

dangerous and unsafe one, they must be understood to mean, not that her position was in the line of or obstructed the proper and free navigation of the canal on the part of other vessels, but simply that, if vessels coming in or down from the west failed for any reason to make a line to the south pier, there was more or less danger of their sheering across the canal towards the north pier, and striking boats moored there. This is clearly explained by persons (recalled on behalf of respondent) who state that the only danger to boats mooring at the north pier was from vessels that failed to get their lines to the south pier, so as to hold and control their movements when coming in. It is shown by the evidence that incoming vessels rarely, if ever, failed to get their lines to the south pier, when exercising proper care and reasonably prudent management. It is also shown that the snubbing line thus usually carried to the south pier controlled the movements of the vessel, and kept her in proper position and place. Such lines sometimes broke when too weak or defective, or when the vessel had too much headway. But ordinarily vessels coming in from the west made their lines to the south pier, and thus controlled their movements, and a weather-bound schooner like the Delaware, unable to proceed on her voyage alone, and compelled to await the departure of the only boat she could obtain to tow her, is hardly to be condemned and found guilty of negligence in obeying the directions of the canal superintendent in mooring where she did, and in assuming that vessels coming in would make their lines to the south pier in the usual way. In *The Mary Powell*, 31 Fed. Rep. 624, Judge Brown says:

"By 'dangerous exposure,' I understand, not the mere possibility of injury through some mischance not reasonably likely to occur, but an exposure that is clearly liable to receive or inflict injury, in the ordinary chances, mistakes, and hazards of navigation, such as are to be reasonably apprehended as liable to arise."

Tested by this rule, the Delaware's place of mooring, even if it had been voluntarily selected by her officers instead of being designated by the canal superintendent under authority of law, cannot properly be said to have been culpably or negligently improper. By the twelfth rule for the government of the canal, if the Delaware, while weather bound and unable to proceed alone and awaiting her only obtainable motive power, had moored anywhere else than the place designated by the superintendent, she would have been chargeable with obstructing the free navigation of the canal. In obeying the lawful order of the proper authority, she cannot have it imputed to her as a fault that she either obstructed the free navigation of the canal or that she did not anticipate the contingency of some vessel coming in, failing to make its lines to the south pier as usual, whereby she would be exposed to the ungoverned and uncontrolled movements of such vessel.

This court finds, therefore, as matter of fact and conclusion of law, that the Delaware, at the time of the collision, was not obstructing the canal; that she was properly moored and in a proper place; and that no fault is chargeable against her in connection with said collision.

The Delaware being free from blame, and lying at anchor or properly moored, the burden of proof is upon the respondent to show either that the schooner Michigan was without fault, or that the collision was the result of inevitable accident, under the well-settled rule that where a moving vessel collides with another at anchor, or properly moored, the former is presumed to be at fault, and liable for the damage, and the burden of proof rests upon her to exonerate and clear herself. *The Clarita* and *The Clara*, 23 Wall. 13; *Steamship Co. v. Calderwood*, 19 How. 246; *The Rockaway*, 19 Fed. Rep. 449; *The Echo*, Id. 453; *The Brady*, 24 Fed. Rep. 300.

It is not material to consider the special faults or acts of negligence alleged against the Michigan in the libel. It is clearly shown that, by the employment of a tug then on hand at the west entrance of the canal, she could have controlled her movements. It is also made highly probable that, if her head sails had been ready for use, they could have been employed to counteract her sheer, by paying her off with the wind to such an extent as to have caused her to miss striking the Delaware. It is shown by the proof that the northwest wind, which was blowing strong as she came in, produced no sea to interfere with her own movements or proper control. The effect of that wind was simply to produce a small, choppy sea, which was not sufficient to prevent or materially interfere with a yawl from carrying a line to the south pier. It is disclosed by the proof that the first movement or tendency of the vessel coming in was to sheer towards the south pier; that, after getting well into the mouth of the canal, there was next a tendency, more or less strong, under different circumstances and conditions, to sheer towards the north pier. The position of the Delaware was seen by the officers of the Michigan. They were also well aware of the fact that, with a strong northwest wind prevailing, the Michigan was more than ordinarily liable to take the second sheer towards the north pier on account of her big cabin aft and large pilot house, which her master states caused her to sheer that day so suddenly. They also knew that, if they failed to get a line to the south pier so as to use their snubbing line in holding and controlling the Michigan, she would, in sheering, collide with the Delaware or some other vessel moored at the north pier. The distance between the lighthouse at the west end of the south pier, and the Skeleton or Dummy light on the north pier, where the Delaware was tied up, is shown to be 1,500 or 1,600 feet. When the Michigan passed the lighthouse at the end of the south pier, her yawl, with three men, was ready and in position to be sent with the heaving line to said pier. It was, however, not started for the pier until the vessel had passed about half the distance between the two lights, say 750 or 800 feet from the lighthouse at the end of south pier. This is the testimony of Calista D. Bornier, an employe of the canal, who was on the south pier abreast of the Michigan, and who had met the schooner at the west end of said pier, and followed her down. Cadotte, the master of the Michigan, expresses the opinion that his schooner had passed the lighthouse at west end of south pier about 500 feet, when the yawl was started for said pier. The

Michigan was moving at the rate of four or five miles an hour after passing the lighthouse. Three miles an hour afforded her good steerage way. It is shown by the testimony of respondent's witness Bornier that it is not easy for a yawl to make a landing when the vessel is going four or five miles an hour. He further states the speed at which the Michigan was moving was a little too fast for her yawl to make the south pier safely. It is also shown that, just about the time the yawl, carrying the heaving line, reached or approached near to the south pier, the Michigan took the sheer that carried her over to the north pier, and against the Delaware. The proof is conflicting as to the length of line which the yawl carried, but the respondent's witness Joseph Gammond, who was in the best position to know the fact, states that the line became tight, and that he was sticking it out from the boat going into the dock; and he further states, in answer to the question, "When the yawl boat came up towards the pier, when you had, as you say, a fathom and a half to two fathoms of line in the yawl, did you have enough to toss it to the man, [on the pier?]" No; there wasn't enough to reach the dock." The heaving line, by means of which the snubbing line is drawn upon the dock, could readily, as the proof shows, have been thrown from 25 to 30 feet, if of sufficient length. The witness Gammond was in the bow of the yawl boat with the heaving line. There were men on the pier ready to catch or receive it if the line had been thrown or tossed to them. It was not thrown, and for the reason stated by said Gammond, viz., there was not enough of that line to reach the pier. It is perfectly clear, therefore, that the yawl was started from the schooner with a line insufficient in length to reach the pier, or that it was started so late that the sheer of the Michigan took place before the yawl could reach the pier and that drew the line away. In either case, there was fault and bad management on the part of the Michigan. It is stated by the witness John Ivers that vessels going in from the west generally go pretty slow; that his vessel went at the rate of almost two miles an hour. Other witnesses say the slower the better. Ivers further states that the yawl boat carrying the heaving line to the south pier is usually started abreast of the lighthouse at the west end of the south pier. The Michigan passed the point from 500 to 750 feet before she started her yawl. She had in fact nearly reached the position at which she would sheer towards the north pier, when the yawl, with the heaving line, was started, and the expected sheer took place before or just as the yawl boat reached the pier, with no supply of heaving line to cast upon the dock. O'Donnell, the mate of the Michigan, states that schooners coming in, as the Michigan was, are generally handled with both forward and aft lines. The Michigan, however, sent out but the one forward line. That line was too short, was sent out too late, and it failed to reach the dock. Her officers knew that a failure to get her line to the south pier would involve the safety of other vessels on the north pier. They knew, from the direction and strength of the wind, that extra care and diligence were required in the management of the vessel, and they content themselves with sending out a single line of insufficient length,

starting it later than usual, and with their vessel going faster than was prudent under the circumstances.

To call an injury resulting from such conduct and management an "inevitable accident" is a misnomer. A collision is said to occur by inevitable accident when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. This rule, announced in *The Lochlibo*, 3 W. Rob. 318, was adopted by the supreme court in *Union Steamship Co. v. New York & V. Steamship Co.*, 24 How. 307-313. So in case of *The Morning Light*, 2 Wall. 550, it is said that inevitable accident "may be regarded as an occurrence which the parties charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." The definition of inevitable accident given by the court in *The Grace Girdler*, 7 Wall. 203, does not conflict with that of the earlier cases, when it is said:

"Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and property. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen."

In *The Clarita* and *The Clara*, 23 Wall. 13, it is said that—

"Unless it appears that both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent the collision, the defense of inevitable accident is inapplicable to the case."

Whether the proper degree of care and caution has been exercised or neglected must be determined in all cases by references to the situation of the parties and all the attendant circumstances. Diligence and negligence are relative terms. The duty to exercise the one or to avoid the other is dictated and measured by the exigencies of the occasion. In proportion to the urgency of the situation or greatness of the necessity, the greater must be the care and vigilance employed. This is well expressed by the court in the case of *The William Lindsay*, L. R. 5 P. C. 338; also reported in 8 Moak, English R. notes 261, where it is said, in reference to inevitable accident:

"Now, the master is bound to take all reasonable precaution to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible because he may have omitted some possible precaution which the event suggests he might have resorted to. The rule is that he must take all such precaution as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed."

It does not appear that the Michigan took any precautions to meet the contingency of her failing to get a line to the south pier. Could she cast upon other vessels the entire risk of such a contingency? Can it be said that without reference to her speed, without reference to the time or

place when or at which her line should be started for the dock, and without regard to the length of such line, a moving vessel can throw upon other vessels, properly moored or at anchor, the contingency or chance of her uncontrolled movements in the event her line fails to reach the pier, and that the stationary vessel must bear the consequences of such failure, as being the result of an inevitable accident? No case cited by counsel for respondent has gone to this extent, and so to hold would be to press the rule of inevitable accident beyond all sound principle. It is urged on behalf of respondent that, under the rule laid down in *The Grace Girdler*, 7 Wall. 203, "the court must find beyond a doubt that ordinary prudence and skill required her [the Michigan] to have used other means of getting the heaving line to the piers; that if the heaving line had reached the pier, the snubbing line could have been handled in time to prevent the accident," before the Michigan can be found guilty of a fault or be condemned. This position is not sound. The Delaware being at anchor and free from blame, the burden of proof rests upon the Michigan to clear herself from fault. It was not incumbent upon the libelants to show affirmatively that she was guilty of negligence, or failed to exercise proper care and skill under the circumstances. The burden is upon her to exonerate herself from blame. We may not and should not speculate, after the event, as to what acts or precaution might have prevented the accident; but it is clear, from all the facts and circumstances of the case, that the Michigan has failed to show that the collision was the result of inevitable accident. The court is also of the opinion that she has failed to rebut the presumption of fault which attaches to her from having collided with the Delaware while the latter was properly moored, and, furthermore, that the evidence establishes affirmatively that she was guilty of negligence and mismanagement in the particulars already mentioned, especially in reference to the line she attempted to send to the south pier.

The conclusion of the court upon the above case is that the decree of the district court dismissing the libel should be reversed, and that there should be a decree for the libelants, with the costs of this and the lower court to be taxed, and it is accordingly so ordered and adjudged, with the direction for such reference as may be necessary or desired to ascertain the amount libelants are entitled to recover for the damages done to or sustained by the Delaware.

THE MICHIGAN.

PRINGLE *et al.* v. THE MICHIGAN.

(Circuit Court, E. D. Michigan. June 14, 1892.)

WITNESSES—PER DIEM FEES.

Witnesses attending federal courts are not entitled to the *per diem* fee of \$1.50, in addition to their mileage, for time spent in coming to and returning from the place of trial, or for time occupied previous to the day of trial in conference with counsel or proctor.

In Admiralty. On motion to correct taxation of costs. For opinion on the merits, see 52 Fed. Rep. 501.

H. C. Wisner, for libelants.

R. T. Gray and *F. H. Canfield*, for respondents.

JACKSON, Circuit Judge. This cause is now before the court on motion or appeal to correct the taxation of costs made herein against respondent. The question presented relates to the proper taxation of witness fees in favor of libelants, and arises upon the following stipulated facts, viz.:

"(1) That the case occupied two days in its trial. (2) That all of the time taxed by the libelants for their witness fees, over and above the two days occupied in the trial of the case, was the time used by such witnesses in traveling to and from the trial of the cause, excepting that some of the witnesses, at the request of libelants' proctor, arrived one day before the trial of the cause, for the purpose of conferring with libelants' proctor in regard to the case. (3) That all of said witnesses, excepting Thomas L. Pringle, were actually paid the amounts stated in the bill of costs. (4) That the affidavit attached to the bill of costs, in which it is stated that the witnesses attended the number of days therein stated, refers to the time used by the said witnesses, as above stated, and not that they were in the court for that number of days."

It is conceded that the taxation of costs is correct, if libelants' witnesses are entitled to fees while coming to and returning from the trial, but that, if their fees are to be determined by the time they were in attendance upon the court or trial, then the taxation in libelants' favor is too much, by the sum of \$25. The statute provides that the witnesses shall receive for each day's attendance in court, pursuant to law, \$1.50, and 5 cents a mile for coming from his place of residence to the place of trial or hearing, and five cents a mile for returning. We think it clear, from the language of the statute and from the provisions for mileage, that witness fees cannot be properly taxed for the time or number of days occupied in coming to the place of trial and in returning. The mileage allowed is intended to cover that time.

It is equally clear that the time occupied by a witness in conference with counsel or proctor before the day fixed for trial or his attendance cannot be taxed as a "day's attendance in court." Witnesses, un-

der the statute, are not entitled to a *per diem* for the time occupied in traveling to and from the place of trial. The excess of the *per diem* taxed, amounting to the sum of \$25, will accordingly be corrected. No direct adjudication on this question having heretofore been made in this circuit, it may be proper to state that the conclusion above reached is concurred in by Circuit Justice BROWN and Associate Circuit Judge TAFT, and is intended to prescribe the rule for the proper taxation of witness fees in such cases.

THE JAMES BOWEN.

THE GEO. E. WEED.

TITUS v. THE JAMES BOWEN.

MURPHY v. THE GEO. E. WEED.¹

(District Court, E. D. Pennsylvania. September 27, 1892.)

1. COLLISION—CUSTOM OF PORT.

The established custom of the port of Philadelphia that on the Delaware river, between League island and Walnut street wharf, at ebb tide, vessels passing up shall keep inshore, and vessels passing down shall keep in channel, supersedes regulations prescribed by the sailing rules prescribed by the act of 1855.

2. SAME—NEGLIGENCE—SIGNALS.

A vessel signaling that she is going westward of a vessel meeting her head on, which is answered by the latter with a signal that she will go to the eastward, is not negligent, although her proper course originally was to the eastward.

3. SAME.

A vessel meeting two vessels which are substantially together, and which must necessarily both pass to the same side of her, may announce her intended course to both by one signal.

In Admiralty. Libel by W. H. Titus, master of the tug Geo. E. Weed, against the steamer James Bowen, to recover damages for collision, and cross libel by Augustus Murphy, master of the tug James Bowen, against the tug Geo. E. Weed. Decree against the Bowen.

Lewis & Tilton, for the Geo. E. Weed.

Biddle & Ward and Rochefort & Stanton, for the James Bowen.

BUTLER, District Judge. The suit is for collision. The material facts are as follows: On the afternoon of September 20, 1891, the Weed, a small tug, was passing up the western side of the Delaware river (well over) from League island to Walnut street wharf in company with another tug, the Ben Hoodley. The latter was a few yards behind, probably a length, and slightly nearer the shore. The tide was ebb. When passing Greenwich piers the Bowen was seen coming down, about three

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

quarters of a mile above, also on the western side, but slightly eastward of the Weed's course. A little later the Ben Hooley signaled the Bowen of her purpose to pass westward, by blowing two whistles, to which the latter replied with two, and immediately the Weed rejoined with an equal number. The Bowen turned slightly eastward, and the Weed and Hooley slightly westward. Soon after, and when near the Weed, the Bowen altered her course to westward, and ran into and sank her. At this time the Weed was nearly, if not quite, across the Hooley's bows and very near her. Other vessels were passing up the river, most of them over eastward, and none between the Weed and Bowen after the signals were given. Among these vessels was the Goodnow, which was over to the east. It is a well established custom of the locality where the collision occurred, that vessels going up with an ebb tide, shall keep in shore, on either side of the channel, so as to avoid the current's force, and those passing down shall keep well out in the stream. This statement disagrees, materially, with the respondent's theory of the case, which is that the Weed was shut off from the Bowen's view by the Goodnow, until near at hand, when she suddenly came out from behind the latter's stern and ran westward across the Bowen's bows, rendering the collision unavoidable. This theory is, however, in direct, irreconcilable conflict with the clear weight of the direct testimony on the subject. It is denied by all disinterested witnesses who saw the vessel (and they are numerous) and is supported only by those in charge of the Bowen, and responsible for her conduct. A vessel did come out from behind the Goodnow, but it is clearly proved that she was not the Weed. The respondent's proctor candidly admits that the weight of direct testimony is against him; but he thinks surrounding circumstances show it to be unreliable. I do not agree with him respecting the effect of these circumstances. It is unnecessary to discuss them, but I may say in passing that while he thinks it virtually impossible to believe that the Bowen turned westward across the Weed's bows, as the libelant's witnesses testify, it seems to me no more difficult of belief than his contention that the Weed ran westward from a safe position behind the Goodnow, across the respondent's bows, thus inviting the destruction which overtook her. Admitting the facts to be however, as above found, the respondent still contends that the Weed is alone responsible for the collision because, *First*, it was her duty under such circumstances to pass the Bowen eastward; *second*, she was wrongfully on the western side of the channel; and, *third*, on failing to receive a reply to her whistles it was her duty to reverse and sound danger signals, which she did not. The first point is predicated on the supposition that the vessels were meeting virtually head on. As I have found this was not exactly their position, but granting it was, the fact is unimportant in view of the respondent's signal that she was going eastward, and the Weed's that she was going westward. It is a sufficient answer, I think, to the second point, to say that the Weed was not wrongfully on the western side. The custom respecting this part of the river, justified her. The sailing rules prescribed by the

act of 1885 do not apply to the locality, which is within the port of Philadelphia. I do not think it important that the Bowen did not again signal in answer to the Weed,—as is assumed in the third point. The latter was fully justified in treating the previous signal as addressed to her as well as to the Hooley, which was in her company. The Bowen could not pass between these vessels, as the witnesses testify, and as is apparent from their situation. Going eastward of the Hooley, she must also go eastward of the Weed, why then require a second signal that she intended going eastward when the sound of the first had scarcely died away? The Weed and Hooley being substantially together, one signal was sufficient for both, and satisfied the requirements of the rule. The proofs show that such signaling conforms to the custom prevailing under such circumstances. I cannot doubt the respondent's liability. Nor am I able to see that the Weed was guilty of any negligence contributing to the result. She immediately turned westward, on receiving the Bowen's notification of her purpose to go eastward, and when the latter changed westward she went further over or endeavored to do so. It is doubtful whether she could have safely reversed in view of the Hooley's position when the danger became apparent.

The libel against the Bowen is sustained. If the parties cannot agree on the amount of damages, a commissioner will be appointed. The libel against the Weed is dismissed.

THURBER *et al.* v. CECIL NAT. BANK *et al.*

(Circuit Court, D. Maryland. October 15, 1892.)

1. EQUITY—PLEADING—JURISDICTION—BILL OF DISCOVERY—OTHER RELIEF.

A bill filed as a bill of discovery, but containing a prayer for other specific and general relief, showed that certain goods pledged to complainants were stored in warehouses by their agent, who took storage receipts in his own name as "agent," and afterwards pledged them to defendant bank for his own benefit. *Held* that, whether or not the bill was sufficient as a bill of discovery, the facts alleged made a case cognizable in equity, since they showed that the goods were apparently impressed with a trust, and that there had been a breach of the trust participated in by the bank.

2. DEPOSITIONS—RE-EXAMINATION OF WITNESS BY CONSENT.

The taking of testimony before a master was protracted and desultory because of the sickness and death of counsel, and of difficulty in obtaining the attendance of witnesses, and, by consent of parties, many orders were obtained enlarging the time for taking testimony, and other orders for admitting testimony taken out of time as if orders for enlargement had been made. *Held*, that such orders could not be considered as an agreement to admit inadmissible testimony thus taken, and that one of the consenting parties could still invoke the rule requiring the suppression of depositions taken on the re-examination of witnesses who had been once examined and cross-examined as to the same matters, unless an order for such re-examination had been first obtained for cause shown.

3. PRINCIPAL AND AGENT—MISCONDUCT OF AGENT—RIGHTS OF THIRD PERSONS—NOTICE.

An agent, pursuant to the order of his principal, loaned money on a pledge of personal property, taking warehouse receipts therefor in his own name as "agent," which he pledged to secure his individual debts to a bank having knowledge of the business relations of the principal and agent and the operations in which they were engaged. *Held*, that this knowledge, together with the use of the word "agent" on the receipts, was sufficient to put the bank upon inquiry, and it was liable to the principal for the amount realized by it from the sale of the goods so pledged.

4. SAME—POWER TO SELL—PLEDGE.

The fact that the agent had power to sell for his principal did not affect the duty of the bank to make inquiry, for authority to sell does not include authority to pledge.

5. SAME—STORAGE CERTIFICATES—RIGHT TO PLEDGE.

The Maryland factors' act, (Code, art. 2,) providing that any person intrusted with storekeepers' certificates or other similar documents showing possession may pledge the goods to anybody who is without notice that such person is not the actual owner, does not excuse the bank from liability, for the word "agent" and the circumstances charged it with notice.

6. SAME.

Md. Code, art. 14, declaring storage receipts to be negotiable instruments in the same manner as bills of lading and promissory notes, does not excuse the bank from liability; for, when the fiduciary character of the holder is expressed on the face of a negotiable instrument, notice is thereby given to the indorsee that the holder *prima facie* has no right to pledge.

7. SAME.

The agent took certain money due his principal, made advances to third parties, and purchased goods therewith, which he warehoused in his own name as agent, thereafter pledging them to the bank by transfer of the storage receipts. He never intended his principal to have these goods. *Held*, that the title to such goods was never in the principal, and that the bank was not liable for the amounts advanced on them.

8. SAME—LACHES.

The principal heard that goods which he suspected might be his were being sold by direction of the bank, but did not notify it of his claim until four months afterwards. During this period the bank had paid over to the agent certain sums remaining after the satisfaction of its loans, and claimed that the principal was guilty of laches. It did not appear, however, whether these sums were realized from the goods owned by the principal or from those owned by the agent. *Held*, that there was no presumption that they were the principal's goods, and the delay would therefore not defeat his right of recovery.

In Equity. Bill by H. K. & F. B. Thurber & Co. against the Cecil National Bank, Jacob Tome, president, and A. M. Hancock. Decree for complainants.

Thomas G. Hayes, for complainants.

Robert H. Smith and *Peter E. Tome*, for Cecil Nat. Bank.

MORRIS, District Judge. This is a bill filed as a bill of discovery, in which the complainants, citizens of New York, allege that Hancock was their agent to advance money to the packers of canned tomatoes in Harford county, Md., upon the security of the canned goods; that the warehouse receipts for the goods upon which they so loaned money were made out in the name of A. M. Hancock, agent, and afterwards, without authority from them, Hancock pledged the goods to the defendant bank, by indorsing the warehouse receipts to it for loans obtained from the bank for his own use. It is alleged that the officers of the bank knew, or had reason to know, that the complainants were the principals for whom the goods were warehoused in the name of A. M. Hancock, agent, and, in taking the warehouse receipts as security for his own debt, they acquired no title to the goods. The prayer of the bill is for a discovery of the details of a large number of transactions in which goods were so pledged, and for the delivery up of the goods in the bank's possession, and an account of those sold by its orders, and for other and further relief.

It is objected on behalf of the defendant bank that the bill and testimony do not disclose a case proper for a bill of discovery, for the reason that all the knowledge sought by it the complainants either already had, or could have obtained by the ordinary processes and practice of courts of law. I do not find it necessary to determine this somewhat difficult question; for, independently of discovery as a ground of relief, it does clearly appear from the allegations of the bill and from the testimony that the goods in controversy are goods which had been pledged to the complainants, and which in their behalf the defendant Hancock had placed in warehouses, taking the storage receipts in his name as agent, and that his pledging of them to the bank was a breach of trust, in which the bank participated. Such a breach of trust as is alleged in the bill presents a case of equity jurisdiction very frequently recognized. *National Bank v. Insurance Co.*, 104 U. S. 54; *Duncan v. Jaudon*, 15 Wall. 165; *Warner v. Martin*, 11 How. 225; *Taliaferro v. Bank*, 71 Md. 208, 17 Atl. Rep. 1036; *Lowry v. Bank*, Taney, 310; *Shaw v. Spencer*, 100 Mass. 382; *Dillon v. Insurance Co.*, 44 Md. 386. Upon the ground, therefore, that the allegations of the bill disclose that the goods in controversy were deposited in the name of Hancock, agent, and therefore apparently impressed with a trust, and that the dealings between Hancock and the bank amounted to a breach of that trust, I think sufficient appears to give a court of equity jurisdiction, without discussing the sufficiency of the bill as a bill of discovery.

Another preliminary question raised by the bank is the admissibility of certain testimony taken before the master. At the hearing, excep-

tions were filed, and a motion made to exclude so much of the testimony of the defendant Hancock and of Alexander Wiley as was taken upon their re-examination, after having been once called, examined, cross-examined, and dismissed, upon the same subject-matter, and upon the ground that no order of court was first obtained for such re-examination. It is urged by the complainants that the re-examination was by consent of the objecting parties. By reason of difficulties in obtaining the attendance of witnesses, and by reason of the illness and death of the original counsel for the bank, and the illness and death of the original counsel for the complainants, the examination of witnesses before the master was protracted and desultory, and the time for examining witnesses on both sides was frequently enlarged by orders of court upon consent of the parties, and orders were obtained by which testimony was agreed to be admitted as if the orders enlarging the time had previously been obtained; but all these orders and agreements had reference solely to enlarging the time, and not to the admissibility of the testimony, and had no reference to any objections except those growing out of lapse of time. I think the objection urged by the exceptions comes entirely within the salutary rule that the depositions of witnesses previously examined as to the same matters will be suppressed, unless an order of court for cause shown has been first obtained for the re-examination, in which the terms on which the leave is granted and the interrogatories proper to be asked are specially settled. 3 Greenl. Ev. § 336; *Trustees, etc., v. Heise*, 44 Md. 465; *Girault v. Adams*, 61 Md. 1. The objections to these portions of the testimony are sustained, and they will not be considered.

The testimony properly before the court shows that Hancock, residing in a village in Harford county, in 1883, and for some years prior thereto, acted as a broker for the sale of canned goods canned by the farmers and packers in that county, and also for the sale of supplies required by the packers. In 1882 and 1883, as a broker, he negotiated sales from the complainants, who were merchants doing business in New York city, to Harford county packers, for cans, solder, and canning tools, for a commission. He also, for a commission, placed for the complainants, in the hands of certain packers, cans to be filled with tomatoes, at an agreed price, and then shipped to the complainants. He also negotiated some sales of canned goods to the complainants on behalf of the county packers. When the packers who had purchased supplies from complainants were unable to meet the notes given in payment, he appears occasionally to have negotiated discounts for such packers at the defendant bank, becoming indorser on their notes. He was, however, known to the bank officers to be a man of no capital and very little credit. Early in the tomato packing season of 1883, Hancock suggested to the complainants that as the price of canned tomatoes was very low, and the packers were anxious to hold on to their goods for better prices, the complainants might get the control of the selling of a large amount of these goods packed in Harford county, if they would make liberal advances of money to the packers on pledge of the goods; that the complainants would get interest on their money and a commission of 5 per cent. for selling, of which com-

mission they were to pay Hancock a share for his services. To this arrangement the complainants consented, and agreed to advance from 70 to 75 cents a dozen on three-pound cans of tomatoes stored in warehouses in their names, with insurance payable to them.

In pursuance of this agreement, the complainants furnished Hancock with large sums of money, which he deposited in the defendant bank in October, 1883, in the name of A. M. Hancock, agent, he having previously had an account there in the name of A. M. Hancock & Co. These sums so furnished and deposited in October, November, and December, in 1883, amounted to over \$93,000, and were loaned out through Hancock's agency to numerous packers; their notes for the loans to the order of the complainants, together with the warehouse receipts in complainants' names, being forwarded by Hancock to the complainants. The anticipated rise in the price of canned tomatoes did not take place, and they came to be worth hardly anything more than the amounts advanced upon them, and for this and other reasons the loans were extended and carried over into the next year. One of the packers becoming insolvent, litigation ensued, in which it was decided that the warehouse receipts issued by the packers for goods stored in their own warehouses, which was the character of many of the receipts taken by complainants as security, were invalid against attaching creditors; and in August, 1884, in order that these goods might be warehoused in such manner that there should be no question about complainants' title, all the receipts then in the hands of the complainants, together with the notes secured by them, were sent by complainants to Hancock, in order that he might for them attend to having the goods properly warehoused for their security. These goods were so warehoused in several storage places, but the storage receipts, by Hancock's direction, were made out in the name of A. M. Hancock, agent. It was the intention of the complainants at that time that the goods should be rapidly shipped to them to be sold, or shipped to the persons they should sell to, and that Hancock also should negotiate such sales on their behalf as he could, and ship the goods to the purchasers, the complainants paying him a part of their commission of 5 per cent. Although constantly written to and urged, Hancock forwarded the goods very tardily, and in September, 1884, he began borrowing money from the defendant bank upon pledges of these warehouse receipts, which had been made out in his name as agent, and which he indorsed over to the bank. During September, October, November, and December, 1884, he obtained from the bank 15 loans, amounting to about \$15,000, pledging as security 10,661 cases, of two dozen cans each, of the tomatoes packed in 1883, and about 5,000 cases of goods packed in the season of 1884.

Without recourse to Hancock's excluded testimony, but with the light thrown upon the transaction by his first examination, and by other witnesses, and by the bank books, check books, letters, and documentary evidence produced and not excluded, enough appears to show that the complainants held the title to the goods of the pack of 1883, which Hancock pledged to the bank. It is true that in this first examination

Hancock does say of these goods that they were put into his hands by the packers, and were warehoused by them in his name as agent, in order that he might sell them to reimburse himself for money which he had advanced them; but from his own testimony, and bank book and the documents and letters he produces, it appears that all the advances originally made by him to these packers of the goods of 1883 had been repaid to him out of the loans subsequently made to them by the complainants; and although he attempts to confuse the matter by speaking of his advances to these packers, and of their orders to him to sell their goods to pay the advances, it is perfectly obvious that the advances were the loans he had made for the complainants with complainants' money. Of the goods of the pack of 1883, all have been traced, and the testimony leaves no doubt that they were portions of the goods pledged to complainants, and held by them as security for their loans to the packers. These loans, with interest, storage, insurance, and commission, in most cases quite equaled, if they did not exceed, the value of the goods, and in October, 1884, the packers had no longer any beneficial interest in them.

As to the goods of the pack of 1884, with regard to some of them, it appears that Hancock, from the sale of other goods pledged to complainants, had money of theirs in his hands, which he should have reported and paid over, but instead he used it in making advances to packers on the pack of 1884, and in purchasing goods of that year. These goods he also warehoused in the name of A. M. Hancock, agent, and they are the goods of 1884 pledged to the bank. Together with these, however, there were some goods of the pack of 1884 which Hancock had taken as security for sales he had made for complainants of cans and solder.

As to the goods of the pack of 1883, the actual fact being that they were the goods of the complainants, and that Hancock had no title to them, and that the warehouse receipts were in his name as agent, unless there is some provision of the Maryland factors' act or of the Maryland warehouse act, or unless the complainants are in some way estopped, it is well-settled law that Hancock, although he had authority to sell, could not, without complainants' authority, pledge the goods, and that the bank, independently of all the other sources of knowledge, from the word "agent" on the face of the warehouse receipts, had notice that Hancock was not the actual owner, and that he was *prima facie* doing an unauthorized and unlawful act in pledging them, and that the bank in loaning money on them assumed the burden of ascertaining the actual fact of ownership and Hancock's authority to pledge. The cases already cited are authority for this rule of law, and many others might be cited.

Beyond the significant fact that the warehouse receipt itself imported that Hancock was not the actual owner, there was much within the knowledge of the officers of the bank with regard to the large amount of money of the complainants passing through their bank in Hancock's account, as agent, and which they knew that Hancock was advancing for complainants on the security of canned goods placed in warehouses in the season of 1883, which should have put them upon inquiry as to

the actual ownership of the goods. It is true that when the account was opened in November, 1883, the officers of the bank asked Hancock for whom he was agent, and he replied, "For my wife and children;" but they could not escape knowing the nature of the transactions for which the account was used, and as to the ownership of these goods taken by them it is not contended that they ever made any inquiry whatever. That the goods pledged to the complainants, stored in the different warehouses, should be warehoused in the name of Hancock, agent, under all the circumstances of the business, was natural. It enabled Hancock to attend to shipping them in such lots as the complainants might make sales of, and as he might be directed by them. The fact that Hancock had the authority from complainants to sell and deliver such of them as he could find purchasers for at satisfactory prices does not help the bank's case at all, for an authority to sell does not include a power to pledge. *Allen v. Bank*, 120 U. S. 32, 7 Sup. Ct. Rep. 460, and cases there cited.

Coming now to the goods of the pack of 1884, I think most of them stand upon a different footing. The title to at least a considerable quantity of these goods was never in the complainants. All that can be said in their behalf is that, as Hancock had converted complainants' money to his own use, and had misapplied it in obtaining these goods of the pack of 1884, instead of paying it over to them, that they might have an equitable lien on the goods to the extent that their money was used in paying for them. But, with some exceptions, Hancock never considered these goods theirs. He did not obtain these goods for them, but for himself. In warehousing them in his name as agent, he may have intended to protect them from other creditors if occasion required; but he did not intend to give complainants a title to them, and never told them anything about them, and they knew nothing about them. If the officers of the bank had gone to the complainants, and asked if these goods were theirs, they would have been obliged to answer that to their knowledge they had no goods of the pack of 1884 warehoused in Harford county.

The money of the complainants has not been directly and distinctly traced to the payment for these goods, and I do not find the misappropriation of complainants' money, in purchasing, brought home to the officers of the bank, so as to affect them with knowledge of it. It seems not at all improbable that some of the loans from the bank went in part to pay for these goods.

On behalf of the bank, it is urged that both by the Maryland factors' act, (Code, art. 2,) and the Maryland act with regard to storage receipts, (Code, art. 14,) the common-law limitations upon the right of one intrusted with goods to pledge them have been so altered as to protect the bank in its transactions with Hancock. The Maryland factors' act provides that any one intrusted with bills of lading, storekeepers' certificates, orders for the delivery of goods, or similar documents showing possession, shall be deemed the true owner of the goods described therein, and may sell or pledge the same to any person: provided, that person

shall not have notice, by such documents or otherwise, that the person so intrusted is not the actual and *bona fide* owner. In the present case, however, it is plain that the bank, from the word "agent" appearing on the face of the warehouse receipt, had notice that Hancock was not the actual and *bona fide* owner.

By the Maryland act with regard to storage receipts, they are declared to be negotiable instruments in the same manner as bills of lading and promissory notes; but it still remains the law with regard to storage receipts, as well as with regard to negotiable instruments, that the pledgee takes them at his peril, if there is anything appearing on the face of the instrument which affects the holder's right to pledge it. The holder of a promissory note, made payable to him as trustee, executor, attorney, or agent, has not *prima facie* the right to pledge it. The fiduciary character of the holder being expressed on the face of the instrument, and giving notice that the holder is not the true owner, there is nothing in any of the Maryland acts which relieves the pledgee from ascertaining the actual authority of the holder to pledge. *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. Rep. 460.

In my judgment, the complainants have established their right to a decree against the bank for the amount realized by it from the sales of 10,661 cases of canned tomatoes of the pack of 1883, pledged to it by Hancock.

It is urged that there was laches on the part of the complainants after they learned that their goods had been pledged and were being sold by direction of the bank, in delaying to notify the bank of their claim, and, in consequence of that delay, the bank paid to Hancock a considerable balance in cash which remained after satisfying the bank's loans, and which, if timely notice had been given, they could have retained. From a letter from complainants to Hancock, dated November, 1885, they appear to have heard that goods were being sold by a commission merchant at Havre de Grace named Seneca, by direction of the bank, for money loaned, which they suspected might be their goods, and they asked Hancock for an explanation of it. What his explanation was I do not find, but, as they did not notify the bank of their claim until four months afterwards, there would appear to have been a remissness on their part; but as there were pledged to the bank by Hancock, besides the goods of 1883, which I have held to be the complainants', about 5,000 cases of the goods of 1884, which Hancock obtained in the manner hereinbefore mentioned, and as to some of which the testimony indicates that they were also held as security for debts due to complainants for goods sold the packers in 1884, and as it does not appear from which of these lots of goods the balance paid over was derived, I do not find that there is any presumption that the money paid over was derived from complainants' goods, rather than from the goods which were not complainants'.

Decree in favor of complainants for the amount realized from the sales of the goods of 1883 sold by the bank, with interest from date of filing bill, and costs.

BANGOR ELECTRIC LIGHT & POWER Co. et al. v. ROBINSON et al.

(Circuit Court, D. Massachusetts. September 20, 1892.)

No. 2,744.

1. CORPORATIONS—TRANSFERS OF STOCK—UNAUTHORIZED SALE—INNOCENT PURCHASER.

The Maine statute providing that shares of corporate stock may be transferred by indorsement and delivery, but that the transfer shall not be valid, "except between the parties thereto," until the same has been entered on the books of the corporation, does not govern the rights of two persons, each claiming a certificate of stock which was transferred to one of them by a third person by mere indorsement in blank, and which the other acquired in good faith, for a valuable consideration, from a stranger, who had it in his possession without authority.

2. SAME.

Nor is such a case controlled by Pub. St. Mass. c. 78, § 6, which is apparently aimed only at stock jobbing, or by Acts Mass. 1884, c. 229, even if it reaches stock of foreign corporations, as its only purpose appears to be to remove the necessity for the registration of transfers of stock certificates as against subsequent purchasers.

3. SAME—ESTOPPEL.

The rule that where one of two innocent persons must suffer through the fraud of a third person, he must bear the loss who placed it in the power of the third person to commit the fraud, does not apply to the case of two persons having a safety deposit box in common, and one of them, without authority, abstracting therefrom, and transferring to an innocent purchaser for value, a certificate of stock indorsed in blank belonging to the other.

4. SAME—NEGOTIABILITY.

While certificates of stock indorsed in blank have a certain *quasi* negotiable character, this quality does not inhere in them to the extent of depriving the owner of title when the certificate is stolen from him, and then transferred to an innocent purchaser for value.

In Equity. Bill of interpleader brought by the Bangor Electric Light & Power Company, a Maine corporation, and Frederick M. Laughton, president thereof, and a citizen of Maine, against Elizabeth R. Lee and Augustus G. Robinson, both citizens of Massachusetts, to determine the right to a certificate of 100 shares of stock in the complainant corporation. Decree in favor of defendant Robinson.

The bill shows that complainant Laughton, in his individual capacity, sold to defendant Robinson the certificate of stock in question, and transferred the same to him by an indorsement in blank, that no transfer on the books of the company had ever been made, and that the stock had subsequently come into possession of defendant Lee, who still retained it, and claimed a right to hold it as collateral security, and that Robinson also still claimed to be the owner thereof, and had notified the company to that effect. From the separate answers of the defendants and the proofs, it appeared that Robinson had certain business relations with one Williams, a broker, and that they had in common a safety deposit box, to which each had access; that Robinson placed the certificate therein, and that, without his authority or knowledge, Williams abstracted it therefrom, and transferred it to Mrs. Lee, as collateral security for a loan, and that he subsequently disappeared without repaying the money borrowed. The answer of Mrs. Lee averred, among other things, that Williams was introduced to her by Robinson, who recommended him to her in high terms, repre-

sented that he was honest, and advised her to buy stocks through him and deal with him, and stated that he himself had employed Williams as his financial agent to buy and sell stocks, and intended to do so in future. She further averred that, believing these representations, she had various dealings with Williams, including that already mentioned.

Charles G. Chick, for complainant.

George C. Abbott, for defendant Lee.

Charles L. Woodbury and *Henry Walker*, for defendant Robinson.

PUTNAM, Circuit Judge. In the view of the court, no statute, either of Maine or Massachusetts, affects this case. The statute of Maine applicable to certificates of stock provides that they may be transferred by indorsement and delivery, but that transfers shall not be valid, "except between the parties thereto, until the same is so entered on the books of the corporation," etc. The question under this statute applicable to this case is: Who are the "parties" with reference to whom the statute by exception declares this transfer valid? In other words, whose name shall be inserted in the blank transfer, under the circumstances of this case, to make it complete? When this is ascertained, the transfer becomes perfect in favor of the person so ascertained as against the other "party," namely, F. M. Loughton, who indorsed the certificate in blank. So far as this case is concerned, there are no outstanding equities in strangers to be considered, and the statute has no controlling effect. Without a due consideration of this rule of construction of the Maine statute, *Iron Co. v. Lissberger*, 116 U. S. 8, 6 Sup. Ct. Rep. 241, could not have been decided as it was; because here the court held that the transfer was valid, under the particular circumstances, in favor of an unregistered transferee as against an attaching creditor of the stockholder of record. When read together, the following cases in the supreme court will be found to be entirely consistent with this conclusion, and to fully sustain it, namely: *Baldwin v. Ely*, 9 How. 580; *Combs v. Hodge*, 21 How. 397; *Bank v. Lanier*, 11 Wall. 369; *Vermilye v. Express Co.*, 21 Wall. 138; *Parsons v. Jackson*, 99 U. S. 434; *Cowdrey v. Vandenburg*, 101 U. S. 572; *Railway Co. v. Sprague*, 103 U. S. 756, and *Hammond v. Hastings*, 134 U. S. 401, 404, 10 Sup. Ct. Rep. 727.

Pub. St. Mass. c. 78, § 6, is apparently aimed only at stock jobbing, as is shown by the reference in *Brown v. Phelps*, 103 Mass. 313, to *Stebbins v. Leowolf*, 3 Cush. 137. Likewise the Massachusetts statute of 1884, c. 229, does not seem pertinent, whether it reaches certificates of stock of foreign corporations or not. Its only purpose appears to be to remove the necessity of the registration of transfers of stock certificates as against subsequent purchasers, and it does not touch the question of the effect of an unauthorized sale of a certificate indorsed in blank. *Fiske v. Carr*, 20 Me. 301, turned on the very peculiar language of the statute cited in it, which unqualifiedly provided that the stock should not pass from the proprietor until the transfer had been recorded. So far as the question at bar is concerned, that statute was essentially different from the present. The latter, by implication and uniform construction, makes an un-

recorded transfer valid, not only as between the parties to it, but also as between all others having notice. *Bank v. Cutler*, 49 Me. 315, is the ordinary application of the present statute, and in no way touches the questions at bar. The court does not perceive that any other Maine decision cited bears on this case. On the whole, the court is satisfied that this suit is to be disposed of according to the general principles of jurisprudence, applicable to certificates of corporate stocks indorsed in blank.

The court is of the opinion that whatever took place personally between Robinson and Mrs. Lee was purely of a friendly character, in no sense allied to business transactions, entirely in good faith, and not to be held by the law to prejudice either. The counsel for Mrs. Lee bring forward the proposition that when one of two innocent persons must suffer from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud; and they cite on this point *Allen v. Railroad Co.*, 150 Mass. 200, 207, 22 N. E. Rep. 917. It can hardly be said that this is a rule of the common law; but, if it were, the practical application of it is not helped by the general terms in which it is expressed. The court is forced to the conclusion that it does not apply to relieve Mrs. Lee any more than it would an innocent purchaser for full value of jewelry stolen as the result of careless exposure by the owner. Mrs. Lee either purchased outright, or advanced money on a pledge of the certificate, or both; but the details of this are of no consequence, because, having advanced a valuable consideration in good faith, she stands in the courts of the United States the same in either view. Robinson was absent when the transaction took place; and, if he had been within reach, *non constat* that she would have inquired of him concerning the certificate, there being nothing on it to show that he had any interest in it. Indeed, there was no person of whom she could inquire, unless of Laughton, the indorser of the certificate. As he had parted with it long before, he could not have aided her. She had no means of protecting herself. Robinson, with reasonable care, could easily have protected all parties. If it were a mere question of balancing equities, or of throwing the loss on the innocent party, the court would have little difficulty, and it regrets that the result of the case must be contrary to what seems natural justice.

The evidence shows, and it is not disputed, that the certificate of stock was deposited by Robinson in a box in the Boston Safe-Deposit & Trust Company, under such circumstances that both Robinson and the broker of whom Mrs. Lee purchased had access to it. The certificate, however, was not intrusted to the possession of the broker, either directly, indirectly, or impliedly; nor was he authorized to remove it from the box. His misdoing was not embezzlement or fraud, but criminal larceny at common law. The condition of things was like that of two persons, lawyers or brokers, occupying the same office, with a common safe or vault, to which each has access, and in which each is accustomed to deposit his papers or securities. The general principle which the court must follow has been stated as late as April of the current year by Lord HERSCHELL in *Bank v. Simmons*, [1892] App. Cas. 201, 215, as follows:

"The general rule of the law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments."

Consider first the exception in behalf of negotiable instruments. This does not extend to bills of lading indorsed in blank, certificates of stock indorsed in blank, bonds or scrip payable to bearer or indorsed in blank and overdue, nor to instances like those in *Parsons v. Jackson*, *ubi supra*, and *Baxendale v. Bennett*, 3 Q. B. Div. 525, where the negotiable paper had been drawn and signed, but never issued. In the view of the court, the rule concerning certificates of stock indorsed in blank is correctly stated in Daniel on Negotiable Instruments, (4th Ed.) §§ 1708, 1709. They have a certain *quasi* negotiability, arising largely, if not entirely, from the fact that the holder has voluntarily made delivery to some other person, and thus precluded himself by the general principles of estoppel; and more particularly by the fact that he has given an apparently unrestricted authority, which cannot be limited to the injury of others by undisclosed instructions. This latter proposition is the ordinary rule applicable to all agencies, and is thoroughly illustrated in *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. Rep. 864. In this case the defendant intrusted to a third person her signature in blank for a business purpose. It was used in violation of the undisclosed authority, and the court sustained the transaction. Certificates of stock indorsed in blank are so far of a negotiable character that they ordinarily pass from hand to hand, that they are not subject to *lis pendens*, and that, as stated by Daniel, in order to effectuate the ends of justice and the intention of the parties, the courts ordinarily decree a better title to the transferee than actually existed in the transferor. Nevertheless, we do not find that any court of authority has ever gone so far as to hold that the holder of them may lose the title to such as may be stolen from him, as he may of negotiable promissory notes, bills, scrip, or bonds, payable to bearer or indorsed in blank.

Touching the other proposition found in the foregoing citation from *Bank v. Simmons*, namely, that the purchaser shows that "the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so," the rule is stated quite generally, but its application is limited. The court need not refer to the well-known cases in which a party stands by silently, and permits his property to be disposed of without a protest. The contest at bar relates to the mere negligence of the original holder, and how far this may prevent him from reclaiming his property. At first it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in the indorsement, he was barred; but the court is unable to find

any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property, aside from strictly negotiable securities. There has been at times a disposition to lay down broadly rules touching negligence in cases analogous to this. In *Bank v. Stowell*, 123 Mass. 196, these rules were largely discussed. The opinion pointed out that they apply only when there is some special duty or confidential relation between the parties, as between a depositor and the bank; and it was held that the maker of a note was not liable for the increased amount by which it was raised, notwithstanding the careless manner in which he had drawn it. The same principle was also discussed in *Baxendale v. Bennett*, *ubi supra*; where it was held that, although the defendant had completed a blank acceptance, and left it in the drawer of his writing table, which was unlocked, from which it was stolen, and afterwards filled up and purchased by an innocent party, yet he was not liable thereon. In *Abbott v. Rose*, 62 Me. 194, 204, the broader rule was stated with favor, but it was not material to the case, and is not harmonious with the principles of the later decisions,—*Breckenridge v. Lewis*, *ubi supra*, and other cases already cited. In all the cases in any way pertinent relied on by the counsel of Mrs. Lee there was a voluntary intrusting of actual possession by the holder. On the whole, the court is unable to find any principle of the common law which will protect her; and the case at bar, though in equity, involves only common-law rights. Let there be a decree that the blank transfer on the certificate of stock in question in this case, deposited in the registry of the court, be filled up in favor of defendant Robinson, and that the plaintiff corporation issue him a new certificate in exchange therefor, and that complainants recover one half of their costs from defendant Robinson and one half from defendant Lee.

FINANCE CO. OF PENNSYLVANIA v. CHARLESTON, C. & C. R. Co. et al.,
(POCAHONTAS COAL CO. et al., Interveners.)

(Circuit Court, D. South Carolina. November 4, 1892.)

RAILROAD COMPANIES—RECEIVERS—CLAIMS OF MATERIAL MEN—DIVERTED EARNINGS.

A diversion by a railroad company of \$2,300 from the payment of claims for material used in keeping the road a going concern, to the permanent improvement of the road, or to the payment of interest on bonds, must be made good by the bondholders, and is so made good by the issue of receiver's certificates and the application of their proceeds to such claims, and the material men are entitled to no further preference from the proceeds of the sale. *Fosdick v. Schall*, 99 U. S. 235, followed.

In Equity. Bill by the Finance Company of Pennsylvania against the Charleston, Cincinnati & Chicago Railroad Company and others. D. H. Chamberlain appointed receiver. 45 Fed. Rep. 436. The Poca-

hontas Coal Company and others intervene by petition to assert claims for materials furnished. Reference to a master ordered. 48 Fed. Rep. 188. Heard on master's report.

B. A. Hagood, Hugh Sinkler, A. M. Lee, Buist & Buist, and Inglesby & Miller, for petitioners.

S. Lord and A. T. Smythe, for respondent.

SIMONTON, District Judge. These are claims by material men, proved and allowed in this court. The petitioners prayed an order for payment out of funds in the hands of the receiver; failing these, that provision be made for them out of the proceeds of the sale of the road, when such sale be ordered. The cases were heard and considered. The opinion of the court can be found in 48 Fed. Rep. 188. The court held that the petitioners had established their equity. A reference was ordered to ascertain whether the Charleston, Cincinnati & Chicago Railroad ever earned any income. Was any portion of it applied to the payment of interest or to any permanent improvement of the property, or in any way for the benefit of the bondholders? How much? The master has made his report, which shows that there was no payment of interest by the road, but that the sum of \$2,300 was taken from cash in the hands of Receiver Lord, derived from earnings, and applied to the construction of the road at and near Marion, N. C. Mr. Lord, temporary receiver, turned over to Mr. Chamberlain, his successor, permanent receiver, \$4,000, derived from earnings. Shortly after his appointment, Mr. Chamberlain filed a petition for leave to issue receiver's certificates to meet certain pressing claims. Mr. Lord had had leave to issue such certificates, but had not used the privilege. In his petition, Mr. Chamberlain sets out the claims to be paid, aggregating \$48,854.81. He estimates that with \$30,000 in certificates and his earnings he can get along comfortably, and he obtained leave to issue the \$30,000 in certificates. The expenditure for the road to Marion is not in his list of claims to be paid. These were:

For taxes,	-	-	-	-	-	-	-	-	\$12,605 90
Freight balances,	-	-	-	-	-	-	-	-	19,136 33
Cross-ties,	-	-	-	-	-	-	-	-	7,567 47
Pay rolls,	-	-	-	-	-	-	-	-	9,593 33
									<hr/>
									\$48,901 93

The larger part of these were due before any receiver was appointed. Neither under Mr. Lord nor under Mr. Chamberlain has the railroad company been able to earn its running expenses, and keep down the payment of taxes. It thus appears that when Mr. Lord used \$2,300 in building the Marion connection he borrowed that sum from moneys urgently needed for pressing demands, and that these demands were met by the issue of receiver's certificates, displacing the lien of the bondholders to the extent of \$30,000. The underlying principle of *Fosdick v. Schall*, 99 U. S. 235, and the cases following it is this: The earnings of the railroad must first be applied to meet the outlays necessary to

keep it a going concern. After this application only can the bondholders lay any claim to them. If earnings have been diverted from this primary purpose, and used for the advantage of the bondholders, either in payment of interest or in permanent improvements which tend to enhance the value of the property, the sums thus diverted must be restored. This restoration may be from the income. If this fail, then the diversion must be met out of the proceeds of sale. There was in this case a diversion of some \$2,300. This the bondholders must restore. They have, in fact, restored it by consenting to the displacement of their lien by the issue of receiver's certificates to the amount of \$30,000. These must be paid out of the proceeds of sale. The money they furnish has been applied to claims of the same rank as those held by the petitioners, and this exonerates the bondholders from any further assessment. It thus appears that the petitioners have no equity which can displace the vested lien of the bondholders. The prayer for preference from the proceeds of sale is refused.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R.
Co. *et al.*, (Moon, Intervener.)

(Circuit Court, D. South Carolina. November 8, 1892.)

1. RAILROAD COMPANIES—RECEIVERS—LABOR AND SUPPLY CLAIMS—PRIORITIES.

A lawyer, employed by a railroad company at a fixed salary in a state where the road is in course of construction, but not yet in operation, is not entitled, on the appointment of a receiver in foreclosure proceedings, to receive payment out of the proceeds of the sale, prior to the satisfaction of the mortgage bonds, even though earnings of the road have been improperly diverted from current expenses for the benefit of bondholders; for the equity to a return of diverted earnings applies only in favor of those who have helped to keep the road a going concern. *Fosdick v. Schall*, 99 U. S. 235, distinguished.

2. RECEIVERS—ORDER FOR PAYMENT OF EMPLOYEES—SALARIED LAWYER.

An order appointing a receiver authorized him to pay out of income, besides the current expenses and charges, all wages due to employees at the date of the order for services within 90 days theretofore. *Held*, that a lawyer employed at a fixed salary per month came within the terms of the order.

3. ATTORNEY'S LIEN.

A lawyer who renders legal services to a railroad company at a fixed salary, and who advances money for the company's purposes, is entitled to a lien for the retention of papers for the whole amount of his claim.

In Equity. Bill by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company and others. A receiver was appointed. 45 Fed. Rep. 436. Heard on the intervening petition of John B. Moon. Decree for intervener.

B. A. Hagood, for petitioner.

Samuel Lord and *A. T. Smythe*, for respondents.

SIMONTON, District Judge. This case comes up on the report of the special master. The petitioner, a member of the bar of Virginia, of

reputation, was the regular counsel of the railroad company in that state, engaged at a salary of \$200 per month. He rendered services of great value to the railroad company in nearly every department of professional duty. He also advanced money for its purposes from time to time. He has in his possession muniments of title and other papers of value. On these he claims a lien for his account proved in these proceedings. The master reports as vouched before him for salary, expenses, and money advanced by the petitioner to the railroad company the sum of \$3,296.81. Of this sum, during the 90 days preceding the appointment of a receiver, there is due for salary \$600, for expenses \$222.30. The order appointing the permanent receiver in this case authorized him, out of the tolls, income, revenue, and issues of the railroad company, in addition to the current expenses and charges, to pay all the wages due to the employes at the date of the order appointing the temporary receiver herein, for labor and services within 90 days before the same. The petitioner was in the employment of the railroad company under a fixed salary. The order of Judge Bond appointing the receiver provided for all employes without qualification, meaning regular employes, employed generally, and not for a particular act. *Railroad Co. v. Wilson*, 138 U. S. 505, 11 Sup. Ct. Rep. 405. The petitioner comes within this class, and is also within the protection of the order. He should get his pay and necessary expenses for the 90 days preceding the appointment of the temporary receiver out of the income made by the receiver; but in no event can he come upon the proceeds of sale either for the total amount of his bill or for this preferred part of it. The railroad has never been built in Virginia. It was, at the best, in the course of construction. So, even were there any diversion of income for the benefit of the bondholders, of which there is no evidence,—see *Finance Co. v. Railroad Co.*, 52 Fed. Rep. 524, (decided at this term,)—the equity established in *Fosdick v. Schall*, 99 U. S. 235, goes only to claims against a railroad as a going concern, and does not exist in favor of those aiding in constructing a railroad,—*Wood v. Guarantee Trust Co.*, 128 U. S. 416, 9 Sup. Ct. Rep. 131,—and if, perchance, the income should fail, this will not of itself give a right to go against the *corpus* or the proceeds of sale,—*Railroad Co. v. Cleveland*, 125 U. S. 658, 8 Sup. Ct. Rep. 1011. Let an order be taken conforming to this opinion. The petitioner may, if he desires, take judgment against the railroad company for so much of his claim as is not preferred. His lien for the retention of papers is recognized and allowed as to the whole claim.

BELLOWS v. SOWLES *et al.*

(Circuit Court, D. Vermont. October 25, 1892.)

EQUITY—PARTIES—BILL TO RECOVER LEGACY.

A legatee under a will brought a bill against the executor and against the receiver of a bank to reach property of the testator held by the bank, and moved that other legatees of the same amount be made parties. *Held*, that there was no ground for compelling the other legatees to become parties to the suit, for, though they claimed in the same right, they did not claim the same trust property, but merely their separate shares in the avails of it, if any, after the assets had been collected and distributed in some way by decree of the probate court.

In Equity. Suit by Frederick Bellows against Edward A. Sowles, as executor of the wills of Hiram and Susan Bellows, and against Chester W. Witters, as receiver of the First National Bank of St. Albans. Motion by complainant for an order of court making Charles Bellows and Bert Bellows parties to the suit. Denied.

Chester W. Witters, pro se.

WHEELER, District Judge. The orator and his brothers, Charles and Bert, are alleged to be legatees of \$2,000 each in the wills of Hiram and Susan Bellows, of which the defendant Sowles is executor. He has brought this suit in behalf of himself and all others in like interest who will join him in it, to reach real and personal estate which was of the testators acquired by the First National Bank of St. Albans, of which the defendant Witters is receiver. They have not joined in the suit, and this defendant moves that they be made parties, as claimants of the same property, by order of court. But these legatees are not claimants of the same property. Each claims a separate legacy of \$2,000 in money. In this state, jurisdiction of distribution of estates of deceased persons is vested exclusively in the probate courts. The equity jurisdiction of this court cannot be restrained by statutes of the state. *Wayman v. Southard*, 10 Wheat. 1; *Beers v. Haughton*, 9 Pet. 329. But the rights of the parties are to be ascertained by the laws of the state. The legacies are not made chargeable upon any of the property, and neither of the legatees is entitled to a decree against the receiver merely because the legacies are unpaid, and he has assets of the estates. The assets must be got together, and be distributed by decree under the will in some way, before either will be entitled to them. *Boyden v. Ward*, 38 Vt. 628. The legatees claim in the same right, but that is not enough to warrant forcing either to become a party to a suit of the other. They do not claim the same trust property in litigation before the court, but merely their separate shares in the avails of it, if any. No ground appears for compelling them to become parties to another's suit. Motion denied.

FOOTE *et al.* v. GLENN.

(Circuit Court, D. New Jersey. September 27, 1892.)

INJUNCTION—RESTRAINING ENFORCEMENT OF JUDGMENT—FEDERAL AND STATE COURTS.

Decrees of state courts, having jurisdiction, in a suit against a corporation, brought by a creditor on behalf of himself and others, established the validity and declared the legal effect of a deed of trust made by the corporation for benefit of creditors, ascertained the debts owing by it, and made calls on unpaid subscriptions to its capital stock, upon which the trustee appointed to execute the deed of trust recovered judgment against a stockholder in a United States circuit court in another state. *Held*, that that court would not restrain the enforcement of such judgment upon charges of fraud and collusion in the allowance of claims by the decrees of the state courts, neither the corporation nor the creditors whose claims were impugned being parties to the suit for injunction, and there being other creditors having just claims for the payment of which there were no assets except the unpaid subscriptions; as, even if more than the complainant's just proportion of such valid claims should be collected by execution, the excess would be refunded.

In Equity. Motion for preliminary injunction. Denied.

Suit by John T. Foote, Catharine J. Cooper, and Robert D. Foote against John Glenn, trustee of the National Express & Transportation Company, to restrain the enforcement of a judgment recovered by defendant against the complainant John T. Foote. See 36 Fed. Rep. 824. The complainants joining with Foote in the bill were the sureties upon the bond given by him upon allowance of a writ of error to review said judgment. Complainants moved on their bill and affidavits for a preliminary injunction.

Alfred Mills and *George Zabriskie*, for complainants.

Charles Marshall and *Charles Biddle*, for defendant.

Before *ACHESON*, Circuit Judge, and *GREEN*, District Judge.

ACHESON, Circuit Judge. That the chancery court of the city of Richmond, Va., in the suit brought by William W. Glenn, suing on behalf of himself and other creditors, against the National Express & Transportation Company, a corporation of Virginia, and others, had jurisdiction to make its decree of December 14, 1880, establishing the validity of the deed of trust for the benefit of creditors, executed by the said corporation, and declaring its legal effect, removing the surviving trustees thereunder, and appointing a new trustee (John Glenn) in their place, ascertaining the debts owing by the corporation, and making an assessment and call upon the subscribers to its capital stock for a partial payment of their unpaid subscriptions, for the purpose of satisfying the debts of the corporation, and that the circuit court of Henrico county, Va., to which the cause was removed, had jurisdiction to make its decree in chancery of March 26, 1886, for an additional assessment and call upon said subscribers, are propositions no longer debatable, in view of the decisions of the supreme court of appeals of Virginia in *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. Rep. 866, and *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. Rep. 129, and the decisions of the supreme court of the United States in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867; and *Glenn* v. 52F.no.6—34

v. *Marbury*, 145 U. S. 499, 506, 12 Sup. Ct. Rep. 914. It is indeed true that the bill now before us to restrain the trustee, John Glenn, from enforcing his judgment obtained on the law side of this court against the complainant Foote, one of the subscribers to the capital stock of said corporation, proceeds upon the ground that the Virginia decrees were procured by fraud. The fraud, however, specifically charged by the bill and set forth in the *ex parte* affidavits filed in support of the present motion is that certain claims were allowed by the decree of December 14, 1880, which were open to valid defenses, and that other specified claims were thereby allowed which were unfounded and fraudulent, and that the court was kept in ignorance of the facts by the fraud and collusion of parties to the cause. But, if this be so, how can this court properly interfere? By what rightful authority can we undertake to pass upon the merits of individual claims sanctioned by the Richmond court? Neither the corporation nor the creditors whose claims are here impugned are before us, or within the reach of the process of this court. Furthermore, the fraud now complained of, if proved, would not invalidate the whole proceedings in the Virginia courts. It is not denied that there are creditors of the corporation who have just claims which should be paid. Now, those creditors are not responsible for the fraud alleged, and they ought not to be prejudiced thereby. There are no assets for the payment of unquestioned and unimpeachable claims except the unpaid stock subscriptions. The trustee appointed by the Virginia court of chancery, acting under the above-recited decrees, is proceeding to collect the stock assessments for the payment of the debts of the corporation. The distribution of the fund so to be raised is exclusively a matter for the Virginia chancery court. Indeed, that court is dealing with a trust over which it has acquired rightful jurisdiction. The complainants, therefore, in seeking redress here, are in the wrong forum. Their application for relief against the consequences of the alleged fraud should be addressed to the Virginia court. The case, we think, falls directly within the principle of the decision in *Graham v. Railroad Co.*, 118 U. S. 162; 6 Sup. Ct. Rep. 1009. We must assume that the Virginia chancery court is freely open to the complainants, and it is not to be doubted that upon proper complaint that tribunal will investigate the facts, and grant appropriate relief if fraud should be shown. In the mean time the worst that can befall the complainants is that a greater sum may be collected by execution at law than Foote's just proportion of the valid claims against the corporation as they may be established ultimately. But, if this should prove to be the case, the excess will be refunded; and, assuredly, the possibility that he may now be compelled to pay more than may be needed in the end affords no equitable ground for restraining execution upon the judgment which the trustee has recovered against him upon the assessments and calls made by the chancery court. *Kennedy v. Gibson*, 8 Wall. 498, 505. We must deny the motion for a preliminary injunction, and dissolve the restraining order heretofore made.

GREEN, District Judge, concurs.

COE v. EAST & W. R. Co. OF ALABAMA *et al.*GRANT *et al.* v. SAME, (SCHLEY, Intervener.)

(Circuit Court, N. D. Alabama, S. D. January 12, 1892.)

1. CORPORATIONS—ISSUE OF STOCK FOR CONSTRUCTION OF RAILROAD—CONSTITUTIONAL RESTRICTION.

Certain stockholders and directors of a railroad company, who owned a controlling interest therein, having the best interests of the company in view, and with the concurrence of all the other stockholders, negotiated a contract on its behalf with a construction company for the building of a portion of the road for \$10,000 per mile in the bonds, and \$10,000 per mile in the stock, of the railroad company. *Held*, that as the contract appeared to be fair, under the circumstances, and involved no fraudulent overvaluation of the work, the bonds and stock issued in accordance with its terms were not void, under Const. Ala. art. 14, § 6, providing that "no corporation shall issue stock except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void."

2. SAME—CONTRACTS BETWEEN COMPANIES HAVING SAME DIRECTORS—RATIFICATION—ISSUE OF BONDS.

The same persons, being also the stockholders and directors of an iron company, negotiated in good faith a contract between the railroad company and the iron company, which took the form of a resolution by the railroad company to lease a railroad owned by the iron company, and pay in stocks and bonds, and of a subscription by the iron company to be paid in property, viz., a lease of their railroad: and the contract was ratified by a unanimous vote of all the stockholders of the railroad company. *Held*, that the contract was, at worst, only voidable, and as no fraud or intentional overvaluation appeared, and the consideration was as nearly adequate as could be expected under the circumstances, the bonds issued in accordance therewith were valid.

3. SAME—ISSUE OF BONDS—PURCHASE BY CONTROLLING DIRECTORS AT DISCOUNT.

Subsequently, the same persons, retaining control of the railroad company, forebore to collect interest on its first mortgage bonds held by them, and advanced to it money for repairs made necessary by an unusual flood, and for improvements, until such floating debt amounted to upwards of \$300,000. For the purpose of paying this, a meeting of stockholders authorized the issue of debenture bonds of the railroad company, not exceeding \$500,000, to be secured by a second mortgage. The directors had previously resolved that such bonds, when issued, should not be disposed of at less than 65 per cent. *Held*, that the purchase by such persons, holding the entire floating debt, of the whole amount of bonds authorized, paid for in such indebtedness, and the balance in cash, was valid.

4. SAME—RIGHTS OF BONDHOLDERS—IMPEACHING PRIOR INDEBTEDNESS.

Thereafter, in accordance with resolutions of the stockholders in the railroad company, which were assented to by all the stockholders, and which authorized the issuance of consolidated first mortgage bonds, in order to extend and improve the road, to take up and retire the first mortgage bonds and debenture bonds, and to cancel the first and debenture mortgages, the railroad company issued to the same persons consolidated first mortgage bonds, and took up at an agreed rate the debenture bonds purchased by them, the first mortgage bonds and stock issued to them and to the iron company, and the first mortgage bonds and stock issued to the construction company, and subsequently sold to them by that company to enable it to complete the road. *Held*, in an action to foreclose such consolidated first mortgage, that subsequent purchasers from them of such consolidated first mortgage bonds were chargeable with notice of the prior bonds and mortgages, and of the terms on which such consolidated bonds were issued, and that, the railroad company acquiescing in the transaction, and no intention to defraud subsequent creditors being shown, such subsequent purchasers could not impeach the prior indebtedness on which such bonds were issued, in order to invalidate the balance of the bonds.

5. EQUITY—RELIEF FROM FRAUD—RELIANCE ON FALSE REPRESENTATIONS.

Holders of first mortgage bonds of a railroad, having contracted with brokers to sell them all their bonds, transferred to the brokers a portion of the bonds, and together with the brokers fraudulently procured the listing of the bonds in the New York Stock Exchange. *Held*, that persons who loaned money to the brokers on such bonds as security, relying either on the standing and representations of the brokers, or on quotations made in the New York Stock Exchange, and produced by fictitious manipulations of the brokers, and not on the false representations made by the

original holders to secure the listing, and who, on nonpayment of the loans, were compelled to buy in the bonds held as security, were not, on the ground of fraud, entitled to priority over such original holders in the application of the proceeds of foreclosure to the satisfaction of the bonds.

6. CORPORATIONS—MEETING OF STOCKHOLDERS—NOTICE—REPORT.

Notice was given to the stockholders of an Alabama railroad company of a meeting to be held at a place in the state on April 20, 1887, to increase the bonded indebtedness of the company, and prior to that date every stockholder consented in writing to the increase. On March 24, 1887, the board of directors held a meeting in the state, at which the call of the stockholders' meeting and the written consent of all the stockholders were recited, and the issuance of the bonds was authorized; and subsequently a report of the directors' meeting, reciting the stockholders' consent, was filed with the secretary of state. *Held*, that there was a sufficient compliance with the law of Alabama providing that a stockholders' meeting to increase the indebtedness of a corporation must be held in the state, that the call must state the time, place, and object of the meeting, and that a report of the meeting must be filed with the secretary of state.

7. SAME—FORECLOSURE OF MORTGAGE TO SATISFY BONDS—RIGHTS OF INTERVENING JUDGMENT CREDITORS.

Part of the consolidated first mortgage bonds of a railroad company were placed in the hands of a trust company, to be issued to a construction company on certain certificates of the completion of an extension of the road. When the extension was practically completed, the bonds were issued on certificates to the construction company, but were retained by the trust company to secure prior advances. Soon after, the construction company failed, and a contractor, whose contract to build part of the road was entirely with the construction company, and contained no agreement to satisfy the same in the railroad bonds, sued the railroad company, and obtained judgment for the balance due. *Held*, that the contractor had no claim on the bonds in the hands of the trust company to subject them to the satisfaction of his judgment.

In Equity. Bill filed by the American Loan & Trust Company, trustee, for which company George S. Coe was substituted, pending the suit, as trustee and complainant, against the East & West Railroad Company of Alabama and others, to foreclose the first consolidated mortgage of said railroad company, for the equal benefit of the holders of its bonds, to the number of 1,750; and auxiliary bill by Grant Bros. and others against the same defendants and James W. Schley, an intervening judgment creditor, to declare void 966 of the bonds, and to foreclose said mortgage for the benefit of the holders of the balance of the bonds. Decree for complainant Coe, and denying the relief prayed for by complainants Grant Bros. and others, and by intervener, Schley.

For prior opinions rendered in the course of this litigation, see 37 Fed. Rep. 242; 40 Fed. Rep. 182, 384; and 46 Fed. Rep. 102. For opinion on denial of motion to dismiss appeal of Grant Bros. from the decree herein, see 50 Fed. Rep. 795.

R. L. Fowler, for complainant.

John H. Inzer, for East & W. R. Co.

Calhoun, King & Spaulding, for Grant Bros.

Wager Swayne and *A. Prentice*, for Browning Bros.

F. S. Smith, for Kelly & Byrne.

Webb & Tillman, for intervener and defendant Schley.

PARDEE, Circuit Judge. The American Loan & Trust Company, in June, 1888, filed its bill to foreclose the consolidated first mortgage of the East & West Railroad Company of Alabama, for the equal benefit of the holders of all or any of its bonds. The bill alleged that the railroad

company had disposed of 1,750 of said bonds to *bona fide* holders for value, and that all of said 1,750 bonds were valid. The bill also disclosed the fact that the mortgaged premises were in the hands of a receiver appointed by this court. It prayed foreclosure and sale of the property for the payment of the said bonds, and that the mortgaged property be placed in the hands of the receiver to be appointed under the foreclosure bill, which was subsequently done, one receiver of this court surrendering possession to another.

On the 26th of July an order was granted allowing Grant Bros. to file an auxiliary bill in behalf of themselves and all other bondholders similarly situated, which bill set up the fact that 966 of the 1,750 bonds were invalid and illegal, and were taken by the defendants W. C. Browning, Edward F. Browning, John Hull Browning, and Amos G. West from the railroad company without consideration, and were a fictitious debt, and that Eugene Kelly and John Byrne had acquired an interest in said bonds with full knowledge of all these facts. It also alleged that the bonds held by Grant Bros. and other holders for value had been acquired for a valuable consideration, without notice of any defect, and that they had been induced to buy the same by a series of misstatements and misrepresentations as to the condition of said road, the payment of its interest, and its fiscal condition, made by Edward F. Browning, J. Hull Browning, and A. G. West, or Grovesteen & Pell, a firm of brokers acting in conjunction with said last-named parties. The bill does not seek to prevent the foreclosure of the mortgage, but prays that the 966 bonds should be adjudged illegal, fictitious, fraudulent, and void, and not entitled to participate in the proceeds of the mortgaged premises; and that the foreclosure prayed for in the original bill of the American Loan & Trust Company should be for the equal benefit only of the said consolidated first mortgage bonds adjudged to be valid by the decree to be rendered in the Grant Bros. case.

Each of the individual defendants has filed an answer denying generally and specifically all the allegations of Grant Bros.' bill of complaint, so far as said averments impeach, in any particular, the *bona fides* of said defendants, respectively.

Subsequent to making up the issues, the American Loan & Trust Company having failed in business, and gone into the possession of a receiver, due proceedings were had by which the American Loan & Trust Company was removed as trustee under the first consolidated mortgage of the East & West Railroad of Alabama, and George S. Coe, Esq., substituted as trustee and complainant herein.

To the main bill, defendant railroad company and James W. Schley have filed answers. The intervention of Schley is also at issue.

Auxiliary Bill of Grant Bros. The complainants in the auxiliary bill have standing in this cause only as *bona fide* owners and holders of bonds issued under the mortgage granted in 1887 by the East & West Railroad Company of Alabama, in which mortgage all bonds are styled "First Consolidated Mortgage Bonds." The resolutions of the stockholders of the East & West Railroad Company of Alabama, which authorized the

issuance of the first consolidated mortgage bonds, and which was assented to by each and every stockholder, recite that—

"The bonds were to be issued for the purpose of providing funds for the extension and completion of the road of the company, to widen its gauge, and to take up and retire the present outstanding first mortgage bonds and debenture bonds, and retiring them, and canceling said first and debenture mortgage," etc.

At the time those resolutions were passed, there was outstanding indebtedness of the East & West Railroad Company of Alabama, and to a large amount represented by bonds secured by a first mortgage of the railway property, and by debenture bonds secured by a second mortgage of the railway property.

The holders of the first consolidated bonds are charged with notice of the prior bonds and mortgages, and of the terms upon which their own bonds were issued. *Caylus v. Railroad Co.*, 10 Hun, 295; *Bronson v. Railroad Co.*, 2 Wall. 287-311. This being the case, it is very doubtful whether complainants can impeach the indebtedness which existed prior to the issuance of their bonds, and upon which their bonds are based. At the time the first consolidated bonds were authorized and issued, every interest consented,—every bondholder, every stockholder, and the board of directors, and, so far as the record shows, every creditor; and the transaction was the consolidation of two series of bonds secured by mortgages of different dates into an equal number of bonds running a longer time, and bearing the same rate of interest, secured by one mortgage on practically the same property. Any and all the defects of consideration, and all equities existing to the prejudice of the prior bonds, were waived and extinguished, and it was competent for the railroad company to make such waiver. See *Bronson v. Railroad Co.*, *supra*. Even if the railroad company had been wronged or cheated, it would seem that subsequent creditors and subsequent purchasers have no right to question the transaction as long as the railroad company acquiesces, and no intention to defraud subsequent creditors is shown. See *Graham v. Railroad Co.*, 102 U. S. 148. And the same case denies, in respect to such matters, that a corporation stands on any different footing from an individual debtor.

The issues made up by the pleadings challenge, and inquiry has been largely made into; the transactions in pursuance of which the railroad company in 1882, 1883, 1884, and 1885 put out the first mortgage bonds for purchase and construction of its railroad, and in 1886 issued its debenture bonds, and sold the same to pay its floating debt. The real basis of the first mortgage bonds and of the debentures are two transactions in 1882,—the purchase of the Cherokee Railroad from the Cherokee Iron Works, and the construction contract with Michael Duff assigned to and assumed by the Southern Railroad Construction Company. The complainants claim that the Brownings and West had an interest in the Southern Railroad Construction Company, and that they were its agents or managers, and that practically it was a mere figure-head to represent the Brownings' interest. The evidence shows it to

have been, and to still be, for that matter, a duly incorporated company under the laws of the state of New Jersey.

If all the complainants' claim in that behalf be admitted, still the contract with the Southern Railroad Construction Company was binding upon the railroad company, as the same was fully and duly authorized at a meeting of stockholders held at the time the negotiations were pending, with full notice of all terms and details, and the same has been ratified from time to time by the stockholders and different boards of directors up to, if not since, the institution of this suit. And in this case the company in its answer still insists that it was a valid, binding contract. The various agreements in the record in relation to construction are to be considered as one contract, put in the form of a subscription to stock by Michael Duff,—an agreement with him to pay for construction, both stock and bonds, and the assignment to, and the assumption by, the Southern Railroad Construction Company, all in good faith and under the advice of counsel.

If it be conceded that the Brownings and West, who were directors of and controlling the East & West Railroad Company of Alabama, were also interested in and controlling the Southern Railroad Construction Company, and, as claimed, were the parties who actually advanced the means to build and construct the road, received the bonds and stock issued under the contract in payment therefor, and that the complainants, acquiring an interest years after, have been injured by the transaction, and can, in this proceeding, inquire into and attack the same, the question still is whether, under all the circumstances, the transaction was not valid. Certainly, if the contract inured to the benefit of the railroad company, and was the best available method for securing the construction of the road, and there was no palpable overvaluation of the work performed and moneys advanced, nor undervaluation of the stocks and bonds received in payment, and it resulted in no injury to any person in interest at the time, it should not be set aside on technicalities, but only in case of palpable intended violation of law. The case of *Van Cott v. Van Brunt*, 82 N. Y. 535, is directly in point:

"The right of the officers of a railroad corporation to enter into an agreement to build its road, and pay for the construction of the same in stocks and bonds, cannot be seriously questioned, and contracts of this description are frequently made for such a purpose. In *Angell & Ames on Corporations*, (section 590a,) it is laid down: 'An agreement is often made by railroads to pay the persons building them a certain proportion of the contract price in stock. Under such a contract the contractor is entitled to the proportion in stock, at its current market value, at the time payment should have been made. And if the stock depreciate, so that it has no market value, the amount agreed to be paid in stock must be paid in money.' See *Hart v. Lauman*, 29 Barb. 410; *Moore v. Railroad Co.*, 12 Barb. 156; *Porter v. Railroad Co.*, 32 Me. 539. If a contract can be made to pay in part for building a portion of the road, it may also be made to pay for the whole thereof in like manner, and there is no valid ground for claiming that, where the contractor is entitled to stock at its market value, he would be liable for the difference between the market value and the par value thereof. There is no evidence in the record before us to establish affirmatively that the value of the work done and mate-

rials furnished was less than the fair and just value of the stock, or that the road built and equipped was worth less than said stock. In fact the testimony shows that the amount expended exceeded the actual value of the stock and bonds which were received in consideration of the same.

"The evidence also established that the stock never had any market value whatever. It is true that some of the bonds were disposed of at 50 and 65 cents upon the dollar, and less, and in some instances by throwing in stock to the same amount, and one half more, and in one instance taken at par in part payment of a debt; but they were intrinsically valueless, and after a while were sold for only a nominal sum, until at last no one outside of the company would take either the bonds or stock at any real price. The arrangement for the building of the road was made after full deliberation and consultation, with the knowledge and approval of all the directors and stockholders. It was assented to as the only means furnished, and the only offer which could be obtained from any one, to insure the construction of the railroad. It was the best thing which could be done under the circumstances, was entirely satisfactory, and made most clearly without any intention to defraud the company or its creditors, and in perfect good faith. It is difficult to see how creditors could be defrauded, when all the property which the company ever had remained in its possession and under its control. * * *

"It is claimed that the defendant, as president, director, and trustee, having wrongfully appropriated the stock to himself without paying for it, takes all the obligations of a subscriber. This depends upon the question whether the transfer of the stock to the defendant and the application of the same was wrongful. It was done, as we have seen, with the full approval of the stockholders, and in fact was a necessity, and, without the contract entered into, no portion of the road could have been built. If the defendant had realized a sum beyond the amount actually expended, there might have been, perhaps, some ground for claiming that the arrangement should inure to and for the benefit of the company. As, however, this was not the fact, and no special advantage accrued to the defendant from the contract, and as there is no proof of any fraud, it is not apparent that there was any wrongful appropriation of the stock and bonds, or that the stock and bonds were diverted from their legitimate use. The mere fact that the defendant held a certificate of the stock which was transferred to him did not make him liable, as it was, to all intents and purposes, paid-up stock."

This case has received some adverse criticism, (2 Mor. Priv. Corp. § 826; Cook, Stocks & S. § 47, note 5; *Jackson v. Traer*, 64 Iowa, 483, 20 N. W. Rep. 764;) but it has been cited with approval and its doctrines have been reaffirmed by the court of last resort in the state of New York in the case of *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. Rep. 145, where it is said:

"The respondent has questioned the legality or validity of the issue of shares upon which plaintiffs base their right to sue. I do not think it is in a position to raise that question, and for several manifest reasons. All of the stock and bonds were issued in payment for the construction of the railroad, and were taken by a syndicate of persons who assumed the contract for the work. It is true that that syndicate was made up of members of the board of directors, but as the members of the syndicate were practically the company, and composed the whole number of stockholders, there was no one to object, and the manner in which they chose to divide up their interests in the proprietorship of the corporation, and to represent them in shares, concerned only themselves. No principle of law forbade the company agreeing to pay

for the construction of its railroad in the way or in the amount it did. *Van Cott v. Van Brunt*, 82 N. Y. 535. If the company's directors were interested in the work and profits of construction, and evaded a direct contract through the form or device of an intermediary contractor, that was a matter for the company, or for its stockholders, to take hold of. But the stockholders and the members of the syndicate were the same persons, and, however wrong the transaction might be if other persons were concerned, here no injury was effected to any one interested in the corporation. And, however illegal the transaction, there was no person apparently to complain of it. As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given, and the mode of its apportionment or division concerned only those interested in the contract through which it was received as payment.

"We may concede that the contract was voidable, as a scheme concocted by the directors for sharing in the profits of construction, but the difficulty is that all the members of the corporation were assenting to it. There was, however, in fact no fraud practiced upon the company. Practically, the promoters of the corporation in this way placed a valuation upon the corporate properties and franchises, which the contribution and expenditure of their money created; and the fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all."

The constitution of the state of Alabama (article 14, par. 6) prescribes:

"No corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void."

And section 1824 of the Code of Alabama (1876) provides:

"All subscriptions to the capital stock of any railroad proposed to be organized under the provisions of this article shall be taken payable in money, labor, or property upon money value, to be named in the list of subscriptions, and, in the event of the failure to perform the labor and deliver the property according to the terms of the subscription, the subscribers shall be bound to pay the amount named in the subscription list in money."

A provision in the constitution of Arkansas, almost identical with that of the state of Alabama, has been construed by the supreme court of the United States not to prevent the carrying out of an agreement by which the bondholders of a railroad stipulated that the road should be bought upon foreclosure by trustees, who should convey it to a new company composed of bondholders, who should receive mortgage bonds of the new company in exchange for their old bonds, and full paid-up stock subject to the mortgage debt, without any payment of money. The court said:

"But appellant disputes its liability upon the bonds given for the balance, upon the theory that they were prohibited from issuing them by the eighth section of the twelfth article of the constitution of Arkansas, adopted in 1874. That section provides that no 'private corporation shall issue stock or bonds except for money or property actually received or labor done; and all fictitious increase of stock or indebtedness shall be void.' In support of this view our attention is called to the fact, admitted by the demurrer, that the full value of the property, rights, and privileges conveyed to appellant did not exceed \$1,800,000, the amount at which the capital stock was fixed; and con-

sequently, it is argued, the \$2,600,000 of bonds were issued without any consideration received in money, property, or labor, and represented only a fictitious indebtedness. In other words, appellant's vendors were fully compensated for their interests by taking to themselves its entire stock.

"We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the state constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the constitution of Illinois, adopted in 1870, containing a prohibition as to railroad corporations similar to that imposed by the Arkansas constitution upon all private corporations, the supreme court of the former state, in *Railroad Co. v. Thompson*, 103 Ill. 187-201, said: 'The latter part of the clause of the constitution in question, which declares that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," we think clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was doubtless to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stock that do not, and are not intended to, represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious.' " *Railroad Co. v. Dow*, 120 U. S. 287-297, 7 Sup. Ct. Rep. 482.

In the case of *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 9 South. Rep. 129, the supreme court of the state of Alabama, in a very able opinion, reviewed all the authorities touching the question of unlawful issues of stock.

As the law of Alabama governs the instant case, and as the decision is a full exposition of that law on the matter in hand by the highest court of the state, I quote at length as follows:

"Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook, in section 47 of his work on Stocks and Stockholders, to the effect that the attempts which have been made, in cases where stock was issued for property taken at an overvaluation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuccessful; and that, if there has been an overvaluation which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto*, or rescinded *in toto*, and set aside. We have found no authority at all asserting the exemption of the stockholders from such liability, where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the Code of 1876, or section 1662 of the Code of 1886.

* * * * *

"When legal provisions are found which are appropriately framed to secure the existence of such responsibility, it is not permissible so to construe them as to allow a mere formal and illusory compliance therewith to defeat the objects intended to be accomplished. No argument is needed to show that a requirement that the stock of a corporation shall be paid in money, or

in labor or property at its money value, inures to the benefit of persons who may become creditors of the corporation, in that it requires the capital stock to be the representative of substantial values, and insures the existence of a fund which must be within reach for the satisfaction of debts if the affairs of the corporation are managed as contemplated by the law. It is equally clear that if a stock subscription which is required to be made payable in money, or in labor or property at its money value, and is in fact made payable in property at the designated money valuation, may be satisfied by the transfer of property, the value of which is insignificant, or merely nominal, as compared with the valuation stated, then, so far as this provision of the law looks to the protection of creditors, it might as well have allowed the subscription to be made payable in 'chips and whetstones.' Except section 6, art. 14, of the constitution, and section 1805 of the Code of 1876, there was not, at the time of the formation of the appellee, in reference to the mode of satisfying stock subscriptions, adequate provision for the protection of such corporations. Those enactments are appropriate for this purpose. The requirements of section 1805 of the Code of 1876, that, 'in case of a failure to perform the labor or deliver the property according to the terms of the subscription, the money value thereof, as named in the list of subscription, shall be paid by the subscribers,' cannot be regarded as providing for a penalty to compel the performance of the labor or the delivery of the property. The evident meaning is that, in the event of such failure, the corporation shall receive the equivalent, and no more nor less than the equivalent, in money or the labor or the property, as the case may be. This clause of the statute is convincing that the statement of the money value of the property in which the subscription is made payable is a material feature of the contract, and that the property delivered must be of a value to correspond with that named in the subscription. As affecting the rights of creditors, the statute is simply a definite requirement as to what will constitute that trust fund to which persons dealing with the corporation have a right to look. The defendants in this case, in making and accepting payments on the stock subscriptions, were acting in a fiduciary capacity in reference to the fund. The performance of the contract of subscription, to be binding on creditors, should have been such as is required in the case of a contract between a trustee and one having knowledge of his trust obligation. In form the stock subscription was such as the statute called for. Under section 2023 of the Code of 1876, and section 8, art. 14, of the constitution, the stockholders are liable only for the unpaid stock owned by them. But the creditors are entitled to demand that the payment on the stock shall be an actual and *bona fide* discharge of the liability imposed by the contract of subscription. The defendants, in making and accepting payments in property, were bound to exercise their judgment and discretion, fairly and honestly directed to secure a substantial compliance with the terms of the contract. In the exercise of that judgment and discretion they are entitled to the benefit of whatever margin there may be for honest differences of opinion in the valuation of the property; but a deliberate and intentional overvaluation is not permissible. The transfer of the property known to be worth only \$5,000 to pay a stock subscription of \$200,000 does not bear the semblance of a compliance with the contract of subscription as to one of the essential terms thereof.

"The taking of property at a valuation forty times greater than its actual worth, which was known to the parties, shows upon its face the absence of a *bona fide* exercise of judgment and discretion in making the valuation, and an intentional noncompliance with the requirement that the property shall be taken at its money value. The absence of the fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust;

and an averment of fraud in reference thereto is unnecessary. The parties beneficially interested in the trust are entitled to a substantial compliance with its terms. They are not bound by an act of mere formal compliance which really involves their practical exclusion from the benefits intended to be secured to them. The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached. The transaction whereby payment was attempted to be made, as shown by the averments of the bill in this case, is not binding on creditors, because it did not constitute such a payment as was contemplated by the terms of the contract of subscription, and was, in effect, a palpable evasion of the requirements of the statute."

I understand this case really decides that where \$250,000 was subscribed to the stock of a company, and issued as fully paid up, and only property to the value of \$5,000 paid therefor, the subscribers were liable in money to the creditors of the company for the difference between the value of the property transferred and the amount of their subscriptions. In reaching the conclusion, the court discusses the whole subject, and declares the principles involved, holding that in case of subscription to the capital stock of incorporated companies in Alabama payable in property, in order to release the subscribers from liability to creditors, there must be no fraudulent overvaluation of the property; no deliberate nor intentional overvaluation. The property to be delivered in payment must be of a value to correspond with that named in the subscription. There must be more than a formal and illusory compliance with the law. There must be a fair exercise of judgment and discretion, fairly and honestly directed to secure a substantial compliance with the law.

In the instant case, the evidence shows that the contract with the construction company was entered upon deliberately after extensive inquiry as to the best bargain the company could secure by those who were the principal owners of the East & West Railroad Company, having no interest other than to make the best bargain for the company that they could, and with the concurrence of every one of their fellow shareholders. E. F. Browning, the president of the railroad company, testifies fully to this, and also that he had acted under advice of counsel, believing he was doing just what his duty to the company required; that from the latter part of April, 1881, up to November, 1882, he made great effort to see if he could find any party who would build the road; he was recommended to see the Erlanger Syndicate, as represented by Frederick Wolf. He saw Mr. Wolf, who stated that he believed his syndicate would undertake to build the road for the bonds and stock, provided the road would run to Trustville, so as to connect with the Alabama Great Southern Railroad. They entered into considerable negotiations, and after a time Wolf informed him that his friends had declined to build the road at that time. Browning also made diligent search to see if he could find any one to build the road; called upon some large builders in New York, and presented the prospectus to them; but they one and all declined to build the road for all the stock and all the bonds which he had a right to offer; and he could not find any one who would build it on any more favorable terms,

nor on any terms at all, until he was introduced to the Southern Railroad Construction Company, which company offered to build it for its bonds at \$10,000 a mile, and its stock at \$10,000 a mile.

W. V. McCracken, a railroad builder of large experience, testifies as follows:

"Question. From your knowledge of that country, and your experience as a railroad builder, was this Duff contract a fair and reasonable contract for the East & West Railroad of Alabama to make for the building of their road? *Answer.* I think, from what I know of the country, and what little I knew of the circumstances at the time,—my impression was,—that it was a fair and proper contract to make. *Q.* Did you receive any stock and bonds in payment, in whole or in part, for the building of the East Tennessee, Virginia & Georgia Railroad? *A.* That portion of the East Tennessee, Virginia & Georgia at that time was called the 'Cincinnati & Georgia Road.' That was the organization under which that part of the road was built, and the persons with whom I was associated, and by whom I was employed at the time, did receive stock and bonds for the building of the road. *Q.* State, if you know, how many bonds and how much stock per mile those parties received for the building of that road. *A.* My recollection is they received twenty thousand dollars of bonds and twenty thousand dollars of stock per mile. *Q.* Does the line of the East & West Railroad cross the road of which you have just spoken? *A.* The old part of it does. * * * *Q.* Do you recollect whether Mr. Browning at that time asked you if you would build this road for ten thousand dollars per mile of its bonds and the same amount per mile of its stock? *A.* He either asked me whether I would build it for that, or whether I would have built it for that. My answer was, I know, very emphatic that I would not do it in either case. *Q.* Could you offer to-day to build a road right through the same country through which the East & West is built, and equip it as called for by the Duff contract, for ten thousand dollars per mile of its bonds and ten thousand per mile of its stock? *A.* I certainly think not. I would not accept an offer to build such a road for such an amount of bonds and stock."

Gen. G. M. Dodge, an engineer and builder of railroads, of national reputation, testifies that he is experienced as a railroad builder, and that the contract of building the East & West Railroad of Alabama in 1882 was a reasonable and fair contract.

G. W. Bucholz, chief engineer of the New York, Lake Erie & Western Railroad, testifies as follows:

"Question. Did you notice what, by the terms of that contract, the East & West Railroad was to pay for the building of that extension? *Answer.* I did read the consideration; yes, sir. *Q.* From your experience as a railroad man, was that contract a fair and reasonable contract for the East & West Railroad Company to make for the building of that extension? *A.* Well, from my experience in the construction of railways, and from my general knowledge of the country through which this railroad runs, I consider the price paid for it, or rather agreed to be paid for it in the contract, as advantageous to the railroad company."

To the same effect is the testimony of Mr. George W. Ballou, a dealer in railroad securities and a builder of narrow-gauge railroads.

Stephen V. White, a large dealer in railroad bonds, says:

"I should think that \$10,000 of bonds and \$10,000 of stock was a low compensation for building the road."

Judge John W. Inzer says:

"A discussion was had in the board of directors whether the price mentioned in the Duff contract was a fair and reasonable price to give for building of that extension. I think it is my recollection that it was agreed that it was a fair and reasonable contract, and that if the work could be done at that price or prices the road could afford to pay. * * *. The contract was discussed at the meeting; it was talked over, and agreed to and approved. *Question.* And I understand you to say that contract met your approval? *Answer.* It did. It was a fair and reasonable contract to make."

Mr. Thomas B. Inness testifies that about the time the construction was begun he spent several days in examining the property, and that he considers the contract, to give \$10,000 a mile in bonds and \$10,000 a mile in stock, a fair one,—to the railroad company.

All of these witnesses join in stating that the contract is not only intrinsically fair, but of a character common to new railroad construction, and naturally resorted to by the East & West Railroad Company, and, as some of them suggest, such as that company could not have got along without, which Mr. E. F. Browning, its president, testifies he found by earnest experiment to be actually the case. I find no evidence in the record, outside of suspicion, to the contrary. It is true there are some statements filed in the record showing that the actual cost in money to build the extension of the East & West Railroad Company was less than the par value of either the stock or bonds given in payment; but there is no evidence in the record to show what the actual value of the bonds and stock was. Certainly the fairness of a contract of the kind in question is not to be determined by the actual financial results ascertained on its completion.

On the whole case as presented to me I am not prepared to find that the transaction between the East & West Railroad Company and the Southern Railroad Construction Company for the building of the East & West portion of the railroad line for \$10,000 per mile in bonds and \$10,000 per mile in stock was any other than fair, and as liberal to the railroad company as could have been expected. Certainly, there was no fraudulent overvaluation of the labor and stock involved, nor, in my opinion, any deliberate, intentional overvaluation, and it seems there was a fair exercise of judgment and discretion on the part of the railroad company, fairly and honestly directed to secure a substantial compliance with the law of Alabama. Common observation and experience show that building and constructing a railroad for cash in hand is one thing, and that building and constructing a railroad without cash in hand, and for the stock and bonds of the railroad company, which are only expected to be valuable when the railroad shall be completed, and then depending on the earning capacity of the property, is an entirely different thing.

It is proper to say, in addition, that E. F. Browning, the president of the railroad company, testifies that he had never any interest whatever in the Southern Railroad Construction Company, except that after the construction company proved unable, in the depression of 1883-84,

to raise any more money from the sale of bonds, he joined with his brothers in buying from the construction company East & West bonds and stock to provide the construction company in that way with means to complete the road; and that the other two Brownings and West also testify, each for himself, to having originally no connection with the construction company, and no connection at any time, except as an independent buyer of bonds and stock; and that these purchases were made, not for the profit in them, but to help out the construction company in building the new line. And there is no evidence to the contrary; nothing but the inferences to be drawn from extracts of letters written by the parties, mainly to the general manager of the railroad, which are in the main explained and shown by the testimony not to be inconsistent with the direct fact of noninterest in the construction company sworn to by each.

The views taken of the construction contract and the authorities cited apply to a great extent to the contract with the Cherokee Iron Works Company.

That the East & West Railroad Company could lawfully contract with the Cherokee Iron Works, although all the stockholders of the one were also stockholders of the other, in the absence of fraud and misrepresentation, is indisputable; nor would the fact that the two corporations had substantially the same directors, who were the active agents negotiating the contract, render it void,—at worst only voidable, but subject to ratification. *Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 U. S. 23; *Richardson's Ex'r v. Green*, 133 U. S. 43, 10 Sup. Ct. Rep. 280; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 707, 10 Sup. Ct. Rep. 708; *Construction Co. v. Fitzgerald*, 137 U. S. 110, 11 Sup. Ct. Rep. 36. The contract between the East & West Railroad Company of Alabama and the Cherokee Iron Works was ratified by a unanimous vote of the stockholders of the East & West Railroad Company of Alabama at a meeting where every share of stock was represented. The subscription by the Cherokee Iron Company to the capital stock of the East & West Railroad Company of Alabama, and the lease of the Cherokee Railroad to the same company, and the agreement for the payment of such subscription for said lease in stock and bonds of the defendant railroad company should, under the evidence, be viewed as one contract, and not as several distinct contracts. The contract was made and entered into as one transaction, and took the form of a subscription to be paid in property,—the lease,—and the resolution to pay in bonds and stock; all under the advice of counsel, and apparently in good faith. It can no more be considered a sale for stock than for bonds; in reality it was for both. The original cost for constructing the Cherokee Railroad, with the cost of repairs added by the Cherokee Iron Works, after that company became the owner, exceeded the par value of the stock and bonds fixed as the price to be paid. The net earnings of the property for 1881 were \$36,859.51; for 1882, \$39,963.41; for 1883, \$36,107.50. The weight of the testimony of experts and others acquainted with the property and with railroad values is to

the effect that the Cherokee Railroad was not overvalued. The consideration of \$175,000, named in the deed made December 1, 1882, by the Cherokee Iron Company to the Brownings and West is shown to have been fixed with the sole purpose of equalizing interests among stockholders of the iron company, and without regard to the actual value of the property.

As a whole, I find that the transaction was valid; the parties were able to contract, and did contract. There appears to have been no fraud or deceit between the consenting parties, nor any intentional overvaluation, and the consideration was as nearly adequate as could be expected under such circumstances.

If, as I have concluded, the transactions with the Southern Railroad Construction Company and with the Cherokee Iron Works are unimpeachable on the part of complainants, then it follows that the transaction between the East & West Company and the Brownings, by which the debenture bonds were acquired, was entirely just and lawful.

The floating debt of the East & West Company December 1, 1886, was about \$300,000. This had been incurred by loss of income, costly repairs made necessary by an unusual flood, and by improvements and purchases, and also by the action of Messrs. Brownings and West in foregoing the payment of interest upon mortgage bonds which they held. As long before as April 21, 1886, the board of directors, with a view to relieving this situation, had directed the calling of a meeting of the stockholders for the purpose of taking steps for the issuance of second mortgage bonds on the company's property and franchises, in an amount not exceeding \$300,000, for the purpose of paying the floating indebtedness then and thereafter to exist, and had further resolved that such second mortgage bonds, when so issued, should not be disposed of by the executive committee at less than 65 cents on the dollar. All of the money constituting this debt had been advanced by Messrs. Brownings and West. A stockholders' meeting, called in pursuance of the foregoing resolution, was held June 30, 1886, and by resolution authorized the "issuing by said railroad company of its debenture bonds in the usual form to an amount not exceeding five hundred thousand dollars, * * * to be secured by a mortgage or deed of trust in the usual form." A condition of these obligations, as issued, was that the company should pay, "as interest upon the principal of its bond, such sum, not exceeding six per centum per annum, as shall remain out of the earnings of the company in each year after paying interest on all bonds secured by existing liens upon its property and its operating expenses: * * * providing that, if less than six per centum be paid in any year, even though less be earned, the unpaid interest shall be carried forward, and shall accumulate to the credit of this bond, and no dividend shall be paid upon the stock of the company until all arrears of interest upon this bond, calculating the interest thereon at six per centum per annum from date of issue, shall have been paid."

The precise sum due to the Messrs. Brownings and West for advances up to the time of the delivery of these bonds was upwards of \$300,000.

Having this amount due them, Messrs. Brownings and West purchased from the East & West Company \$500,000 debenture bonds at 65 cents, the price previously fixed by the board of directors, the aggregate price being \$325,000. This sum the purchasers immediately paid in indebtedness of the East & West Company, and in cash.

There remain to consider the charges made in the bill in regard to the dealings of the Brownings and West with Grovesteen & Pell; in substance that, confederating together to dispose of bonds of the East & West Railroad Company of Alabama, they fraudulently procured the listing of the bonds on the New York Stock Exchange, and then by fictitious sales in the exchange procured the bonds to be quoted at a high rate, and thus induced complainants and others, innocent persons, to buy at a much higher figure than the bonds were intrinsically worth.

The case shows that the Brownings and West, the holders of about four fifths of the bonds and securities of the East & West Railroad of Alabama, were, and had been for a long time, anxious to dispose of their interest; that some time prior to February 18, 1887, Edward F. Browning, then president of the East & West Company, was approached by Pell, of Grovesteen & Pell, with reference to a purchase by his firm of the bonds and stock belonging to the Brownings and West. The reason given by Pell for desiring to make the purchase was that his firm already owned or controlled the Rome & Decatur, a parallel road then in process of construction, and desired to own them both. Browning inquired into the standing of the firm, and found it good, and their means reported to be large. Proof of this is found in the fact that six months later they were able to borrow large sums on collateral from Grant Bros., the complainants, and from various persons who are witnesses for complainants, one of whom, W. C. Stokes, testifies that at the time, August, 1887, when he loaned money to Pell, he had known him socially for several years, and knew no reason to doubt his word.

February 18, 1887, a contract was made by and between Grovesteen & Pell, first party, Brownings and West, second party, and the East & West Company, third party. Grovesteen & Pell agreed to build an extension of the railroad, about eight miles long, to a junction with the railroad from Broken Arrow to Eden, in Alabama, to provide not less than 50 new freight cars, and such new locomotives and equipments as might be required for the business of the entire road. The East & West Company agreed that it would make a new consolidated mortgage to secure \$15,000 of 6 per cent. bonds for each mile of completed road, "for the purpose of taking up and retiring the present outstanding first mortgage and debenture bonds of the said party of the third part." Of these bonds it would issue to Grovesteen & Pell \$150,000 in payment for eight miles of new road, and for the new cars and locomotives, and would also make to Grovesteen & Pell a further payment, in stock, at the rate of \$10,000 for each mile of the extension. The Brownings and West agreed that they would "deliver to the American Loan & Trust Company, to carry out the purposes of this agreement," not less than 700 outstanding first mortgage bonds, all of the 500 outstanding debenture bonds, and

not less than \$750,000 par value of the stock of the East & West Company, " * * * and receive therefor consolidated bonds to be issued by said party of the third part, in exchange, on the basis of one million six hundred and fifty thousand dollars par value consolidated bonds for one million one hundred thousand dollars first mortgage bonds of the said party of the third part, five hundred thousand dollars par value debenture bonds of the said party of the third part, and one million dollars par value of the capital stock of said party of the third part; the basis of the valuation of the said bonds and stock being in the following proportion, namely, said one million one hundred thousand dollars first mortgage bonds, one million dollars cash; said five hundred thousand dollars debenture bonds, two hundred thousand dollars cash; said one million dollars of stock, two hundred thousand dollars cash." Grovesteen & Pell further agreed to buy from the Brownings and West all of the consolidated bonds which they would thus acquire, and also the stock deposited by them with the American Loan & Trust Company, the price of the bonds to be 85 cents for 200, to be paid for at the time of the deposit with the trust company, and a progressively higher price,—about enough to cover interest and all deferred purchases until December 10, 1887, when the transaction must be closed. No additional payment for the stock was contemplated by the contract. Two hundred and fifty thousand dollars in stock was to go with the first lot of bonds. The remaining \$500,000 was to remain as security until the contract is fully performed.

In pursuance of this contract Grovesteen & Pell built the contemplated extension of eight miles from Broken Arrow to Eden. They also paid to the Brownings and West, May 16, 1887, \$250,000 for 300 consolidated bonds at 85 cents, and received also a bonus in stock as provided by the contract. No other or further transactions under this contract and between the parties are disclosed by the testimony.

It appears, also, that three months later, in August, 1887, Pell borrowed \$270,000 in six loans, pledging as collateral \$177,000 East & West consols, and \$152,000 first mortgage bonds of the Rome & Decatur, a road competitive and substantially parallel to the East & West.

The testimony shows that Pell owned or controlled the Rome & Decatur, and this, as already stated, was his principal reason for the purchase of the control of the East & West Railroad. None of this money was paid to the Brownings and West, or any of them. It appears further that during the months of May, June, July, and August, 1887, Pell several times caused East & West consolidated bonds to be sold for account of his firm, by one broker, and bought for the same account by another, thus causing to be reported and published by the stock exchange, as real, what were in fact fictitious sales, designed to induce the belief that the reported price was in fact the current value of the bonds. The price reported was, however, in no instance any higher than the 110 which Pell had been paying to miscellaneous holders of first mortgage bonds.

The evidence further discloses that E. F. Browning, president, made applications at different times prior to the contract with Grovesteen &

Pell to list the securities of the East & West Railroad in the New York Stock Exchange, which applications contained misrepresentations as to the earnings and operating expenses of the road, and as to the actual physical condition of the same; and after the contract with Grovesteen & Pell, the said Browning made two applications,—one (exact date not given) to list 11,090 shares of the stock of the company, and the other April 14, 1887, to list 1,109 of the first consolidated bonds of the company; which last-mentioned application was granted after numerous examinations, before the committee of the exchange, of Mr. Browning and Mr. Pell, of Grovesteen & Pell, about May 14, 1887. The last-mentioned application, as produced by the stock exchange, contains three serious misstatements of important facts directly relating to the value of the bonds: (1) That of the entire issue of the bonds authorized, 600 were reserved by the railroad company to build extension to Birmingham, Ala., widen gauge, and furnish additional equipment; (2) that the gauge—three feet—was then being changed to standard gauge; (3) that the road was then earning at the rate of \$79,000, net, per year over its operating expenses. The facts being that (1) only 150 bonds were reserved, and those were so reserved to carry out the contract with Grovesteen & Pell for extension and equipment, and not to widen the gauge of the road; and (2) the gauge of the road was not being changed to standard gauge, nor had any practical steps been taken therefor; and (3) the road was not earning at the rate of “\$79,000, net, per year over its operating expenses,” nor any respectable sum over its operating expenses. The statement with regard to the earnings was based upon estimated receipts and doctored reports, with the aid of that lively and sanguine imagination which generally has possession of promoters of railroads and of interested speculators in securities on unfinished railroads.

Mr. Browning testifies that the application produced from the stock exchange is not the one he signed, but corresponds in the above statements with one which Pell prepared for him to sign, but which he refused to sign; that he made numerous changes in the application prepared by Pell, and particularly so as to state that only 160 bonds were reserved for extension and equipment; and, with regard to the gauge, that the company was proposing to change the same to standard gauge; that, after the corrections were made, the whole was copied on a typewriter of the American Loan & Trust Company, signed by him, and given to Pell; that the application produced contains only the last page of the application copied on the typewriter of the American Loan & Trust Company, and signed by him, the first three pages being substituted; that the substitution is shown by indications as to the removal of brass tags, and the fact that the first three pages are typewritten on a different typewriter from the last page. The application has been retained by the master, and is now in the record. An examination shows that the first three pages are typewritten on a different typewriter from the last page, the first three being apparently the production of the “Caligraph,” and the last of a “Remington;” and the marks at the top show that originally tags or brass fasteners were used to hold the pages together, which have since been removed and a pin substituted.

On the other hand, however, the application to list the stock, made about the same time, which is not disputed by Browning, contains two of the statements in question: (1) That the gauge is now being changed to standard; and (2) "the road is now earning \$79,000, net, per year over its operating expenses." And it further appears that, on the application to list the bonds actually filed with the stock exchange, Mr. Browning appeared twice in support of the application, and was examined at length with reference to the matters contained therein, and it would seem that if there had been a substitution, as is claimed by Browning, it would then have been noticed either by him or by the committee. There is some testimony tending to show that E. F. Browning, after the contract with Grovesteen & Pell, and after he had vacated the presidency in favor of Pell, continued to be intimate with Pell, visiting him at his office every day up to Pell's disastrous failure, and during the time that the fictitious sales were being made in the stock exchange. Also, that E. F. Browning was on the finance committee of the American Loan & Trust Company, which was loaning money on East & West Railroad securities, and was necessarily acquainted with the quotations on the exchange of the first consolidated bonds of the East & West Railroad Company, and thus they knew that they were selling at rates largely over their value, and was a party to the deceit, which it is claimed was for the benefit of the bonds still owned by the Brownings and West.

All this, however, is denied by Browning, who swears that he went to see Pell four or five times in relation to the terms of the contract afterwards perfected, and not again until a short time before Pell's failure, when he gave Pell, to sell for his account, some El Cristo mining stock, which being sold, he visited Pell's office to collect his money, and was compelled to return from day to day for the same. That at these visits he had nothing whatever to say about the railroad, except to pass the remark as to how it was getting along, etc. That he had no knowledge whatever that Pell was selling East & West Railroad bonds, and has no interest therein, and was absolutely ignorant of and disconnected with such transactions. That he sold no bonds of his own otherwise than in the Pell contract, and authorized no sale.

The complainants contend, on the aforesaid showing, that the Brownings and West, in conjunction with Pell, grossly misrepresented the value of its property and its condition; the gauge of the road and the number of bonds which would be outstanding; and by these means innocent parties were induced to buy these bonds; and further, that, under the contract between the Brownings and Grovesteen & Pell, Grovesteen & Pell were really the agents of the Brownings to market these bonds.

Six witnesses testify as to the representations on which it is claimed innocent parties purchased the bonds in question, and their evidence is substantially as follows:

Frederick Grant, complainant, sworn:

"We hold thirty thousand dollars of those bonds. We made the loan in the board the 16th day of August, 1887, through Donald, Gordon & Co. My brother happened to be away at the time, and we made the loan in the board, —thirty thousand dollars,—and Mr. Pell himself came in with that loan.

He merely brought in thirty thousand dollars of the East & West Alabama and six of the Rome & Decatur. The bonds were brought in by Mr. Pell. I was not familiar with the prices, and I therefore looked at the printed list, and saw that one hundred nine and a quarter was bid for the bonds. *Question.* Have you the list that you looked at? *Answer.* Yes, sir; I have it here,—the very list; and I told my cashier to draw the check while Mr. Pell waited there; and he gave him a check for thirty thousand dollars. And I looked over the bonds, and they seemed to be all right. That gave us a margin of considerable over twenty per cent., which is our usual margin in making loans of that kind,—in making loans on the stock exchange. The bonds had been selling on the market at about that price, so I was told afterwards. *Q.* What, if any, information did you have as to the nature, character, and consideration of those East & West Railroad bonds before or at the time you made this loan? *A.* Well, I can answer that in a very few words: That we were simply governed by the quotation. As I said, I looked at this list; I knew it was a new bond. And there were sales made before we made the loan on these bonds, and the question came up when the concern failed whether any such *bona fide* sales had ever been made; and it was merely what they termed in the stock exchange as a 'washed sale,' and that misled us, as it did a great many others, regarding the price of those bonds."

Richard L. Edwards, president of the Bank of the State of New York, testifies:

"*Question.* I will ask you to give a statement of the history of how he came to the bank, and everything that transpired between you and him in connection with the securities of the East & West Railroad Company, and with your accepting the same for any loan made by Mr. Pell by your bank. *Answer.* Some time previous, I don't remember how long, probably over a month, just before that time, he had frequently made application to the bank for loans of \$25,000, or sometimes \$50,000, on dividend paying securities, and he mentioned the East & West Railroad of Alabama bonds,—the first mortgage bonds. He called attention to the market price, and was generally refused on the ground that we did not know anything about the bonds. Sometimes he would come in close on to three o'clock, and beg pretty hard for \$25,000 just overnight, and I loaned him \$25,000, I think, on about thirty or fifty of the bonds. It remained three or four days, and I submitted the loan to the board at a board meeting, and I asked the question of the board,—of the various parties whom I thought ought to know something about these securities,—but they did not appear to know, and so I called the loan; and refused to lend him, on applications made subsequently, at all on those bonds. After this loan was called, a subsequent application by Pell on this loan, on the same securities, was refused repeatedly; and he then told me he was negotiating for the sale of all the bonds through an English syndicate,—the price was 107½,—and he hoped to consummate it within a few days. No application was made for a further loan for some days. He wanted to open an account with the bank, and I refused him. I told him, no; he could not open an account with the bank. In a day or two afterwards he came back, and said he felt very much grieved at my refusal to open an account with him. I had known him some time, and he wanted to know if I would give him my reasons. I told him, 'Yes; you are dealing in a class of securities I don't know much about, and I don't propose to loan you money on them,' and therefore I didn't think it would be very agreeable to either party, and not to his advantage. That ended that matter, but, probably a week or so after that, he came in and told me that he had sold all the bonds of the East & West Railroad Company of Alabama at 107½ to an English

syndicate; that he was president of the road, and wanted to open an account; didn't want to borrow any money on the bonds, and he could keep from \$50,000 to \$100,000 in money on deposit; Drexel, Morgan & Co. it was arranged through, and he wanted to know if I wouldn't open an account with him. I questioned him at length about the sale of the bonds, etc., and he stated positively—he stated so to the cashier—that he had sold all the bonds, and he was out of the woods, and he had made ever so much money; I have forgotten the amount he mentioned. I turned around to the cashier, and asked him to hear the same story from Mr. Pell, and, if he thought advisable, to take his signature. He did so; he took his signature. He was to keep thirty thousand dollars to forty thousand dollars on deposit, and, after he opened his account, nearly all his operations were confined to shifting those bonds for loans; you could tell that from the checks that came in; and he finally came to me. So, in watching the account, I noticed that there were loans paid off, and I sent for him and told him that I could not afford to take up these bonds, and asked him if he had to borrow money on them; otherwise he might find himself close on to three o'clock without those bonds and no money. 'Oh, no,' he said, he would 'take care of that.' So I stopped his certification several times until he made deposits from the loans he had made to other parties. In one instance he made a \$50,000 loan of L. Hoffman & Co. against his signature account. Then some days after that he told me he was ready to deliver those bonds to Drexel, Morgan & Co.; that he had to take up his loans around the street; and he wanted to make an arrangement for the certification of his checks to take up the loans and deliver the bonds to Drexel, Morgan & Co. He said there were over 500,000 of them; about 500,000 of them he wanted to deliver. I said: 'Pell, you had better go slow. Take 100,000, and deliver that amount on the account.' In order to get one hundred thousand of the bonds, he had so many of the Rome & Decatur mixed up with his loans that he checked off 180,000; I think it was one hundred and eighty. It was in different checks. The idea was to take 100,000 East & West, and deliver to Drexel, Morgan & Co. at 107½ on account of his sale through them to this English syndicate. When three o'clock arrived, he came down with 181,000 Rome & Decatur bonds and 84 East & West, stating that there was some misunderstanding with Drexel, Morgan & Co., it having been intended that these bonds should not go through until the following Wednesday. I think it was, possibly Thursday or Friday. On the following Wednesday he was to take up the bonds, and deliver the bonds to Drexel, Morgan & Co., and he came back with the story that Drexel or Morgan, I don't remember which, had gone off on his yacht, and would not be back for ten days, and nobody knew anything about it at Drexel, Morgan & Co.'s. Well, of course, that exposed the whole piece of rascality, and I shut right down on him, and he failed. He closed up, and I had to take the bonds, and work out of them as well as I could. The bonds and stock and ten shares of the American Loan & Trust Company's stock he also brought down with the other securities. So that is the reason I call it a 'forced loan.'"

S. A. Shephard, called and sworn for the complainants:

"*Question.* Mr. Shephard, are you or not connected with the Bank of Montreal? If so, in what way, and how long have you been so connected? *Answer.* I have been connected with the Bank of Montreal for nineteen years; thirteen years in New York. *Q.* In what position? *A.* As third officer of the bank here. *Q.* Were you so connected with them in July and August, 1887? *A.* I was. *Q.* Did you or your bank have any transactions with Grovesteen & Pell during those times? *A.* Yes, sir. *Q.* Please state whether your bank is now the holder or owner of any bonds of the East & West Rail-

road; if so, how many. A. The bonds are not held by the bank. Q. Who are they held by? A. In my name. Q. From what did you acquire them? A. They were sold on the exchange. Q. Sold by whom? A. By a regular broker. Q. As whose bonds were they sold? A. The Bank of Montreal. Q. State how the Bank of Montreal, if you know, became possessed of these bonds? A. Made a loan to Grovesteen & Pell. Q. When? * * * A. About June; just before they failed; a few days before they failed. Q. Mr. Shephard, I will get you to state which member of the firm made or transacted the loan. A. Mr. Pell. Q. State whether or not Mr. Pell said anything in regard to those bonds, or their value or price, at the time loan was made. A. Well, I can't remember on that special transaction; but he was continuously borrowing money from the bank. Q. Well, state whether Mr. Pell said anything during the time that he was carrying on the transaction with the bank in regard to the character of the bonds,—their price. A. Mr. Pell several times pointed out to me the price of these bonds on the stock exchange list,—they were selling at a certain price; and he did that more than once, I am very certain. The bonds were traded in the stock exchange; sold at a certain price, and bought. Q. Do you remember what those quotations were, so pointed out to you? A. They were 109, I think, so far as I can remember. Q. Did he say anything about whether the bond was a good bond, or anything of that kind? A. Well, a bond that is selling at 109 is always supposed to be a good bond. Q. Did Mr. Pell pay his indebtedness to the Bank of Montreal from which these ones were taken? A. No; he did not. Q. The bank sold the bonds for the debt? A. Yes, sir."

Walter C. Stokes, called and sworn for the complainants, testified as follows:

"I loaned the money in the board to Grovesteen at a quarter before three. The loan was brought in by Mr. Pell. He, after bringing the loan into the office, came around into the customers' office, where I was, and, while waiting for his check, passed some conversation. My cashier sent for me, and asked me if I wanted to make the loan on these securities. He said, 'I wouldn't do it.' * * * I looked at the securities, and said, 'I don't recognize them.' I had been away for a long time, and I says, 'I will have to see what Pell says,' and I went to Pell and asked him. I told him my cashier objected to making the loan. I didn't know the securities. He said, 'What do you want to know about them?' and I asked him whether they were the first mortgage on the road, and he said they were. I asked him whether they paid their interest, and he said, 'Yes.' Then I asked him,—still hesitating to make the loan,—I asked him whether they were listed, and he said, 'Certainly, they were;' and he reached over and touched the tape of the machine, and said, 'Six of them were sold to-day at 109 or 109½.'—I am not clear which; I think he said 109. I knew it was late, and he was very warm. I didn't want to make the loan, but I had known Pell socially for several years, and had no reason to doubt his veracity in any way. I didn't think very much of the strength of the house, because there had been some rumors about their condition which would have made me nervous about making the loan. I said, 'Do you know about those bonds?' and he said, 'You bet your sweet life I do.' I said, 'Do you consider them perfectly good,' and he said, 'I know they are.' It was ten minutes of three, and the perspiration was coming from every pore in his face. I felt that I didn't want to make the loan, but I went back to the cashier, and told him to draw check for him. I says, 'Pell says he knows all about them, and they are the first mortgage bonds, and I don't see how I can lose much on them. At any rate, call that loan at half past nine to-morrow morning, and give him a check.' That was done, and the next morning the loan was called, and I sent over from the exchange

about half past ten o'clock to know whether it had been taken up. It had not. I went over again at 11 o'clock, and it had not been taken up. I sent down to hurry it up, and word came back that it was all right, they would hurry it up. I waited until 12 or 12:30, and no return, and I went down myself, and could not find either Grovesteen or Pell; I found the cashier, though, and he said they would attend to it. Then I waited for an hour, until I found Grovesteen, and he told me that it was all right, that we could not lose a cent, and he would see it was taken up. I went back to my office, and put him on notice if it was not taken up until half-past one or two, I would proceed to sell him out under the rule. * * * I proceeded to sell them out under the rule, and they were offered by the chairman from 109 down on the fraction until they got down near par, and then down to one per cent., and from that on down to 65, without bringing forth a single bid, and then, not wanting to sacrifice the property, I withdrew them."

Maximillian Herschel, called and sworn for the complainants:

"I had some money to loan at that time, and, as I was not a member of the New York Stock Exchange, I requested the firm of E. C. Humbert & Co. to loan for me some money in the New York Stock Exchange. Well, they reported to me that they had loaned out the money to Grovesteen & Pell, about—I don't know exactly, but I suppose between 12 and 2 anyhow. I was in E. C. Humbert's office, and a boy came in and handed in to the cashier some bonds in an envelope, and asked for a check for the same. Well, the cashier handed to me the bonds to see whether they were satisfactory to me, and I looked over the bonds, and said: 'I don't know anything about these bonds. I never heard of them. I don't want them.' So the cashier handed the bonds back to the boy, who was in there to get the check, and told him to go to Grovesteen & Pell, and ask them to send in some other collateral. Then, after a while, a short time after the boy had left, Pell came in, and he acted as if he was angry, and he said, 'What's the matter with these bonds? Ain't they good collateral?' 'Well,' I says, 'they may be good collateral. I don't know anything about them. I never heard of them.' 'Well,' he says, 'they are good bonds.' 'Well,' I says, 'they may be good bonds. You may consider them good bonds; but I make it a rule never to loan money on anything that is not quoted in the stock exchange, anyhow.' 'Well,' he said, 'if that is the case, they are quoted regularly in the New York Stock Exchange, and transactions take place in them regularly.' While saying so, he took hold of the bond list, and also of the sales list, and pointed out to me where they were regularly quoted, and what transactions had taken place. He says, 'There they are. They are selling,' I believe he said, 'about 107 or 108 or 109.' And he said, 'Besides that, everybody is taking them. I have borrowed money on them of several banks and brokers; and not only this,' he says, 'but they have been negotiated on the other side, by a syndicate headed by Drexel, Morgan & Co.' So, on these statements, I let him have the money, of course, to my sorrow."

Sylvester Post, called and sworn for the complainants:

"*Question.* I will get you to state whether the firm of Hutchinson Bros. at that time had any dealings with Messrs. Grovesteen & Pell. *Answer.* They made a loan to them of \$25,000 the day prior to their failure. *Q.* Did you receive any security for the loan? if so, what? *A.* We received \$25,000 East & West. We received \$25,000 East & West Alabama firsts and five Rome & Decatur firsts. *Q.* Did you have a conversation with any member of that firm in regard to that loan on that day? *A.* With Mr. Pell. *Q.* Please state what it was. *A.* He entered our office a few minutes before three with a loan for \$25,000, and I told him I didn't like the securities; we had a loan prior to

that, and I objected to them at that time; and he said those bonds were regularly listed on the exchange; there were daily sales of them; and he called my attention to the bond list. I referred to that, and found that they were; I think 109 bought; I could not say definitely; sales about nine to ten; several bonds had four to six bonds, or something like that; and he said they were a perfectly good bond. I told him I rather doubted it, as the price indicated they were not a strictly first-class bond. First-class bonds at that time were at a higher price. Q. Did he make any reply to that? A. No, further than saying they were as good as anything on the list. Q. Did your firm do anything to reduce these bonds to ownership after the failure of Grovesteen & Pell? A. We brought suit through John L. Branch, 120 Broadway. Mr. Blair, of Blair & Rudd, was appointed referee in the case, and the bonds were closed out at auction. Q. And by whom bought? A. We bought them in to protect ourselves."

The foregoing evidence—and no other witnesses were examined on the subject—is not sufficient to show that the complainants, or any person similarly situated, bought the first consolidated bonds of the East & West Railroad of Alabama on any representations the Brownings had made, either to list the bonds or otherwise. On the contrary, it tends to show that all the complaining parties became the holders of those bonds either on the standing and representations of Pell, or through their reliance upon the quotations that were made of said bonds in the New York Stock Exchange, produced by the fictitious sales manipulated by Pell, or both. It is true two of the witnesses testified that, if the bonds had not been listed, they would not have dealt in them. This falls far short of proving that they purchased the bonds for the reason that they were listed, or because of any representations made by any person to procure the listing. The common-sense fact is, and will appear from an inspection of any list of quotations upon the New York Stock Exchange, that the mere listing of securities on the New York Stock Exchange is no criterion whatever as to the value of such securities; and common experience teaches that the listing of securities on the New York Stock Exchange is not a first-class test even as to the genuineness of such securities. At all events, the evidence does not satisfy me that the complainant acquired the bonds because they were listed on the New York Stock Exchange, and it was only in representations, which may have led to such listing, that the Brownings were concerned. In this connection it may also be noticed that not one of the complaining parties who have testified is shown to have acquired the bonds in controversy at the prices quoted in the New York Stock Exchange, or even at or near par value, but practically at about the prices fixed in the Grovesteen & Pell contract. The contract between the Brownings and Grovesteen & Pell cannot be properly construed to mean other than a contract of sale by the Brownings to Grovesteen & Pell, and I am wholly unable to construe it to be a procuration constituting Grovesteen & Pell agents for the Brownings to market bonds.

The view that I have taken of the several points in the case renders it unnecessary to pass upon several other important questions presented in

the pleadings and proofs, among others, to wit, that the bill of Grant Bros. is defective for want of necessary parties; that it is without equity, because the complainants have a complete and adequate remedy at law; and the estoppel claim in favor of Kelly & Byrne, (purchasers of the Brownings and West,) by reason of the negotiations had between the bondholders (complainants participating) and the Brownings and West, and the reorganization contract resulting therefrom March 22, 1888.

In the voluminous record and brief submitted in this case, there may be minor points in favor of complainants that have escaped my attention, but the conclusions reached on the salient points are such it necessarily follows that complainants have failed to establish a case entitling them to equitable relief in the present proceeding.

Schley's Case. Schley's position in this case since the order of consolidation is that of an intervener. The litigation in his behalf was commenced by filing a bill in 1888 against the East & West Railroad Company of Alabama, the American Loan & Trust Company, trustee, and other persons, setting out that he was a judgment creditor of the railway company, that his judgment was unsatisfied, and the railway company insolvent, praying for a receiver, and that the earnings of the railway be sequestrated and applied to the satisfaction of his said judgment. He also set forth the general mortgage given by the East & West Railroad Company to secure its first consolidated bonds; prayed that the same be foreclosed for the benefit of his judgment, and the bonds secured thereby, except certain bonds that were alleged to have been illegally and fraudulently issued; and he prayed for an account of the bonded indebtedness of the railroad company, and general relief.

A full statement of the case and of the preliminary proceedings will be found reported in the case of *American Loan & Trust Co. v. East & W. R. Co. of Alabama*, 37 Fed. Rep. 242, wherein the pleas of Schley to the main bill, and the demurrer of the American Loan & Trust Company to Schley's bill, denying jurisdiction, were overruled. Thereafter, the case as to Schley was fully put at issue. By stipulation of counsel, all the testimony, relevant and material in this intervention of Schley, taken in the main case or in the case of Grant Bros., may be considered here.

The answer of defendant trustee contains a demurrer to Schley's bill for want of equity; and the answer also charges that his judgment is collusive, and not based on real indebtedness of the East & West Railroad Company. I am not disposed, however, to pass upon these and other objections of a technical nature, as the case can be more satisfactorily disposed of upon the merits.

As to the general proposition that Schley, as a judgment creditor, filing a creditor's bill, and procuring an appointment of a receiver thereunder, was entitled to have the net earnings of the railroad company, from the time that his receiver was appointed up to the substitution of a receiver in the interest of the trustee under the bill of foreclosure, applied in reduction of his judgment, it only needs to be noticed that in an in-

quiry heretofore had, provoked by Schley on reference to, and report of, the special master, it was found that there were no net earnings during the period in question.

On this hearing Schley contends (1) that the \$500,000 of debenture bonds issued by the East & West Railroad Company were illegal and invalid, and that their exchange into first consolidated mortgage bonds was also invalid; (2) that the first consolidated mortgage and the bonds issued thereunder are invalid, because of the informalities and irregularities in complying with the laws of the state of Alabama in relation to increase of indebtedness of corporations; (3) that the American Loan & Trust Company, as trustee, fraudulently issued \$75,000 of bonds to Grovesteen & Pell prior to the time when the same had been earned by said Grovesteen & Pell under the terms of the contract and the requirements of the mortgage, and that the said trust company now holds 50 of the first consolidated mortgage bonds, which should be applied to the payment of Schley's judgment, or postponed until his judgment is satisfied.

1. The debenture bonds having been exchanged for new bonds, and the debenture mortgage having been satisfied of record, the irregularities attending the issue of the bonds, and the granting of the mortgage, are now immaterial; the debenture bonds were never void, but represented, beyond contest, a sufficient indebtedness to operate a good and sufficient consideration for the new bonds issued in lieu thereof.

2. The informalities and irregularities alleged against the issuance of the first consolidated mortgage bonds are (1) that such mortgage was authorized by a meeting of the stockholders held out of the state of Alabama; (2) that no notice of such meeting was given, as required by law, to increase the indebtedness; and (3) that no report of the stockholders' meeting was made or filed in the office of the secretary of state of Alabama, as required by law.

The evidence shows that a meeting of the stockholders was called to meet at the office of the company at the town of Cross Plains, Ala., on the 20th day of April, 1887, for the purpose of providing funds for the extension and completion of the road, to widen its gauge, and to take up and retire the outstanding mortgage bonds and debenture bonds; and that prior to that date every stockholder consented in writing to the issue of the first consolidated mortgage bonds, and to the granting of the mortgage to secure the same for all the purposes aforesaid, except to widen the gauge; that on March 25, 1887, at a meeting of the board of directors, apparently held at Cedartown, in the state of Georgia, but actually held, according to the testimony of President Browning, at the town of Cross Plains, Ala., the aforesaid call of a stockholders' meeting and the unanimous consent of the stockholders were recited, and resolutions authorizing the issuing of the first consolidated mortgage bonds for the purposes aforesaid were duly passed; and that a report of the directors' meeting reciting the stockholders' consent, duly certified, was filed in the office of the secretary of state of the state of Alabama, on the

22d of October, 1887, prior to Schley's suit against the railroad company.

On this state of facts the law of Alabama was sufficiently complied with. The whole transaction seems to have been valid between competent contracting parties antecedent to Schley's becoming a creditor of the railroad company, and Schley cannot be heard at this time to question the matter, unless he aver and prove that it was a part of a scheme to defraud subsequent creditors. *Porter v. Steel Co.*, 120 U. S. 671, 7 Sup. Ct. Rep. 1206.

This last aspect of the case has been sufficiently considered, and determined adversely to Schley's contention, in disposing of Grant Bros.' case.

3. The contract of Schley, upon which his judgment was based, was made with Grovesteen & Pell for the building and construction of the extension from Broken Arrow, and he was to be paid therefor monthly upon statements furnished by the engineer selected by the parties, except that 20 per cent. of the amount due upon each payment was to be reserved until the completion of the entire contract. His contract was entirely with Grovesteen & Pell, contained no agreement to satisfy Schley's demands in bonds of the railway company, and gave Schley no lien whatever on any bonds which might be issued by the railroad company to Grovesteen & Pell for building the road. He had no contract whatever with the railroad company, and the judgment he finally obtained against the railroad company was for money only, without recognition of any lien; in fact, no lien of any kind was claimed in the suit.

The contract of the railroad company with Grovesteen & Pell for construction provided as follows:

"Payments to the party of the first part for the construction of the extension from Broken Arrow to Eden, Alabama, and of the equipment hereinbefore mentioned, of the one hundred and fifty thousand dollars par value of said consolidated bonds and stock, at the rate of ten thousand dollars per mile of said extension, shall be made by the said trustee in the following manner: On presentation of bill of lading for shipment to the parties of the third part of at least five hundred tons of steel rail, seventy-five thousand dollars par value of said consolidated bonds, and upon the certificate of the engineer in charge and of the general manager of said party of the third part that the work has been performed and equipment furnished in accordance with the terms of this agreement, the remaining seventy-five thousand dollars par value of said consolidated bonds, and also said stock at the rate of ten thousand dollars par value per mile."

The mortgage securing the first consolidated bonds provides:

"But such bonds, or any of them, shall be issued by the trustee only upon the written order or demand of the president of the said railroad company, accompanied by the certificate of its chief engineer that part or parts of said railroad, in respect to which said bonds are demanded, has, or have, at the date of said certificate, been so completed as to be ready for the regular and continuous running of trains, which certificate shall clearly state the points or places from and to which the said railroad shall have been so completed, and the precise length of the entire completed portion in miles, which order and certificate may be accepted by the trustee as sufficient evidence of its authority to issue said bonds as aforesaid."

It appears from the evidence that the bonds for \$75,000 for construction, under the contract with Grovesteen & Pell, were issued about August 16, 1887, on the following certificates:

"EAST & WEST RAILROAD COMPANY OF ALABAMA,
"NEW YORK, August 16th, 1887.

"W. D. Snow, Esq., Secretary American Loan & Trust Company—DEAR SIR: We beg to notify you that the extension of the East & West Railroad Company of Alabama from Broken Arrow to Pell City, the junction point with the Georgia Pacific Railroad, is completed, making in all one hundred and twenty miles of road.

"S. A. CRUIKSHANK, Sec'y.

Very respectfully,

GEO. H. PELL, Pres't."

"CARTERSVILLE, GA., Aug. 16th, 1887.

"To W. D. Snow, Secretary American Loan & Trust Company, 115 Broadway, New York: The completion of the East & West Railroad to the Georgia Pacific Railroad at Pell City, on Monday, the 15th of August, gives that road now one hundred and twenty miles of track.

"JOHN POSTELL, V. P. and G. M."

"OFFICE OF EAST & WEST RAILROAD OF ALABAMA,
"NEW YORK, Aug. 16th, 1887.

"W. D. Snow, Esq., Secretary American Loan & Trust Company—DEAR SIR: I desire to inform you that John Postell is acting chief engineer of the East & West Railroad of Alabama.

"Very respectfully,

GEO. H. PELL, President."

John Postell, being examined in behalf of Schley, testifies that he was the chief engineer and general manager of the East & West Railroad Company of Alabama in the spring, summer, and fall of 1887, and gave the foregoing certificates as to the completion of the East & West Railroad to the Georgia Pacific Railroad at Pell City, on Monday, the 15th of August, 1887. On being asked whether, at the time he gave that certificate, that portion of the East & West Railroad of Alabama from Broken Arrow to Pell City had been completed, and was ready for the regular and continuous running of trains thereon, answered:

"Yes, sir; I considered practically that it was. *Question.* And the connection had been made? A. Yes, sir. *Q.* Isn't that about as soon as it was completed? A. I think we had connected, running trains the next day. *Q.* Isn't it a fact that the trains did not begin to run regularly on that portion of the road—regularly and continuously, now—until late in the fall of 1887? A. Well, it is a matter of memory with me; the schedule will show; I can't remember now whether it is so or not. *Q.* Mr. Postell, isn't it a fact that Mr. Schley, the contractor for the extension of that road, continued to work on that road, and did do work on that road after the date of the certificate, in its construction? A. Well, as I stated just now, the road was completed very hurriedly to make connection, in order to get the business started; and I authorized Mr. Schley to leave out a few of the ties, so as we could make the connection, and then we could put them in easier afterwards with the trains on the road, as the ties were at a distance, and had to be hauled in wagons, and it delayed the finishing of the road a week or two; and then he finished putting in the ties; perhaps he was a week or more putting them in; the road, though, was practically finished, except putting in those ties. It facilitated the work."

The first time that Schley made any claim against the railroad company for construction seems to have been September 6, 1887, when he obtained a certificate from the auditor of the company stating that the balance due him on that date on construction of the East & West extension, according to the final estimate by the engineer, was \$13,431.72. The record also shows an account made out against the railroad company dated August 26, 1887, for the amount of said indebtedness, sworn to by Schley on October 21, 1887, as due from the company, with interest at the legal rate from August 26, 1887. His suit was instituted in the circuit court of Cherokee county, Ala., against the company on November 11, 1887, and his judgment was obtained at the same term on December 16, 1887. It is thus seen that, at the time the certificates were given on which the bonds were issued to Grovesteen & Pell for the extension, Schley's claim for indebtedness against the company for and on account of such construction was not in existence; or, if in existence, not made known to the company, or to the trustee under the mortgage.

I find no record in the evidence tending to show that the trustee, in issuing the bonds upon the certificates aforesaid, acted otherwise than in good faith. It would seem that, although the certificates were not in the exact form required by the mortgage, and by the contract with Grovesteen & Pell, it was, in the absence of fraud, competent for the parties in interest to waive informalities, and, as the road was practically completed at the time the certificates were made and the bonds issued, no injury could or did result to any parties by reason of waiving the formal certificate required by the contract. At least, it is difficult to see how the transaction resulted in any wise to the injury of intervener, Schley. The evidence shows that the certificates were made and the bonds issued prior to the failure of Grovesteen & Pell, and there is a very strong inference arising from the showing of Schley in this case that his claim against the company for the amount due him on construction did not arise until after the failure of Grovesteen & Pell, which was about August 24, 1887.

The evidence shows that the American Loan & Trust Company is now a holder of 50 of the first consolidated mortgage bonds of the East & West Railroad Company, but it is not very full as to the manner in which the company acquired the bonds. Enough, however, appears to show that, when the 75 bonds were issued on the certificate of August 16th, they were retained by the trust company for account of Pell to secure advances and loans made to him at and prior to that date; that afterwards Pell directed the trust company to turn over 25 bonds to John Postell in settlement of a suit which Postell had brought against the railroad company and others; and that, on the 24th day of August, Postell receipted for 25 of the said bonds, although, in fact, he received but 18. It appears that on presentation of his order the trust company demurred to delivering the bonds called for, claiming that it held them as collateral security for advances made to Pell, but some sort of a compromise was effected by which it did surrender 18, taking a re-

ceipt for 25. The testimony of O. D. Baldwin, president of the American Loan & Trust Company, is to the effect that the trust company now holds 50 of the said bonds, and they now stand on the books of the company at \$33,000, but the actual cost of the same is upwards of \$50,000. Since the institution of this suit, the American Loan & Trust Company, having failed, has been removed as trustee, and the present complainant George S. Coe substituted, so that now the American Loan & Trust Company has no further interest in this suit than as the holder of the aforesaid 50 bonds. It is very doubtful whether intervenor, Schley, in this litigation can maintain a claim against the holder of bonds who is not a party to the suit, for the purpose of appropriating any portion of the bonds or postponing the payment of them beyond others of the same issue. On the evidence, however, it does not appear that he has established any claim against the said bonds for which the court could give him relief, even were the proper parties before the court.

All that can be done for the intervenor, Schley, in this case, seems to be to recognize his judgment as a valid judgment against the East & West Railroad Company, but inferior as a lien to that of the bondholders under the first consolidated mortgage, the foreclosing of which is sought in the present suit.

On the Main Case. The evidence establishes the granting of the mortgage, the foreclosure of which is sought; the issuance of 1,750 bonds, each for \$1,000 thereunder, dated December 1, 1886, payable to the American Loan & Trust Company or bearer, December 1, 1926, in gold coin, at the office of the American Loan & Trust Company, in the city of New York, together with interest thereon at the rate of 6 per cent. per annum in like gold coin, payable in June and December of each successive year until maturity, on presentation and surrender of the coupons attached to said bonds; that the said East & West Railroad Company has made default in the payment of the interest coupons, maturing on December 1, 1887, and on all coupons maturing thereafter; that the said default has not been waived; and that the trustee has declared, in accordance with the terms of said mortgage, the principal secured by said mortgage to be due and payable.

The complainant is, therefore, entitled to a recognition of the lien under the mortgage, and a decree of foreclosure as prayed for.

It appearing, however, that, since the institution of the suit and the appointment of the receiver, the receiver, under authority from the court, and with consent of parties, has issued and sold certificates to the amount of \$650,000, payable on or before April 1, 1894, and drawing interest at the rate of 8 per cent., which receiver's certificates are by order of court and consent of the parties a first lien upon all the property and franchises of the said railroad, it follows that the decree of foreclosure must recognize the lien and priority of said receiver's certificates.

The accompanying decree will be entered in the case.

MOFFETT *et al.* v. CITY OF GOLDSBOROUGH.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 21.

MUNICIPAL CORPORATIONS—CONTRACTS—ORDINANCES—BOND.

A city passed an ordinance authorizing certain persons to construct and operate waterworks, giving them power to acquire the necessary land, and making certain requirements as to purity of water, and the repairing of gas pipes, sewers, and highways disturbed in laying the water pipes. It was also provided that the grantees might operate the waterworks for 20 years, unless the city bought them at a price to be fixed by agreement or arbitration. There was no money consideration, and no bond was required by the ordinance; but after its passage the city required a bond, which, as given, was conditioned to be void if the grantees faithfully performed their "contract" "during the construction of said works." *Held*, that the ordinance did not constitute a binding contract, and the failure of the grantees to construct or begin the construction of the works did not render them liable on the bond. 49 Fed. Rep. 213, reversed.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

Action by the city of Goldsborough against John F. Moffett, Henry C. Hodgkins, and John V. Clarke, as principals, and Daniel G. Griffin as surety, upon a bond given to secure the performance of an alleged contract to construct waterworks. Jury waived, and trial by the court. Judgment for plaintiff. 49 Fed. Rep. 213. Defendants bring error. Reversed.

Louis Marshall, for plaintiffs in error.

F. H. Busbee, for defendant in error.

Before BOND and GORR, Circuit Judges, and SIMONTON, District Judge.

BOND, Circuit Judge. This is a writ of error to the circuit court of the United States for the eastern district of North Carolina. The facts presented by the record, at least so far as it is necessary to state them that the points raised by the writ of error may be understood, are these:

The city of Goldsborough, having power so to do by its charter, did on the 29th day of March, 1887, adopt an ordinance authorizing Moffett, Hodgkins, and Clarke, citizens of the state of New York, to construct, maintain, and operate waterworks to supply the city with water. The style of the ordinance is: "An ordinance authorizing Moffett, Hodgkins, and Clarke to construct, maintain, and operate waterworks to supply the city of Goldsborough, North Carolina, and its inhabitants with water, and defining their rights, duties, privileges, and powers." The first section gives the grantees power to acquire the necessary land for the purpose of the grant. The second provides for the purity of the water. The third, that in laying their pipes and mains they shall not unnecessarily obstruct any highway, shall repair any gas pipe or sewer which they disturb, and leave the highways in as good condition as they found them when they commenced to lay their pipes and mains. The ordinance provided that the grantees might operate the waterworks for 20 years, unless within that time the city bought them at a value to be as-

certained by agreement or arbitration. Upon the passage of this ordinance, the city required the grantees or licensees to give a bond (although there is nothing in the ordinance requiring a bond) for the proper exercise of the powers granted by the ordinance. A bond was given in the words following:

"Know all men by these presents that we, Moffett, Hodgkins & Clarke, of Watertown, N. Y., as principals, and Daniel G. Griffin, as surety, of Watertown, are held and firmly bound unto the city of Goldsborough, N. C., in the sum of five thousand dollars, (\$5,000,) to be paid to the city or its assigns, for which, well and truly to be paid, we hereby jointly and severally bind ourselves.

"Dated the 7th day of June, A. D. 1887.

"Whereas, the city of Goldsborough, N. C., did on the 29th day of March, A. D. 1887, adopt an ordinance authorizing and empowering Moffett, Hodgkins & Clarke to construct, maintain, and operate waterworks to supply the city of Goldsborough, N. C., and its inhabitants with water; and whereas, the said ordinance was duly accepted by said Moffett, Hodgkins & Clarke; and whereas, it was further required by said city that the said Moffett, Hodgkins & Clarke give a bond in the sum of five thousand dollars (\$5,000) for the faithful performance of their contract: Now, if the said Moffett, Hodgkins & Clarke, or their assigns, do faithfully perform the terms of their contract during the construction of said works, then this obligation to be void; otherwise to remain in full force and virtue.

"MOFFETT, HODGKINS & CLARKE. [Seal.]
 "DANIEL G. GRIFFIN. [Seal.]"

The circuit court held that the ordinance above recited was a contract on the part of the licensees, plaintiffs in error, to build and complete a system of waterworks for the supply of that city by a specified time, and that the bond above recited was a security given by the grantees named in the ordinance for the performance of such contract.

This suit is brought upon the bond, and not upon any failure to accept or comply with the ordinance. There are five errors assigned in the record, of which we think it necessary to consider but the first and second, which embrace the above-recited rulings of the court. It will be seen from the above statement of facts that there was no money consideration which passed between the city of Goldsborough and its licensees under the ordinance. There was no mutuality in the so-called "contract." The whole plant, when complete, was and remained the property of the grantees. If the city of Goldsborough found the works successful after they were put in operation, it could purchase them at an agreed valuation, or by an award of arbitrators, but the grantees in the ordinance were under no obligation to let the plant remain longer than it was remunerative, and could remove it at any time. But there was no obligation in the ordinance upon the grantees to give any bond whatever. The third section of it required the grantees to leave the streets of the city in as good repair after their use as they found them. The bond recited above, upon which this suit is brought, was apparently executed to secure this desired end. It is a bond without consideration, and even in its language can only be construed to bind the parties thereto

in a penalty of \$5,000, that the grantees during the construction of the waterworks will obey the provisions of the ordinance. As the grantees never constructed or attempted to construct any waterworks under the license given them by the city ordinance, there has been no breach of the condition of the bond. We are of opinion that it was error in the circuit court of the eastern district of North Carolina to hold that, by the terms of the ordinance of the city of Goldsborough, the licensees therein agreed to furnish the city of Goldsborough with waterworks by the 1st day of October, 1887, and were bound, pursuant thereto, to construct and operate waterworks for the use of that city; and that the court erred in holding that the defendants below violated the conditions of a certain bond executed by them to the plaintiff (below) wherein they agreed to pay the plaintiff the sum of \$5,000 in case they did not faithfully perform the terms of their contract during the construction of waterworks for the plaintiff. We think there was error in these rulings, for which the judgment of the court below should be reversed, and the suit dismissed, with costs, and it is so ordered.

OLIVER *et al.* v. GILMORE.

(Circuit Court, D. Massachusetts. September 14, 1892.)

No. 3,887.

1. CONTRACTS—PARTIES TO ACTIONS.

Upon a contract between manufacturers, by which, in consideration of the party of the first part not using his plant for a certain purpose, the parties of the second part severally agree to pay him a percentage on their sales, he may maintain an action against one of them alone, where it is plain that each is helden only for his own payment.

2. MANUFACTURING CORPORATIONS—ULTRA VIRES—LIMITING PRODUCTION.

A private manufacturing corporation stands on the same footing as an individual with respect to its power to enter into contracts to limit production, for, as it owes no special duty to the public, it can ordinarily limit or omit the exercise of its corporate powers.

3. CONTRACTS—PUBLIC POLICY—LIMITING MANUFACTURES.

A contract between manufacturers, whereby the first party agrees, in consideration of a percentage on the sales made by the second party, not to use his plant for the production of strap and T hinges for five years, the contract to be void in case the second party increase his facilities for the production of such hinges, is void as against public policy.

4. SAME—ENFORCEMENT—PARTIAL PERFORMANCE.

The contention of the first party that, as he had fully performed his promises, he could recover the pecuniary consideration, even though the contract was not enforceable while entirely executory, was without merit.

At Law. Action by Henry W. Oliver and others, constituting the firm of Oliver Bros. & Phillips, against Edwin W. Gilmore upon a contract. On demurrer to the declaration. Sustained.

The contract in question, marked "Exhibit A," was as follows:

"Memorandum of agreement made and concluded this fifteenth day of February, (1883,) eighteen hundred and eighty-three, by and between Oliver Bros. & Phillips, party of the first part, and the Stanley Works, a corporation of the state of Connecticut, Roy & Co., a corporation of the state of New York, E. W. Gilmore & Co., of North Easton, Mass., C. Hager & Son, of St. Louis, Mo., McKinney Manufacturing Company, of Allegheny, Pa., the Peck, Stowe & Wilcox Company, a corporation of Cleveland, Ohio, and elsewhere, the Aetna Nut Company, a corporation of the state of Connecticut, and Sargent & Co., a corporation of the state of Connecticut and of New York, parties of the second part, witnesseth: That the said party of the first part agrees that the works, factory, and machinery owned, leased, and controlled by them, situate in Pittsburgh or elsewhere, shall not be operated or used by any person whatever for the manufacture of strap and T hinges (it being understood that the said Oliver Bros. & Phillips may use any machinery other than their regular strap and T hinge machinery for the manufacture of wrought-iron butts) for and during the period of five (5) years from and after the first day of March, (1883,) eighteen hundred and eighty-three. In consideration whereof, the said parties of the second part severally agree to pay to the said party of the first part, from and after the first day of March, 1883, a sum of money equal to three and one half per centum of the net sales of strap and T hinges, sold by the several parties of the second part during the month of March, 1883, and for each succeeding month during the period of this agreement, which said sales shall be ascertained and reported to said first party as follows: On or before the fifteenth day of each month after March, 1883, each individual, firm, or corporation composing said second parties, forming or operating a separate establishment for the manufacture of strap and T hinges, shall make a report under oath, to be signed by some member of the firm or officer of the corporation, as the case may be, and by a bookkeeper or other person, a member of, or in the employ of, said firm or corporation, who shall be best acquainted with the *data* from which sales are made up, or by the person making up said sales, attested to before a notary public or justice of the peace, of the net amount of the sales for the calendar month preceding, which said report shall be accompanied by a check or draft for the per centum, as before provided. The reports and drafts herein provided for shall be made to the Wheeling Hinge Company, of Wheeling, West Va. It is further agreed that, should either of said second parties fail to make report of sales and pay over the per centum thereon contemplated by the terms of this agreement at the times herein designated, to said first party, notice of such failure shall be forthwith mailed to each of said second parties, and if within thirty days after the mailing of such notice the terms of this agreement are not complied with by the corporation or firm so in default, or in case of failure by the defaulting party, then, by the association of strap and T hinge manufacturers, this agreement shall, at the option of said first party, be no longer in force, and the first parties shall be at liberty to resume the manufacture of hinges the same as if this agreement had not been made. It is also agreed that if any one of the parties of the second part should build, buy, or place in their works any additional machinery, which will in any way increase their present facilities for the manufacture of strap and T hinges, this agreement shall thenceforth be null and void. In witness whereof the said Stanley Works, the said Roy & Co., the said E. W. Gilmore & Co., the said C. Hager & Son, the said McKinney Manufacturing Company, the said Peck, Stowe & Wilcox Company, the said Aetna Nut Company, and the said Sargent & Co., have affixed their names and official signatures. This agreement to be void and of

no effect unless signed and agreed to by all the parties named in the body of this agreement; but, if so signed by all, to remain in force until the expiration of the time specified in this agreement.

"OLIVER BROS. & PHILLIPS.

"THE STANLEY WORKS,

"WM. H. HART, Treasurer.

"ROY & COMPANY.

"E. W. GILMORE & CO.

"C. HAGER & SON.

"MCKINNEY MFG. CO.,

"WM. S. MCKINNEY, President.

PECK, STOWE & WILCOX CO.,

By R. A. NEAL, President.

ÆTNA NUT CO.,

By R. A. NEAL, President.

SARGENT & CO.,

J. B. SARGENT, President."

The declaration was in two counts, as follows:

"*First Count.* The plaintiffs say the defendant made a contract with them, a copy of which is hereto annexed, marked 'A,' whereby, in consideration of the agreements therein made by the plaintiff, the defendant promised to pay to the plaintiffs, on or before the fifteenth day of each month, except January, in the year 1887, a sum of money equal to three and one half per cent. of the net sales of strap and T hinges made by him during the month preceding, and the defendant further promised to make a report of said sales, signed and sworn to, as provided in said agreement, and send the same to the Wheeling Hinge Company; and the plaintiffs have done all things which they agreed to do in said contract. And the plaintiffs say that three and one half per centum of the net sales made by the defendant during the first eleven months of 1887 amounted to the sum of three thousand dollars during each of said months, but the defendant has neglected and refused to pay said sum of three thousand dollars, and has neglected and refused to make reports as aforesaid, though demand was made upon him so to do on the fifteenth day of each of said months; wherefore the defendant owes the plaintiffs said sum of three thousand dollars, and interest thereon from each of said fifteenth days.

"*Second Count.* And the plaintiffs say the defendant made a contract with them, a copy of which is hereto annexed, marked "A," whereby, in consideration of the promises therein made by the plaintiffs, the defendant promised not to build, buy, or place in his works any additional machinery which would in any way increase his facilities for the manufacture of strap and T hinges, and the plaintiffs have done all things they agreed to do in said contract; but the defendant, during the year 1887, at divers times, did build, buy, and place in his works additional machinery for the manufacture of strap and T hinges, whereby the plaintiffs are greatly damaged, to wit, in the sum of ten thousand dollars."

M. F. Dickinson, Jr., and Samuel Williston, for plaintiffs.

Francis L. Hayes, for defendant.

PUTNAM, Circuit Judge. Plaintiffs concede that the second count is invalid. The important and difficult questions in the case turn on the first count, and the contract which is made a part of it by its tenor. We desire at the outset to dispose of two or three minor considerations. It is clear that the point of nonjoinder of other parties is not well taken, because it is plain that each subscriber to the contract is holden only for his own payment. Also, on the matter of *ultra vires*, inasmuch as a corporation instituted for private trading or manufacturing purposes, and owing no special duty to the public, can ordinarily limit or entirely

omit the exercise of its corporate powers, and is no more holden than an individual to proceed at a pecuniary loss with its intended operations, no question of that sort can be raised on a declaration alleging unqualifiedly that a contract was made. In a declaration of this character, all questions of *ultra vires*, authority of officers of the corporation, and formalities of execution are covered in; and objections in reference thereto can only be made to appear by subsequent pleadings, or by the facts as developed at the trial. The proposition of the plaintiffs that, as they had fully performed, the defendant is liable, even, if the contract could not be enforced while it was executory on both parts, is not sufficiently sustained by the authorities cited by them, and is controverted by *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. Rep. 299; *Arnot v. Coal Co.*, 68 N. Y. 558; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; and *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478. Also, the plaintiffs' proposition that what is sought to be accomplished by this contract indirectly might have been, under the law, accomplished directly, by the defendant's purchasing the works and closing them, does not aid us in coming to a conclusion in this case. There are many matters which the law cannot prevent, but which it refuses to aid when in an executory form. This is singularly illustrated by many of the expressions in the house of lords in *Steamship Co. v. McGregor*, [1892] App. Cas. 25. Also the decisions quite uniformly recognize the distinction, in actions for the price of manufacturing plants sold, between cases where the vendor merely has knowledge of the purpose of the purchaser to create a monopoly, and those where the vendor becomes an active participant in that purpose. If we were to accept the law without modification, as one branch of it was left by the court of king's bench in *Mitchel v. Reynolds*, 1 P. Wms. 181, (A. D. 1711,) and as the other was stated in 4 Bl. Comm. pp. 156-159, concerning forestalling and engrossing, there would seem to be no doubt that the demurrer would necessarily be sustained. So far as the latter branch is concerned, the contract would seem to be in violation of the old rules of the common law, intended to prevent the gathering up of the control of commodities into few hands; and, as to the former, while *Mitchel v. Reynolds*, was that of an individual excluding himself from pursuing his occupation, yet there can be no difference in principle or practical application between shutting out a person and shutting out a manufacturing plant or establishment. Indeed, the latter would much more probably tend to the detriment of public and private interests than the former, and on a much larger scale. In such instances, not only does an individual operative suffer the personal injury against which *Mitchel v. Reynolds*, was aimed, but the public receives detriment through a destruction of values and a depopulation extending through entire towns or villages. We must, however, take cognizance of the fact that the rules formerly laid down touching this topic are not now to be regarded as inflexible, and have been considerably modified. *Gibbs v. Gas Co.*, *ubi supra*, 409, and *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658. This has, perhaps, been the result of the pressure of the tremendous advances made by the

vast extensions and rapidly increasing complications of modern business and manufacturing affairs, and of an apparent inability of perceiving how the old, strict rules can be applied judicially to the present conditions without laying down propositions which might in their application check enterprise, or interfere with freedom of trade. The departure in this direction by the judiciary and by legislation have been even more marked in Great Britain than in the United States. This will be seen, so far as the courts are concerned, from striking expressions in some of the English cases which we will cite, especially by the result in *Collins v. Locke*, L. R. 4 App. Cas. 674, and by many things said in *Steamship Co. v. McGregor*, *supra*, in the house of lords, by Lord COLERIDGE, (21 Q. B. Div. 544,) and in the court of appeal, (23 Q. B. Div. 598.) While in the United States there is a tendency to revive, with the aid of legislation, the strict rules of the common law against all forms of monopoly or engrossing, the legislation of Great Britain has had a different tendency. In *Steamship Co. v. McGregor*, 23 Q. B. Div. 628, 629, Lord Justice Fry said:

"The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public. They were held criminal accordingly. But early in the reign of George III. the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed, (12 Geo. III. c. 71,) and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future. The new policy has been more clearly declared and acted upon in the present reign; for the legislature has, by 7 & 8 Vict. c. 24, altered the common law by utterly abolishing the several offenses of badgering, engrossing, forestalling, and regrating."

Therefore, in view of the modern English tendency, encouraged in the legislation explained by Lord Justice Fry, it may not be safe to follow the later English decisions too closely, although some of their most extreme expressions are found in the cases cited by the supreme court in *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553. We do not intend, however, to launch into a boundless sea of trouble by attempting a general investigation of the present condition of this branch of the law in the United States and Great Britain. We have referred to it only to show the necessity of making an examination sufficient to ascertain whether there are any modifications of the old rules which reach the case at bar. We think it will be found that the later decisions divide themselves into three or four classes, none of which affect it. One embraces such cases as *Collins v. Locke*, *ubi supra*, and *Machinery Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. Rep. 412, and 28 Fed. Rep. 558. This consists, not in agreements that establishments shall be closed, or that any one shall withdraw from

his trade or profession, although such results may incidentally follow, but in agreements for apportionments between individuals or corporations; and these are quite likely to be in the line of the modern division of labor, and thus prove of advantage to the community. Another class relates to new enterprises, for the building up of which parties are not likely to venture, unless permitted to impose their own conditions. This class is illustrated in part by *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; and *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. Another relates to conditions on which persons enter the employment of manufacturers or dealers, and is illustrated by *Rousillon v. Rousillon*, 14 Ch. Div. 351. Still another class, and perhaps the most striking of all, is that which enlarges the limitation of the territory within which, for proper reasons, an individual may bar himself from pursuing his trade or profession. The courts now seem to consider that *Mitchel v. Reynolds* referred to a trade which was necessarily local, at a period when all trades were presumably of that character; and that is therefore not strictly applicable to the present condition of affairs, when the good will which a manufacturer or dealer secures is often national or international in its character, requiring for its protection agreements likewise national or international in their effect. The principle of this class is recognized in *Rousillon v. Rousillon*, *ubi supra*, and in *Navigation Co. v. Winsor*, 20 Wall. 64.

We think it will be difficult to find any departure or modification of the old rules not covered by the foregoing classification, no part of which seems to touch the case at bar. This relates solely to the question whether a contract is against public policy, in which, for a merely pecuniary consideration, a manufacturer agrees to close his works entirely, or in part, for a specified number of years; in the case at bar made all the more characteristic in consequence of the counter stipulation that, if either of the other parties to the agreement should extend his works, the contract should become void. The defendant maintains that there is a lack of legal consideration for his promise. We presume he does not mean by this that a contract which may in some senses operate in restraint of trade, is invalid simply because the only consideration which the promisor receives is a pecuniary one. In *Navigation Co. v. Winsor*, *ubi supra*, this was the only consideration; yet the court sustained the contract, observing that the stipulation objected to "was presumed to be founded on a valuable consideration in its influence on the price paid for the steamer." The cases are full of observations to the effect that the courts maintain these contracts under reasonable circumstances, principally because it is through them only that parties who have built up by honest industry a trade with a valuable good will, can secure an equivalent for the latter. The suggestion of the defendant on this point, however, leads directly to a proposition which seems to open a path through this case.

It will be observed that, although the suggestion of the defendant that a mere pecuniary consideration is not sufficient to sustain these contracts cannot be taken without qualification, yet this class of agreements is so different from ordinary ones that no action can be maintained on one of

them, because it is under seal, without some reasonable consideration is shown. What is this reasonable consideration? Ordinarily, it is that when the covenantor surrenders his trade or profession an equivalent is given to the public; because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accomplished. The same occupation continues; the same number of mouths are fed. So, in the later cases, modifying *Mitchel v. Reynolds* with reference to the territory within which agreements to withdraw from a trade or profession may lawfully be effective, as the fact is that the field through which the transfer of the business operates is frequently national or international, instead of local. So, also, in the class of cases already spoken of, in which there is only a division of labor. This doctrine of compensation, by force of which the public and individuals lose nothing, was recognized in *Navigation Co. v. Winsor*, *ubi supra*, in a striking way. The original contract under discussion in that case related to a period of seven years. As to this, the court said (page 71) that "the public was not injured by being deprived of any of the business enterprise of the country." A subsequent contract was made, which was the one then before the court, by which, without any compensation to the public, a new contract covering ten years was made for a merely pecuniary consideration, and the court held it void for the additional three years. In this case the court used (page 69) the following expressions:

"This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another, situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast."

To a like effect is *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 53, 54, 11 Sup. Ct. Rep. 478.

Navigation Co. v. Winsor laid down very satisfactorily the reasons supporting this branch of the law, stating that one is the injury to the public by being deprived of the restricted party's industry, and the other the injury to the party himself by being precluded from pursuing his occupation, and being thus prevented from supporting himself and his family. It seems to the court that the case at bar is subject to both of the objections stated, without any proper compensatory consideration. The court also thinks that, in lieu of having "no tendency to destroy the usefulness" of property, or "to deprive the country of any industrial agency," or to require "transfers of residence or allegiance," or "the cessation or diminution of business," it is in all these respects directly the reverse.

Some of the decisions observe that contracts are presumably invalid

which prevent a manufacturer from operating his works for a considerable period of time as he may deem his own interests or those of the public require; and the court finds nowhere any modification of the old rules which relieves the case at bar from this objectionable feature. It is not intended by this to say, whether or not, in an emergency of an overstock, manufacturers or miners may stipulate for handling their works or mines in a specific manner, or for shutting them down in whole or in part, each for such limited time as would ordinarily enable a congested market to relieve itself; but a contract extending over a period of five years, intended, like this at bar, for restricting production, and absolutely binding manufacturers and dealers, while still retaining their plants and establishments, to operate them in a particular way, or to shut them down in whole or in part, is such an incumbrance on the freedom of individual action, necessary to the public good, as to be invalid. Therefore, in view of the fact that by this contract plaintiffs stipulate to shut down their works, at least so far as strap and T hinges are concerned, for the long period of five years, for no consideration except a pecuniary one, and without a lawful equivalent with reference to the continuance of manufacturing, or its development, in other directions, and also in view of the other fact, that this contract is especially marked by the further stipulation that it shall be void if the other parties to it increase their existing facilities, the court holds that, as the case stands, the demurrer must be sustained as to both counts. The expression of the supreme court in *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553, repeated in *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, that "the question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable," must, however, be regarded. The court will not presume to define, in advance of the facts which may be shown, or perhaps to define at all, what may be the practical effect of these expressions; but, being warned by them, it cannot determine on this demurrer that it is impossible for the plaintiffs to allege particular circumstances, not now appearing, which may modify the result. It is equitable as between the parties that the plaintiffs should recover the money stipulated for by the contract; therefore an opportunity should be given to amend, if desired.

Demurrer sustained. The first and second counts and the declaration are adjudged insufficient. Judgment for defendant, with costs, unless on or before November rules next plaintiffs amend, and pay costs to the time of filing their amendment.

ASPLEY v. MURPHY et al.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 30.

1. PROBATE COURTS—JURISDICTION—SPECIFIC PERFORMANCE—REPEAL OF STATUTE.

Act Tex. 1843, entitled "An act to organize probate courts," (2 Sayles' Early Laws Tex. art. 1788,) which, in section 27, expressly repeals "all laws and parts of laws heretofore in force relative to the duties of probate courts," was applicable only to laws conferring general probate jurisdiction, and not to Act Tex. 1844, § 2, (1 Sayles' Early Laws Tex. art. 1841,) which vests in those courts the special power of enforcing specific performance of contracts to convey land. 50 Fed. Rep. 376, affirmed.

2. SAME:

The act of 1846, itself, by sections 2, 13-16, conferred power upon the probate courts to authorize an administrator to make a deed in satisfaction of a claim for land due by the estate, when the administrator accepted the claim; and the court, on evidence taken, approved the same.

Error to the Circuit Court of the United States for the Northern District of Texas.

Action by Robert F. Aspley against J. P. Murphy and others to recover an undivided two-ninths interest in and to block 77, in the city of Dallas, Tex. The circuit court, over the objection of plaintiff, admitted in evidence certain records of the probate court. See 50 Fed. Rep. 376. The court afterwards instructed the jury to return a verdict for the defendants. Plaintiff brings error. Affirmed.

Chas. I. Evans and B. H. Bassett, for plaintiff in error.

Simkins & Morrow, (W. S. Simkins, of counsel,) for defendants in error.

Before PARDEE, Circuit Judge, and LOCKE and BILLINGS, District Judges.

BILLINGS, District Judge. This case is before this court upon a writ of error to the circuit court of the United States for the northern district of Texas. The suit was an action of trespass to try title, brought by the plaintiff in error against the defendants in error, to recover an undivided interest in a block of ground situate in the city of Dallas. There was a trial by jury, and there is a bill of exceptions as to the admission of a deed offered in evidence by the plaintiff below. The bill of exceptions presents several grounds of exceptions to the admission of the deed. But one ground was insisted on in the argument, and that presents the question: "In the year 1847, had the probate courts of the state of Texas the power to authorize an administrator to make a deed in satisfaction or payment of a claim for land due by his estate, where the administrator accepted the claim, and the court, upon evidence taken, approved it?" The record shows that the facts in the case bearing upon this question were as follows:

John Grigsby died in March, 1841. In February, 1847, the administrator of his estate, the administration of which was pending in the

probate court of Houston county, upon a petition which represented that Crawford Grisby had in the lifetime of the decedent a contract with him, whereby he was entitled to a conveyance of 1,000 acres out of a tract in said petition described; that said Crawford Grigsby was also deceased, and his estate was represented by an executor, who represented the heirs,—after a hearing, and upon proof having been offered, obtained the following order: "That he be, and is hereby, authorized and required to make a deed to the heirs of Crawford Grigsby, deceased, for one thousand acres of land, agreeable to the contract as proven." In pursuance of this order the deed was made.

The question is, had the probate court the authority to make the order? The statute of 1844, entitled "An act to define and fix the practice of probate courts in certain cases," in section 2, (1 Sayles' Early Laws of Texas, art. 1341,) provided as follows.

"Sec. 2. That whenever there may be outstanding bonds, obligations, or contracts in writing for the conveyance of land or tenements against the estate of any deceased person, which it may be to the interest of said estate shall be lifted or complied with, it shall be the duty of the probate court, where the succession was opened, or where the same was or may be administered, upon an application by petition of the executor or executrix, administrator or administratrix, or guardian, where all the heirs are minors, and have such guardian, after full proof of the existence of such bond, obligation, or contract, in writing, and upon satisfactory evidence that a compliance with the requirements of said bond, obligation, or contract would be beneficial to the interest of said estate, to decree that the person thus applying shall fully comply with the same, and any deed, or tender of deed, made under such decree, shall be as valid and binding as if it had been made or tendered by the testator or intestate himself."

No question is made but that this section of the statute, above quoted, gave the probate courts the power to authorize the deed in question. The matters to be considered are: *First*, had this section been repealed? and, *second*, what other statute, if any, was there in force which authorized it?

1. As to the repeal. After the admission of Texas into the Union as a state, a constitution (in 1845) was adopted, which distributed the probate jurisdiction between the district courts and the inferior or probate courts. The sections which bear upon this matter are Const. 1845, art. 4, §§ 1, 15, (Charters and Constitutions, pt. 2, Tex. pp. 1772, 1773:)

"Section 1. The judicial power of this state shall be vested in one supreme court, in district courts, and in such inferior courts as the legislature may from time to time ordain and establish; and such jurisdiction may be vested in corporation courts as may be deemed necessary and be directed by law."

"Sec. 15. Inferior tribunals shall be established in each county for appointing guardians, granting letters testamentary and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates; and the district courts shall have original and appellate jurisdiction and general control over the said inferior tribunals, and original jurisdiction and control over executors, administrators, guardians, and minors, under such regulations as may be prescribed by law."

In article 13, § 3, it was provided as follows, (Charters and Constitutions, pt. 2, p. 1781:)

"Sec. 3. All laws or parts of laws now in force in the republic of Texas, which are not repugnant to the constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force as the laws of this state until they expire by their own limitation, or shall be altered or repealed by the legislature thereof."

It is thus evident that by force of section 3, art. 13, all the probate laws were continued in force until they should be repealed by the legislature.

The plaintiff in error contends that section 2 of the act of 1844 was repealed by the act of May 11, 1846. This last act is entitled "An act to organize probate courts." 2 Sayles' Early Laws Tex. art. 1739. The repealing clause is found in the last section of the act, (section 27,) and is as follows:

"Sec. 27. That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of succession be, and the same are hereby, repealed, and the unfinished business of all estates, now pending, shall be conducted from this date in accordance with the provisions of this act.

In the written opinion of the trial judge he reaches the conclusion that the act of 1844 was unrepealed by that of 1846, upon the ground that the decisions of the supreme court of Texas give countenance to the doctrine that this repealing clause was intended by the legislature to include only general laws upon the subject of the settlement of successions, and not to include those provisions of statutes which, though they affected the settlement of successions, nevertheless, from their evident object, would more properly be designated and classed as statutes under some other head. He refers to *Booth v. Todd*, 8 Tex. 137, and to *Duncan v. Veal*, 49 Tex. 613, and to *Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. Rep. 544.

Two things, we think, should be suggested, in this connection, as also tending to establish the conclusion reached by the court below upon the question of legislative intent upon the matter of repeal: *First*, the question presented to the court in this case is one as to power or authority which had been conferred by a previous statute, and strictly not as to duties of the probate courts; and, *secondly*, the inquiry whether courts ought not, rather than to infer that the legislature intended to sweep away all laws on this subject of the settlement of estates, leaving as the statute law on that difficult and important subject only that brief statute, containing the language of repeal, consisting of only 27 sections, to infer that the legislature intended to repeal only the act of February 5, 1840, which had for its title the very words used in the repealing clause, being entitled "An act to regulate the duties of probate courts and the settlement of successions," (1 Sayles' Early Laws Tex. art. 736,) and being an act largely relating to forms of procedure in the probate courts, especially since the question presented to us is with refer-

ence to the action of a probate court which has been acquiesced in for upwards of 40 years.

If the conclusion reached by the trial judge is correct, that, as matter of legislative intent, it ought to be held that there was no repeal of the act of 1844, then it follows that the court had full power to make the questioned order, and the deed executed in accordance with it was properly admitted in evidence, and the record discloses no error. But in a matter so intricate, and at the same time so grave and important, as the effect of this repealing statute, and in the absence of any direct decision by the supreme court of Texas upon the question as presented here, we have thought it our duty to consider also the question of power or authority in the probate court to make the order in dispute even under the statute of 1846 alone, and we are of opinion that this statute, in itself, gives adequate power. Sections 13-16, 2 Sayles' Early Laws Tex. art. 1739, are as follows:

"Sec. 13. That every claim for money, or personal property, or for land, before it can be acknowledged, must be verified by the affidavit of the owner before the judge of probate or a notary public, stating what part is due and unpaid and not satisfied; and, when thus verified and presented, the executor or administrator shall indorse thereon his acceptance or rejection, with the date of presentation. Sec. 14. That all claims accepted by executors or administrators shall be presented to the judge, who shall indorse on the same his approval or nonapproval. Sec. 15. That no action shall lie on a claim before its presentation for acknowledgment, but if a claim be rejected by the executor or administrator, or if accepted by him and disapproved by the judge, the owner of such claim may, for the establishment thereof, institute suit against such executor or administrator, before a justice of the peace or the district court of the county where the succession is opened; but no judgment thereon shall give such claim priority, but it shall be paid currently with other claims of the same degree. Sec. 16. That any party interested in his own right, or as representative in right of another, may, by giving security for the costs and damages, appeal to the district court from any judgment, decree, or order of the probate court, rendered in term time, within twenty days from the date of said judgment, decree, or order. Executors, administrators, and guardians, and the attorney for the state, may appeal without security."

Section 2 of this act, in the compendium of powers which the probate court shall have either in term time or vacation, recognizes the power "to approve or disapprove of claims acknowledged by an executor, administrator, or guardian." The substance of sections from 13 to 16, inclusive, is to provide the manner in which a claim for land, etc., shall be verified before presentation. If rejected by the administrator, or if accepted by him and disapproved by the judge, the owner may institute suit according to jurisdiction in another court. If, on the other hand, a claim for land, etc., shall be both accepted by the administrator and approved by the judge, any party in interest *i. e.*, creditor or heir or legatee, may appeal to the district court.

It is an elemental rule of construction that effect is to be given, if possible, to the whole instrument or statute, and to every section and clause. Cooley says, (Const. Lim. p. 58:)

"If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative rather than one which may make some idle and nugatory."

Unless the construction we have given to the act of 1846 is correct, section 18, so far as claims for lands are concerned, would be idle and nugatory.

In the light of the history of Texas and Texas lands, of which we must take judicial notice, it seems clear that if the legislature intended to and did repeal the act of 1844 in regard to power of the probate court to set off undisputed claims for land, it must have been intended to give the necessary power to the probate court constituted under the act of 1846, as otherwise confusion, litigation, and delay would result in the settlement of successions. Considering the act of 1846 with reference to the other powers and jurisdiction conferred upon the probate court, and giving effect, if possible, to the whole law, and to every section and clause, the construction we have given the act of 1846 seems necessary. Section 2 of said act fully authorizes and empowers the probate court "to direct the partition of the property of estates." This power could not be exercised with much effect or practical good unless the same court had the power to set off to others than heirs undisputed claims for land. In this case the forms pursued by the administrator and the heirs of Crawford Grigsby were the forms of the act of 1844; that is, the petition was filed by the administrator, and was verified by proof of witnesses taken before the court. But the substance of the procedure was precisely that authorized by the statute of 1846. It comprised the presentation of a claim for land not only verified, but established by testimony, both as to the contract and its having not been performed by the obligor, accepted by the administrator, and approved by the judge; and it ended in a decree from which any party having an interest might have appealed to the district court. There may have been irregularity as to the witness who made the proof, and in the order of the steps taken, but all the safeguards of the statute of 1846 were observed. There was, though in a different order from that pointed out by that statute, everything which that statute required, viz., the verification, the acceptance, and the approval, and the thing done—the approval of the claim—was made by a judge in open court, who had full authority to make it. We are of opinion that whether we adopt the conclusion of the trial judge upon the grounds upon which he places it, or consider it, as we do, in connection with the power given to the probate court by the act of 1846 itself, there was no error in the ruling in the court below that the deed was legally authorized and properly admitted in evidence.

There was another point presented by the counsel for the plaintiff in error as to the authority of the probate court to go further than to recognize an undivided or an equitable interest. But we are of opinion that since the probate court had jurisdiction and authority to approve the claim, it had all the power to authorize a deed which, in case of rejection or disapproval, the district court would have had, after a decree

had been obtained; that the order or decree of the probate court was a "direction for the partition of an estate," through a suit brought there; and that the decree should have been attacked by appeal, or in some direct action, and cannot be assailed collaterally. We find no error in the record of the circuit court, and the judgment must be affirmed, at the cost of the plaintiff in error.

ALLEN v. UNITED STATES.

(District Court, N. D. California. September 29, 1892.)

CUSTOMS DUTIES—DRAWBACKS—COAL USED BY AMERICAN VESSELS.

The provision of Schedule N of the tariff act of 1883, allowing (as amended by the act of June 19, 1886, 24 St. at Large, p. 81) a drawback of 75 cents per ton on imported coal afterwards used by steam vessels of the United States engaged in foreign commerce or the coasting trade, was not repealed by the provision in Schedule N of the act of October 1, 1890, which merely imposes a duty of 75 cents per ton on imported coal; but the drawback, less 1 per cent. thereof, is continued in force by the proviso to section 25 of said act, relating to drawbacks "allowed under existing law."

At Law. Suit by Charles R. Allen against the United States to recover a drawback on certain imported coal. On demurrer to the complaint. Overruled.

Page & Ellis, for plaintiff.

The United States District Attorney, for defendant.

Ross, District Judge. There is but a single question presented by the demurrer to the complaint in this case, and that is, does the act of congress of October 1, 1890, (26 St. p. 600,) commonly known as the "McKinley Bill," repeal the provision of the act of March 3, 1883, (22 St. p. 511,) as amended by the act of June 19, 1886, (24 St. p. 81,) granting a drawback in certain cases upon bituminous coal imported into the United States? That portion of the act of March 3, 1883, fixing a duty on coal is found in Schedule N of the act, and reads as follows:

"Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. A drawback of seventy-five cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board of vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the secretary of the treasury shall prescribe."

By section 10 of the act of June 19, 1886, it was declared—

"That the provisions of Schedule N of 'An act to reduce internal revenue taxation, and for other purposes,' approved March 3, 1883, allowing a drawback on imported bituminous coal used for fuel on vessels propelled by steam, shall be construed to apply only to vessels of the United States."

That portion of Schedule N of the act of October 1, 1890, entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," reads:

"Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. Coal slack or culm, such as will pass through a half-inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel."

If there was nothing more in the act of October 1, 1890, upon the subject in question, there would be no difficulty in reaching the conclusion announced by the attorney general in an opinion given by him in answer to a similar question propounded to him by the secretary of the treasury, (19 Op. Attys. Gen. U. S. 687;) for, as he there says, and as was said, in substance, by Judge LACOMBE in *Re Straus*, 46 Fed. Rep. 522, the act of October 1, 1890, was manifestly intended as a complete revision of the tariff laws, and therefore the law upon the subject in hand is to be ascertained by reference to the terms and provisions of that act. And the omission from that portion of Schedule N of the act of October 1, 1890, imposing a duty of 75 cents a ton on bituminous coal, of the drawback clause in relation to such coal contained in the act of March 3, 1883, as amended by section 10 of the act of June 19, 1886, would, in the absence of any other or further provision upon the subject, clearly manifest the intention of congress to abolish such drawback. But the act of October 1, 1890, declares in section 25—

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed, on the exportation of such articles, a drawback equal in amount to the duties paid on the materials used, less 1 per centum of such duties: provided that, when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measurement thereof may be ascertained: and provided, further, that the drawback on any article allowed under existing law shall be continued at the rate herein provided; that the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States, and their exportation therefrom, shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either, or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the secretary of the treasury shall prescribe."

It is upon the true construction of this section that the decision in the present case, in my opinion, hinges.

It is urged on the part of the government that section 25 deals exclusively with drawbacks upon exports, and that the word "article" in the second proviso "means and refers to an exported article, and to no other." An analysis of the section does not sustain the contention. The section provides in distinct terms for a drawback—*First*, on all ar-

ticles wholly manufactured from imported materials and thereafter exported; *second*, for a drawback on all articles made partly from imported materials and thereafter exported. This language, as said by plaintiff's counsel, covers every possible manufacture made in this country, whether wholly, or partially only, of foreign materials, and thereafter exported. These provisions are followed by the proviso that the drawback allowed "under existing law on any article shall be continued at the rate herein provided;" that is to say, the amount returned shall be that of the duty paid, less 1 per centum. There could be no clearer recognition than is here expressed of the fact that there were at the time of the passage of the act of October 1, 1890, existing laws providing for drawbacks. Among them, as has been seen, was the act of March 3, 1883, as amended by that of June 19, 1886, giving a drawback on bituminous coal imported into this country, and used on steam vessels of the United States. This drawback was, therefore, by the express language of the second proviso of section 25 of the act of October 1, 1890, continued, but at the rate provided in that section, to wit, the amount of duty paid, less 1 per centum. This, it seems to me, is the natural and ordinary meaning of plain language. There is not only no authority in the court to interject by construction the word "exported," as the attorney for the government contends should be done, before the word "article" in the proviso in question, but it would, in effect, be so to construe that proviso as to make it apply to drawbacks on exported articles specifically provided for in the preceding clauses of the section; that is to say, to drawbacks on articles manufactured in this country wholly or partially of foreign materials and thereafter exported. The court is not at liberty to say that congress meant by the words embodied in the proviso in question to provide for the same drawbacks it had immediately before made specific provision for; nor is it at liberty to hold that the legislature, in declaring "that the drawback on any article allowed under existing law shall be continued at the rate" specified in the section, did not mean what its language naturally and plainly imports. It is true that ordinarily the office of a proviso is to restrain or qualify some preceding matter, and will be so restricted in the absence of anything in its terms, or in the subject it deals with, indicating an intention to give it other and broader effect; but where, as in the present case, to restrict it to the matter preceding it would, as has been shown, make it mean precisely the same thing as the clause to which it is appended, the language employed should be given the natural and ordinary meaning it conveys as an independent clause. "Like everything else, interpretation has its limits, beyond which it cannot legitimately go. Where the legislative meaning is plain, there is not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them. The judges have simply to enforce the statute according to its obvious terms." Bish. Writ. Law, § 72; *Thornley v. U. S.*, 113 U. S. 313, 5 Sup. Ct. Rep. 491.

The laws existing at the time of the passage of the act of October 1, 1890, allowing drawbacks, were not uniform. In some cases the draw-

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back was fixed at the amount of duties paid, less 10 per cent.; in others the deduction was 1 per cent.; and by the act of March 3, 1883, the full amount of duty paid on bituminous coal was allowed as a drawback. Rev. St. §§ 3017, 3026; 18 St. p. 340; 23 St. p. 57. By the second proviso of section 25 of the act of October 1, 1890, the amount of drawback allowed is placed on all articles at a uniform rate, with certain exceptions specially provided for elsewhere in the act, as, for example, in paragraph 322, (26 St. p. 588,) in relation to salt. The provision of the act of March 3, 1883, in regard to that article, was as follows:

"Salt in bags, sacks, barrels, and other packages, twelve cents per one hundred pounds; in bulk, eight cents per one hundred pounds: provided, that exporters of meats, whether packed or smoked, which have been cured in the United States with imported salt, shall, upon satisfactory proof, under such regulations as the secretary of the treasury shall prescribe, that such meats have been cured with imported salt, have refunded to them from the treasury the duties paid on the salt so used in curing such exported meats in amounts not less than one hundred dollars: and provided, further, that imported salt in bond may be used in curing fish taken by vessels licensed to engage in the fisheries, and in curing fish on the shores of the navigable waters of the United States, under such regulations as the secretary of the treasury shall prescribe; and, upon proof that the salt has been used for either of the purposes stated in this proviso, the duties on the same shall be remitted." 22 St. p. 514.

By the act of October 1, 1890, the order of the enactment is somewhat changed, but it is, in substance, the same, and is as follows:

Salt in bags, sacks, barrels, or other packages, twelve cents per one hundred pounds; in bulk, eight cents per one hundred pounds: provided, that imported salt in bond may be used in curing fish taken by vessels licensed to engage in the fisheries, and in curing fish on the shores of the navigable waters of the United States, under such regulations as the secretary of the treasury shall prescribe; and, upon proof that the salt has been used for either of the purposes stated in this proviso, the duties on the same shall be remitted: provided, further, that exporters of meats, whether packed or smoked, which have been cured in the United States with imported salt, shall, upon satisfactory proof, under such regulations as the secretary of the treasury shall prescribe, that such meats have been cured with imported salt, have refunded to them from the treasury the duties paid on the salt so used in curing such exported meats, in amounts not less than one hundred dollars." 26 St. p. 588.

This is cited on the part of the government as illustrative of the method adopted and pursued by congress in the act of October 1, 1890, when providing for the retention of existing drawback rights in respect to imported articles passing into home consumption, and not thereafter exported. The answer to this is that, in the case of the use of imported salt from a bonded warehouse in curing fish not exported, as permitted by the first provision of the above-cited paragraph of the act of 1890, there is a remission of duties, not the allowance of a drawback; which latter necessarily implies the former payment of duty; and in the case of the drawback permitted by the second provision of the paragraph on imported salt used in curing meats afterwards exported, the provision is that there shall be refunded from the treasury the duties paid on the salt so used in curing such exported meats, in amounts not less than

\$100. It is manifest that these provisions could not be brought within the general language employed in the second proviso of section 25 of the act declaring that drawbacks allowed "under existing law on any article shall be continued at the rate herein provided;" that is to say, the amount returned shall be that of the duty paid, less 1 per centum; and therefore a special provision in relation to salt became a necessity.

Demurrer overruled, with leave to the defendant to answer within the usual time.

MARINE, Collector, v. PACKHAM *et al.*

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 14.

CUSTOMS DUTIES—CLASSIFICATION—CONSTRUCTION OF LAWS—GLASS BOTTLES.

Empty bottles and demijohns are not dutiable at 1 cent and $1\frac{1}{4}$ cents per pound, according to size, under paragraph 103 of the tariff act of October 1, 1890, when such duties would amount to less than 40 per cent. *ad valorem*, but at 40 per cent. *ad valorem*, under the proviso of paragraph 104. SIMONTON, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Maryland.

This was an appeal by William M. Marine, collector of the port of Baltimore, from the decision of the board of general appraisers, reversing the action of the collector in levying certain duties on empty bottles and demijohns. The decision of the appraisers was affirmed by the circuit court, and the collector appealed. Reversed.

Wm. A. Maury, Asst. Atty. Gen., for appellant.

Wm. S. Thomas, (John L. Thomas, on the brief,) for appellees.

Before GOFF, Circuit Judge, and HUGHES and SIMONTON, District Judges.

GOFF, Circuit Judge. Packham, De Witt & Co., on December 6, 1890, imported into the port of Baltimore, from Hamburg, a lot of empty bottles and demijohns, upon which duty was assessed by the collector at the rate of 40 per centum *ad valorem*. Paragraphs 103 and 104 of the "Act to reduce the revenue and equalize duties on imports, and for other purposes," approved October 1, 1890, under which the collector acted, read as follows:

"(103) Green and colored, molded or pressed, and flint and lime glass bottles, holding more than one pint, and demijohns and carboys, (covered or uncovered,) and other molded or pressed, green or colored, and flint or lime bottle glassware, not especially provided for in this act, one cent. per pound. Green and colored, molded or pressed, and flint and lime glass bottles, and vials holding not more than one pint, and not less than one quarter of a pint, one and one half cents per pound; if holding less than one fourth of a pint, fifty cents per gross.

"(104) All articles enumerated in the preceding paragraph, if filled, and not otherwise provided for in this act, and the contents are subject to an *ad valorem* rate of duty, or to a rate of duty, based upon the value, the value of such bottles, vials, or other vessels shall be added to the value of the contents, for the ascertainment of the dutiable value of the latter; but if filled, and not otherwise provided for in this act, and the contents are not subject to an *ad valorem* rate of duty, or to rate of duty based on the value, or are free of duty, such bottles, vials, or other vessels shall pay, in addition to the duty, if any, on their contents, the rates of duty prescribed in the preceding paragraph: provided, that no article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per centum *ad valorem*."

The specific duty laid by paragraph 103 not amounting in this case to as much as 40 per centum of the value of the importation, the collector assessed the duty at that rate, under the proviso of paragraph 104. Packham, De Witt & Co. claimed that the articles so imported should have been classified as empty bottles and demijohns, dutiable at 1 cent and 1½ cents per pound, under paragraph 103, but they paid the duty assessed by the collector under protest. Their claim was sustained by the board of general appraisers, the action of the collector being reversed by it. The collector appealed to the circuit court of the district of Maryland, and that court affirmed the ruling of the board of general appraisers. The collector prayed an appeal from the decision of the circuit court, which was allowed.

By the act of congress alluded to, it is provided "that on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely;" and then follows the many schedules and paragraphs of that act, including 103 and 104, as quoted. It will be observed from this that not only are the "paragraphs," as such, particularly recognized and numbered, but that congress had a special purpose in so doing, and used the word "paragraph" as synonymous with the word "section." If we keep this in mind, and give the words of the proviso of paragraph 104 their usual and natural meaning, we will have no difficulty in finding the intention of congress, and in ascertaining the rate of duty imposed on importations of the character mentioned. The supreme court of the United States, in *Thornley v. U. S.*, 113 U. S. 310, 313, 5 Sup. Ct. Rep. 491, say: "Where the meaning of a statute is plain, it is the duty of the courts to enforce it, according to its obvious terms. In such a case there is no necessity for construction." The same court, in the case of *Lewis v. U. S.*, 92 U. S. 618, 621, said: "Where the language of a statute is transparent and the meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe." *U. S. v. Wiltberger*, 5 Wheat. 95; *Cherokee Tobacco*, 11 Wall. 621.

The contention of the appellee is that the proviso to paragraph 104 has no application to paragraph 103, but that it applies only to articles

mentioned in that paragraph when "filled," and that the words "preceding paragraph," in the proviso, are used to avoid the necessity of repeating all the articles enumerated in paragraph 103, which it is claimed are never subject to an *ad valorem* rate of duty. It is conceded that the words "preceding paragraph," when they are used in the first part of paragraph 104, refer to paragraph 103, but it is insisted that the same words when used in the proviso to paragraph 104 allude to that paragraph, and have no application to 103. We do not think this contention can be sustained. It seems impossible to confine the effect of this proviso to the paragraph in which it is found. Paragraph 103 imposes a duty on bottles holding more than one pint, and on demijohns and carboys, and other glassware, not especially provided for, of 1 cent per pound; on bottles holding not more than one pint, and not less than one quarter of a pint, of 1½ cents per pound; if holding less than one fourth of a pint, 50 cents per gross. This duty is imposed on such articles when they are imported empty. Paragraph 104 provides that all articles of glassware enumerated in paragraph 103, if filled, should the contents be subject to an *ad valorem* rate of duty, that the value of such articles shall be added to the value of the contents, in order to find the dutiable value of the importation, and that the duty shall then be paid on the value so found, according to the rate imposed on such contents. But if the articles are filled, and the contents are not subject to an *ad valorem* rate of duty, or are free of duty, then such articles, in addition to such duty as may be payable on the contents, shall pay the rate duty prescribed in paragraph 103. It then provides that "no article manufactured from glass, described in paragraph 103, shall pay a less rate of duty than forty per centum *ad valorem*." The two paragraphs, 103 and 104, must evidently be considered together. The words "preceding paragraph," in the first line of paragraph 104, and also where they are used therein immediately before the word "provided," must refer to paragraph 103, and the same words in the proviso to paragraph 104 are intended to apply to paragraph 103, and not to any part of the paragraph in which they are found. We think the intention of congress was to impose a duty on the articles mentioned in paragraph 103 that would produce a revenue amounting to at least 40 per centum *ad valorem*. If the rates imposed by that paragraph produce a sum equal to or exceeding in amount that arising from a duty of 40 per centum *ad valorem* on the articles imported, then the provisions of the paragraph are to apply. But if those rates do not produce a duty equal in amount to 40 per centum *ad valorem* on such articles, then that amount of duty is to be imposed thereon, and the rates mentioned in paragraph 103 are not to apply. We do not think that congress used the words "preceding paragraph" in the proviso of paragraph 104 as meaning "this paragraph," nor do we see that the word "paragraph," where so used, is intended to convey the same meaning as the word "sentence," when we find it so frequently used in the act mentioned as identical with the word "section."

For the reason given, we find that there is error in the decree of the circuit court passed on the 9th day of January, 1892, affirming the de-

cision of the board of general appraisers made on the 9th day of February, 1891, in the matter of the protest of Packham, De Witt & Co. against the decision of the collector of customs at the port of Baltimore, as to the rate and amount of duties chargeable on certain demijohns and glass bottles, imported December 6, 1890, and it follows that the decree must be reversed, and the cause remanded to the circuit court for the district of Maryland for further proceedings in accordance with this opinion.

SIMONTON, District Judge, (*dissenting.*) I am unable to concur in the conclusion reached by the court. The question is, do the words of the concluding proviso of paragraph 104 relate back to and control the terms of paragraph 103? The words "preceding paragraph" in that proviso mean paragraph 103. This paragraph 103 distinctly states the duty to be paid on certain descriptions of glassware when they are imported empty. If intended to hold more than a pint, 1 cent per pound; if a pint, or not less than a quarter of a pint, $1\frac{1}{2}$ cents per pound; smaller vessels 50 cents per gross. This is definite, easily computed, has the element of certainty, and seems to be complete and final. So much for empty vessels. The next succeeding paragraph deals with the same class of glassware if brought in filled, and fixes the duty to be paid on it in that condition. The rule prescribed for fixing the duty in paragraph 103 is abandoned, and a new method is adopted. If the contents of such vessels are subject to an *ad valorem* duty, or to a rate of duty based upon value, the vessels pay the same rate of duty as their contents. If the contents are not subject to an *ad valorem* duty, or to a duty based upon value, then the filled vessels pay, in addition to the duty on their contents, the rates prescribed in paragraph 103; in no case, however, less than 40 per cent. *ad valorem*. Perhaps 103 is referred to in this connection in order to show the kinds of glassware upon which 104 fixes the duty if they are brought in filled. Paragraph 103 deals exclusively with and settles the duty to be paid on glass vessels described in that paragraph when they are brought in empty. Paragraph 104 deals with the same class of glass vessels, but only when they come in filled. Any other construction would radically change paragraph 103, and would substitute for its plain provisions, easily understood and applied, another mode of ascertaining duty on empty glass vessels, fluctuating and uncertain.

I am of the opinion, therefore, that the proviso at the end of paragraph 104 qualifies the terms of that paragraph only, and that it does not relate back to or affect paragraph 103, and that the circuit decree should be affirmed.

In re SANBORN.

(District Court, N. D. California. September 20, 1892.)

No. 10,430.

CRIMINAL LAW—FINES AND IMPRISONMENT—IMPRISONMENT FOR DEBT.

Rev. St. U. S. § 990, providing that "no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, when, by the laws of such state, imprisonment for debt has been or shall be abolished," applies only to civil cases, and a fine imposed for a violation of federal laws punishing crimes and misdemeanors is not such a debt as is within the scope of the provisions of the constitution of California abolishing imprisonment for debt.

Habeas Corpus. Petition by C. Sanborn to be released from imprisonment, on the ground that his further confinement is in violation of Rev. St. § 990, and the constitution of California relating to imprisonment for debt. Petitioner remanded.

Wm. Hoff Cook, for petitioner.

Charles A. Garter, U. S. Atty.

MORROW, District Judge. The petitioner was convicted in this court on the 5th day of May, A. D. 1890, upon three indictments for a violation of section 5480 of the Revised Statutes of the United States in using the post office establishment of the United States in carrying out a scheme to defraud. He was thereupon sentenced upon the first indictment to pay a fine of \$250, and to be imprisoned for the term of 18 months, and, in default of payment of the fine, to be further imprisoned until the fine is paid. Upon the second indictment he was sentenced to pay a fine of \$250, and to be imprisoned for the term of 12 months, and, in default of payment of the fine, to be further imprisoned until the fine is paid. Upon the third indictment he was sentenced to pay a fine of \$250, and to be imprisoned for the term of six months, and, in default of payment of the fine, to be further imprisoned until the fine is paid. The aggregate term of imprisonment was therefore 36 months, and the fines amounted to \$750. In the petition for the writ of *habeas corpus* it is alleged, in substance, that, allowing the petitioner such deductions and credits as are provided by law, his term of imprisonment has expired, and that he is now held in custody solely for the collection of a debt, to wit, the fines imposed by the court. From the return of the warden of the state prison it appears that, deducting the credits allowed by law, the petitioner has served his time of 36 months' imprisonment, and that he is now held in custody by reason of the nonpayment of the fines imposed as part of the sentence in each case. The petitioner alleges that he is being imprisoned for a debt, and that he is entitled to his discharge, on the ground that such imprisonment is illegal.

Section 990 of the Revised Statutes provides as follows:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt provided by the laws of

any state shall be applicable to the process issuing from the courts of the United States to be executed therein, and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."

The constitution of this state provides, (article 1, § 15):

"No person shall be imprisoned for debt in any civil action or mesne or final process unless in cases of fraud; nor in civil actions for torts, except in cases of willful injury to persons or property; and no person shall be imprisoned for a militia fine in time of peace."

It is claimed that under this provision of the constitution imprisonment for debt has been abolished, but it will be observed that the constitutional provision relates only to civil actions, and even as to those imprisonment may still be imposed in cases of fraud and in civil actions for tort, where there has been willful injury to person or property. It is urged, however, that under this constitutional provision a modification, condition, or restriction has been placed upon imprisonment by the laws of this state, which, under section 990 of the Revised Statutes, is made applicable to process issuing from the courts of the United States in criminal cases. This modification, condition, or restriction is claimed to be contained in section 1205 of the Penal Code of this state, as follows:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine."

In *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. Rep. 372, the supreme court of this state held that under this section there could be no further imprisonment for a nonpayment of a fine, where the fine was coupled with a sentence of imprisonment; but that decision turned upon the wording of section 1205 of the Penal Code, and not upon the constitutional provision abolishing imprisonment for debt. The court simply held that this section did not apply to cases in which the judgment is for a fine coupled with a sentence for imprisonment. It is expressly stated in the opinion of the court that the legislature might, if it saw fit to do so, provide for the collection by imprisonment of all fines, whether the judgment be one of fine alone or one of both fine and imprisonment; but it was held that the legislature had not so provided, and therefore the judgment of the court in that case, imposing imprisonment until the fine be satisfied, was void.

How the absence of legislation on the part of the state providing for imprisonment in default of payment of a fine can be made applicable to a case arising under a law of the United States is not very clear. It is true that counsel for the petitioner urges with great earnestness that a fine is a debt, and that, as there is now no law in this state for imposing imprisonment until a fine is paid, therefore this absence of law is a modification or restriction upon imprisonment for debt. This argument is ingenious, but it is not sound, for the reason that it is not based upon a correct interpretation of section 990 of the Revised Statutes. Can it be supposed that congress intended to give to the states the power to regulate and control the measure of punishments to be inflicted by the courts

of the United States in the execution of the criminal laws of the national jurisdiction? The construction contended for on behalf of the petitioner would largely involve this result, and make the punishment in many cases depend, not upon the judgment of the court, or the laws of its jurisdiction, but the diverse statutes of the different states. Take, for instance, a statute of the United States imposing a fine and imprisonment. In one state imprisonment would be continued until the fine is paid; in another state the fine would be discharged by imprisonment, at a certain rate per day; while in another state the fine would be abolished altogether. It does not seem possible that such consequences would have been left to discovery by a process of verbal construction. It would be more consistent with the rules established for the construction of United States statutes to say that if congress had intended to so modify its criminal laws it would have done so by express and unequivocal language. But it is conceding too much to say that congress has omitted to express its will with respect to a limitation upon imprisonment for a fine. In the act of June 1, 1872, (17 St. at Large, pp. 196-198,) it is provided, in section 14, (sections 1042 and 5296, Rev. St.,) that a poor convict, sentenced to be imprisoned and to pay a fine or fine and costs, and having been imprisoned 30 days solely for the nonpayment of such fine or fine and costs, may be discharged on application to a commissioner of a United States court for the district where he is imprisoned, upon showing that he is unable to pay such fine or fine and costs, and that he has not any property exceeding \$20 in value, except such as is by law exempt from being taken on execution for debt. Having legislated upon the subject so as to provide for the discharge of the poor convict, upon certain conditions, after a service of 30 days for the nonpayment of the fine, how can it be said with reason that the discharge of the convict worth more than \$20 has been left to be regulated by the laws of the state, when the conditions might be such as to discharge such a convict without any service whatever for the nonpayment of the fine? Such an interlacing of national and state authority in the execution of the criminal laws of the general government would only be tolerated where the procedure has been clearly established.

Returning now to section 990 of the Revised Statutes, it appears clear, in the light of these considerations, that it was intended to apply to civil cases only, and such has been the construction placed upon it by the courts. In *U. S. v. Hewes*, Crabbe, 307, the court went so far as to hold that the statute did not even affect the United States as a party to a civil action. This decision, however, has not been followed by the courts of the United States, and in *U. S. v. Tellow*, 2 Low. 159, the exemption has been expressly denied. In *U. S. v. Walsh*, Deady, 281, the United States brought a civil action in the district court of Oregon against the defendant to recover certain penalties for making, preparing, and selling matches without the same being stamped as required by the internal revenue laws. The court made an order for the arrest of the defendant, and, upon being arrested, he gave bail, whereupon his attorney filed a motion to vacate the order, on the ground that it was

improperly allowed. It was claimed that, as the constitution of Oregon provided that there should be no imprisonment for debt in that state except in case of fraud or absconding debtors, the United States was not entitled to arrest a defendant in an action for a penalty. The court, in denying the motion, said:

"The word 'debt' is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the state constitution was intended to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to another, are unable to pay as they undertook and promised. In this view of the matter, the clause in question should be construed as if it read: 'There shall be no imprisonment for debt arising upon contract, express or implied, except,' etc. Such is substantially the language employed in the legislative acts of most of the states abolishing imprisonment for debt, and there can be but little doubt that this was the end which the framers of the constitution had in view, as well as the popular understanding of the clause when the instrument was adopted at the polls."

In *Low v. Durfee*, 5 Fed. Rep. 256, Judge LOWELL, in the circuit court of Massachusetts, held that—

"The intent of Rev. St. §§ 990, 991, is that in civil actions for debt the defendant shall be subject to imprisonment, and be released therefrom precisely as he would be under the law of the state."

In *McCool v. State*, 23 Ind. 127, the defendant was sentenced to pay a fine of five dollars and costs, and stand committed until the fine and costs were paid. It was claimed that the court erred in adjudging that the defendant should be committed for the payment of costs, for the reason that the costs were due to private parties, officers, etc., and, as the constitution prohibited imprisonment for debt except in cases of fraud, the imprisonment of the defendant until the costs were paid was in conflict with the constitution of the state. The court disposed of this claim in the following language:

"The costs are but an incident of the fine assessed, resulting from the same act; and, although they are due to the officers of the court and witnesses for services rendered in the course of the prosecution, they are adjudged against the defendant because of his criminal act, and may be fairly regarded as a part of the punishment. The fine, when assessed, becomes a fixed liability to pay the state a definite amount of money. The costs are taxed, and are due to the officers and witnesses; and we are at a loss to perceive upon what principle the latter is a debt, within the meaning of the section of the constitution referred to, while the former is not. The fact that the one is payable to the state and the other to individuals, we think furnishes no ground for such a distinction. In our opinion, neither of them is a debt, within the meaning of the constitutional provision referred to, and the judgment of the court below was therefore correct."

It is clear that a fine imposed for the violation of laws for the punishment of crimes and misdemeanors is not such a debt as is within the scope of provisions of the constitution abolishing imprisonment for debt, and section 990 of the Revised Statutes is therefore not applicable to a criminal case. The petitioner is remanded to the custody of the warden of the state prison.

HAMMOND BUCKLE CO. v. GOODYEAR RUBBER CO. *et al.*

(Circuit Court, D. Connecticut. November 5, 1892.)

No. 700.

1. PATENTS FOR INVENTIONS—ANTICIPATION—SHOE BUCKLES.

Claim 1 of letters patent No. 301,884 issued July 15, 1884, to Theodore E. King and Joseph Hammond, Jr., for an overshoe clasp, consisting in the combination of a catch plate, a tongue pivoted directly to the tongue plate, and the tongue plate extending rearward of the pivot, and in contact with the catch plate, when the parts are engaged, was not anticipated by either the Hartzhorn patent of 1849, No. 6,736, or the Budd patent of 1871, No. 120,323.

2. SAME—INFRINGEMENT.

The said claim is infringed by a buckle made under letters patent No. 418,924, issued January 7, 1890, to John Nase, which shows a rearward extension of the upper plate, although it differs from the King and Hammond buckle in certain other respects.

In Equity. Bill by the Hammond Buckle Company against the Goodyear Rubber Company and others for infringement of letters patent No. 301,884, issued July 15, 1884, to Theodore E. King and Joseph Hammond, Jr., for an overshoe clasp. The alleged infringing buckle was made by defendants under letters patent No. 418,924, issued January 7, 1890, to John Nase. A motion for preliminary injunction was heretofore denied. 49 Fed. Rep. 274. The case is now heard on the merits. Decree for complainant.

George H. Hey, for complainant.

C. H. Duell, for defendants.

TOWNSEND, District Judge. This is a bill in equity for the alleged infringement of letters patent No. 301,884, dated July 15, 1884, for overshoe fastenings, with prayer for an injunction and an accounting. The first claim of said patent is the only one involved in this suit, and is as follows:

"(1) In combination, the catch plate, the tongue pivoted directly to the tongue plate, and the tongue plate extending rearward of the pivot, and in contact with the catch plate when the parts are engaged, all substantially as described."

The defenses are anticipation, lack of patentable invention, and non-infringement. The question of validity has been twice argued in this court, and decided in favor of the patent in *Buckle Co. v. Hathaway*, 48 Fed. Rep. 305, 834. In the opinions of the court therein said first claim of the patent in suit was fully explained and construed. Upon the question of validity, I shall therefore confine myself to a consideration of the new matter presented by defendants.

The defendants have introduced as additional evidence of anticipation a number of patents and exhibits which were not before the court upon the former hearings. Several of the patents are for articles such as corkscrews and button hooks, so pivoted to a handle as to be carried in the pocket. They do not suggest the invention embodied in the first

claim of the patent in suit, as heretofore construed by this court. But defendants claim that anticipation is shown by other patents alleged to be analogous to that of the complainant. They rely especially upon the Hartzhorn patent, No. 6,736, granted in 1849, and the Budd patent, No. 120,328, granted in 1871. The Hartzhorn patent is for an improvement in buckles used for suspenders, and which, it is stated, may be used for other purposes. The mode of attachment of the tongue directly to the tongue plate is practically the same as that of the Hammond and King patent, No. 191,758, which was passed upon by this court in the Hathaway cases, and found not to anticipate the patent in suit. Furthermore, the Hartzhorn patent shows the tongue pivoted above the main plate, which is not bifurcated. The spring plate does not extend beyond the pivot bearings. This construction is very different from that of the patent in suit. The two exhibits, "Hartzhorn's Modified Clasp," differ materially from the invention claimed in the patent itself. If Hartzhorn had invented in 1849 such a buckle as is shown in "Modified Clasp No. 2," there would have been little occasion for the numerous inventions and patents in this department during the past 40 years. The Budd patent is for a check-rein fastener. It is not designed for any use analogous to that of the patent in suit. Its only engagement is when it is open. There is no occasion for the rearward extensions of complainant's patent, and I do not find any such extension claimed in Budd's patent, or shown in the drawings. But, even if such extensions as are contained in the models shown by defendant correctly represent the patent, it does not seem to me that they furnish any proof of anticipation. The tongue of complainant's patent could not be used in combination with the plates in the Budd clasp because of the spring in the lower plate. There is no bifurcation in the lower plate of the Budd patent, and if one is made, as in the "Budd Modified Clasp," it so weakens the support of the tongue pivot in its socket as to render the device impracticable when applied to buckles. Again, neither of the modified exhibits shown operates to so lock the parts together when closed as to prevent the tilting down of the take-up plate. I am unable to find the invention of the complainant in any of the other patents introduced by the defendants.

The contention of the defendants that the rearward extensions of the tongue plate in the patent in suit do not involve patentable invention was disposed of in *Buckle Co. v. Hathaway*, *supra*, in favor of the patent. For the reasons already stated, I do not find anything in the additional evidence introduced which would lead to a different conclusion.

The additional evidence as to the state of the art, especially the pivoted pocket tool patents, confirm the view taken by the court in the *Hathaway Case*, that the mere elongation of the tongue plate would not have been patentable, but that the mode in which the extension was accomplished in the patent in suit, and the catch plate supported thereby, was patentable.

The defenses of anticipation and lack of patentable invention are not sustained.

The defense of non-infringement presents a much more difficult question. The defendants' buckle is made under letters patent No. 418,924, issued to John Nase in 1890. Its construction was fully explained by the court in its opinion denying complainant's motion for a preliminary injunction. 49 Fed. Rep. 274. As stated by Judge SHIPMAN, in that opinion, in defendants' buckle the catch plate is in part supported by the upwardly projecting ends of the lower plate. It will be seen, by a comparison of the two patents, that the construction of defendants' clasp differs substantially from that of the plaintiff. In the operation of defendants' buckle, the catch plate is in part supported by the upwardly projecting ends of the lower plate. The bifurcated rearward extensions serve to protect the upward extensions against strain when the buckle is in use. One of complainant's experts admits that the arms of the lower plate do not so project rearwardly as to form a bearing for the catch plate. I am not prepared to say that the patent of defendants does not possess the element of novelty in the changed angle of the lower extension to support the pintle. It may be an improvement upon the invention embraced in complainant's patent. But such invention cannot be used, as in this case, in connection with the rearward extensions, so as to appropriate the invention of complainant. The rearward extensions of the upper plate of defendants' buckle do seem to me to infringe upon complainant's patent. It may be true that they serve to "prevent the upturned lips from being bent out of shape or broken when the buckle is in use;" but they also, as in complainant's patent, prevent the cloth of the overshoe from getting caught in the bight of the tongue, in the act of closing the tongue into engagement with the take-up plate. It also appears that, when the tongue and the catch plate are first engaged, the catch plate rests upon the rearward extensions of the tongue plate in exactly the same way as in the patent in suit; and if the engagement be made with each slot successively, and upon feet of different sizes, adapted to the successive slots, it will be found that the catch plate is generally, while in use, supported by the rearward extensions, and only incidentally or momentarily, if at all, upon the upturned lips. I do not think that the fact that the upward extensions may thus incidentally support the catch plate prevents infringement. The rearward extensions of the upper plate, not the upward extensions of the lower plate, form the bearing surface for the catch plate when the parts are first engaged. It will be seen by an examination of the specification and drawing, Fig. 2 of the patent in suit, that the term "engaged" applies to the parts at the first moment of engagement as well as when closed.

In the opinion of the court denying the motion for a preliminary injunction, the court suggested that, although the rearward extensions of the lower plate of the patented buckle might nominally exist in defendants' buckle, it was not clear that they extended rearwardly of the pivot, as contemplated in the patent. The view which I have taken renders it unnecessary to decide the question of infringement upon this ground. I am satisfied that in practical use the bifurcated rearward

extensions of defendants' buckle perform the same functions as those already construed and adjudicated in favor of the complainant's patent. Let there be a decree for an injunction and an accounting.

SAWYER SPINDLE Co. et al. v. W. G. & A. R. MORRISON Co.

(Circuit Court, D. Connecticut. September 26, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—SPINNING MACHINES.

In letters patent No. 253,572, issued February 14, 1882, to John E. Atwood, for an improved support for spindles in spinning machines, the characteristic feature of the invention is "a supporting tube which is flexibly mounted with relation to the spindle rail, and contains the step and bolster bearings for the spindle, so that the latter and aid tube may move together laterally in all directions during the self-adjustment of the spindle, while carrying an unequally balanced bobbin and its yarn, instead of relying upon the movement of the spindle and its bearing within and independently of the supporting tube, as heretofore." *Held*, that this invention possessed patentable novelty over the spindle support of Francis J. Rabbeth, covered by letters patent No. 227,129, issued in 1880, and over the unpatented Danforth spindle of 1842.

2. SAME—INFRINGEMENT—COLORABLE CHANGES.

The 2d, 8d, and 5th claims of the Atwood patent are infringed by a device substantially similar in form, except that the bottom of the supporting tube is surrounded by a closed oil cup, which prevents the facility and promptness with which the flexibility of the spindle can be graduated; for a copyist cannot escape infringement by adding features which hinder the patented combination from exhibiting some of its minor advantages.

In Equity. Bill by the Sawyer Spindle Company and others against the W. G. & A. R. Morrison Company for infringement of a patent. Decree for complainants.

Fish, Richardson & Storrow, for complainants.

Charles L. Burdett, for defendant.

SHIPMAN, Circuit Judge. This is a bill in equity, which is founded upon the alleged infringement of letters patent to John E. Atwood, No. 253,572, dated February 14, 1882, for an improved support for spindles in spinning machines. The application was filed February 27, 1880. The invention was made in July, 1878, and antedates the patents to John Birkenhead, No. 214,750; the English patent to Haddan, sealed February 7, 1879, and the two patents to J. E. Braunsdorf, Nos. 214,355 and 214,356,—which were all applied for in or after September, 1878. The step of a spindle is the lower end of its vertical shaft, and revolves within the step bearing in which it is located. The bolster of a spindle is its cylindrical part, and revolves within the bolster bearing, which is a ring surrounding the bolster. Formerly the step bearing was placed in a horizontal rail, while the bolster bearing was mounted in another rail, supported above the step rail, each of these bearings being nearly rigid. The spindle carries a bobbin and its yarn load, and neither of the three is made perfectly true, and therefore neither is equally balanced. The inequalities of the load create a tendency to vi-

brations or "gyrations" of the spindle, which must have high speed, if rapid work is to be attained. A construction of the bearings which should permit the spindle to yield laterally, and thus permit greater speed, was important. The bolster rail, upon which was mounted a nearly rigid bolster bearing, was therefore disused, and a spindle was constructed, and is commonly used, with a sleeve attached to the spindle blade so as to encompass a support containing the bolster bearing. The step bearing is in the closed end of the bolster support, and the frame requires only one spindle rail.

The Atwood invention is of this class of spindles, and was an improvement upon the spindle support of Francis J. Rabbeth, which was invented in 1878, and was patented in 1880, by letters patent No. 227,129. The priority of the Rabbeth invention is admitted in the Atwood patent. The Rabbeth structure had a supporting tube rigidly connected with the rail; a bolster bearing, which was a thin tube affording a lateral bearing surface for the spindle; a yielding cushion between the bolster bearing and the supporting tube; and a step bearing within the supporting tube. This tube may constitute the step bearing, but the step bearing and the bolster bearing are separate pieces, and consequently the spindle and the bolster bearing can vibrate in all directions. This spindle had a rapid sale. It had great capacity for speed, because the yielding packing or cushions cushioned its vibrations; but, using the language of Gen. Draper, of the Hopedale Mill, whose firm built and sold it, and whose experience in spindle manufacture makes him a very competent witness, "owing to the narrow space in which the cushion is necessarily confined, it will not serve its cushioning purpose satisfactorily, if the vibrations or gyrations become extreme." The packing was beaten upon as the spindle vibrated, "became thin, and was cut in two at the space between the bolster and the step." The specification of the Atwood patent says:

"The characteristic feature of my present invention is a supporting tube, which is flexibly mounted with relation to the spindle rail, and contains the step and bolster bearings for the spindle, so that the latter and said tube may move together laterally in all directions during the self-adjustment of the spindle, while carrying an unequally balanced bobbin and its yarn, instead of relying upon the movement of the spindle and its bearings within and independently of the supporting tube, as heretofore in this class of spindles. By reason of my improvement, the means whereby the movable capacity or flexibility of the spindle is afforded are rendered openly accessible, and more easily renewed, if need be, than heretofore; and, further, elastic materials may be successfully employed, which would be liable to injury and rendered inelastic by oil if located within the supporting tube, as heretofore. I am also enabled to readily graduate the degree of flexibility of the spindle with relation to the spindle rail, so as to accommodate the self-adjusting capacity of the spindle to the various conditions incident to its use in working with bobbins materially differing in size and weight. All of these advantages are due to the novel characteristic feature before referred to."

The claims of the patent, which are said to have been infringed by the defendant, are as follows:

"(2) The combination, substantially as hereinbefore described, with a spindle rail, of a sleeve whirl driven spindle, a base piece rigidly fixed to the spindle rail, and a combined bolster and step mounted loosely in said base piece, and secured thereto by a yielding attachment, as set forth. (3) The combination, substantially as hereinbefore described, of a spindle rail of a spinning machine, a spindle, and a supporting tube, flexibly mounted with relation to the spindle rail, and containing step and bolster bearings. * * * (5) The combination of the spindle rail, the spindle, the supporting tube, loosely mounted with relation to the rail, and containing the step and bolster bearings for the spindle, the spring, and the nut for compressing it, substantially as described."

The bolster bearing and the step bearing are formed in one tube, called the supporting tube, and consequently move together, and are in line with each other. The connection between this tube and the rail is yielding. A hole larger than the tube is bored through the rail, or through a base piece in the rail, and the lower end of the connecting tube is extended through the rail far enough to enable the tube to be secured by a nut at its lower end, and by a spiral spring surrounding the tube below the rail. "The spring serves as a cushion against the rocking or tipping of the spindle," and is strong enough to resist a heavy strain. By altering the position of the nut, the pressure of the spring can be adjusted to different loads upon the spindle. In one form of the device, a cushion of leather is placed between the flange of the tube and the top of the rail. In another form, shown in Fig. 4 of the drawings, this annulus is omitted; the tube does not rest upon the rail, but upon a base tightly secured in the rail. The spiral spring bears against the bottom of the base instead of against the bottom of the rail. The supporting tube, within which are formed both the step bearing and the bolster bearing, and flexibly mounted upon or in relation to the supporting rail, the tube moving out of position under the influence of the vibrations of the spindle, together with the manner in which the tube is secured to the rail, so that graduated pressure can be given and strength can be secured, are the important features of the patented device. It had room and strength to resist heavy strains, speedily received favorable recognition and success, and has gone largely into use. The combined bolster bearing and step bearing in one tube, which is flexibly secured to the base piece or rail, distinguishes it from the Rabbeth device.

The defense is twofold: (1) That the improvement is not a patentable invention; and, (2) if it is, it is of so narrow a character that there is no infringement. Upon the question of patentability, the contention is that self-adjusting spindles and supporting tubes, which contain both step and bolster bearing, are old, and that a spiral spring and nut, for the purpose of a yielding support to a sleeve or a spindle, are also old, and that there was no invention in moving the flexible connecting means from a point adjacent to the rail, as in the Danforth spindle, or from within the tube, as in the Rabbeth spindle, and pulling it on the outside of the tube, and below the rail. This statement gives but an imperfect account and idea of the patented invention. There were in pre-

vious structures—for instance, in the Rabbeth device—a tube which might be said to contain or include the two bearings for step and bolster, but there was no tube which combined the two bearings in one piece of metal, so that both moved with the spindle and in line with each other, whereby the danger that one of the bearings would bind upon the spindle was removed. It is true that prior devices contained somewhere a yielding spring and a nut. The spring or cushion of the Rabbeth device has already been explained. The unpatented Danforth spindle of 1842 had a dead spindle with a rotating sleeve, which carried the bobbin and was itself moved up and down on the dead spindle by a traveling rail, with which it was connected by a spring plate, spring, and nut. This spindle was of an entirely different class from that of the Rabbeth and Atwood spindles, it had no supporting tube, and the mechanism contains no idea of adapting itself to the vibrating movements of the rotating sleeve. The fact that it had a spiral spring has no bearing upon the question of patentability. The flexible support of the Atwood tube below the rail is far more than a change of the position of the Rabbeth cushion from the inside of his tube. The result is to cushion, but the method by which the cushioning is produced is very different.

The spindle of the defendants does not have the washer below the flange of the tube, and therefore does not infringe the first and fourth claims of the patent. Instead of screwing the base piece of drawing No. 4 into the rail, the defendant inserts in the hole through which the base piece would pass an oil cup, which is also secured in the rail with a set screw. It is the Atwood spindle of drawing No. 4, plus an oil cup, and, if the oil cup was omitted, it is substantially admitted that infringement would exist. But it is claimed that the improvement, if patentable at all, is a narrow one, and consists in the specific arrangement of the flexible connection so placed as to secure certain advantages, and that, if another mode is adopted which does not secure these advantages, there is no infringement. Surrounding the bottom of the tube with a closed cup does prevent the nut and spring from being easily accessible, and prevents the facility and promptness with which the flexibility of the spindle could be graduated; but a copyist cannot escape the charge of infringement by adding to his copy a feature which hinders the patented combination from exhibiting some of its minor advantages. Let there be a decree for an infringement of the 2d, 3d, and 5th claims, and for an accounting.

SEATTLE & M. RY. CO. v. STATE *et al.*

(Circuit Court, D. Washington, N. D. September 24, 1892.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CONDEMNATION PROCEEDINGS.

Proceedings for the condemnation of a right of way in the state of Washington cannot be removed into a federal court by corporations of Oregon and New York, which are joined as defendants, unless the record shows a separable controversy.

2. SAME—FEDERAL CORPORATION.

Proceedings for the condemnation of a right of way cannot be removed into a federal court by a federal corporation joined as a defendant, when it does not appear that such corporation is concerned in the litigation, for in such case the record does not show that the case is one arising under the constitution and laws of the United States: *Union Pac. Ry. Co. v. Kansas City*, and *Union Pac. Ry. Co. v. Myers*, 5 Sup. Ct. Rep. 1118, 115 U. S. 1, distinguished.

At Law. Condemnation proceedings brought by the Seattle & Montana Railway Company against the state of Washington, the Columbia & Puget Sound Railroad Company, the Oregon Improvement Company, the Farmers' Loan & Trust Company, the Northern Pacific & Puget Sound Shore Railroad Company, the Northern Pacific Railroad Company, and King county, to secure a right of way. The action was commenced in the superior court of the state of Washington for King county, and removed into the United States circuit court by the Northern Pacific Railroad Company, the Oregon Improvement Company, and the Farmers' Loan & Trust Company. On motion to remand. Granted.

Burke, Shepherd & Woods, for plaintiff.

A. F. Burlingame, for defendants.

HANFORD, District Judge. The Seattle & Montana Railway Company, a corporation organized under the laws of the state of Washington, and owner of the western division of the transcontinental line known as the "Great Northern Railway," commenced this proceeding in the superior court of the state of Washington for King county, for condemnation, under the laws of the state, for right of way purposes, of a strip 60 feet wide in Railroad avenue, in the city of Seattle, extending from the northern line of Yesler avenue in a southerly direction to the location of a site selected for its proposed depot and terminal ground; and a strip of the same width for a branch curving from Railroad avenue near King street, in a southeasterly direction, and extending to the city limits. The scheme involves the crossing and recrossing of two existing lines of railway by four tracks, each of which is designed to be operated as part of the main line of said transcontinental railway; and also a crossing by said four tracks of spur tracks, wharves, and other permanent improvements, and the rebuilding or removal of existing inclines and elevated railway tracks, which were constructed and are in use for convenience in the transfer of freight from cars to ships and *vice versa*. The space which the plaintiff is thus seeking to appropriate is upon the

water front of the city, wholly outside of the meander line of the harbor, and below the line of ordinary high tide.

The several defendants are joined because they respectively have or claim interests in the premises as follows: The state of Washington is supposed to be the owner of the fee; King county claims a lien upon a portion of the premises for delinquent taxes; the Columbia & Puget Sound Railway Company and the Northern Pacific & Puget Sound Shore Company, two local corporations, jointly own the right of way of the two existing lines of railway, and the company first mentioned also owns the wharves, spur tracks, inclines, and elevated railways above mentioned; the Oregon Improvement Company, a corporation of the state of Oregon, owns all the stock of the Columbia & Puget Sound Company, and has the management and use of all its property; the Farmers' Loan & Trust Company, a corporation of the state of New York, is a mortgagee of the property owned and controlled by the Oregon Improvement Company; the Northern Pacific Railroad Company appears to have an interest in the property of the Northern Pacific & Puget Sound Shore Railroad Company, the nature of which is not disclosed, and it is operating one of said existing lines of railway. The defendant last mentioned is a corporation created by an act of congress, and, on the ground that as to it the suit is one arising under the constitution and laws of the United States, it filed a petition and bond for the removal of the cause to this court. The Oregon Improvement Company and the Farmers' Loan & Trust Company also filed their petitions and bonds for removal, each claiming a right to have the case removed to this court, because it involves a separate controversy as to it, and that it is a citizen of a state other than Washington, of which the plaintiff is a citizen. The record has been brought here, and now the plaintiff moves to remand, claiming that this court is without jurisdiction.

When a number of persons have been joined as defendants in an action, and the nature of the controversy does not appear upon the face of the record, the bare assertion in a petition for removal, by one defendant, that there is a separable controversy, is not sufficient. A proceeding which abruptly terminates the progress of a case in a court of competent jurisdiction cannot be justified if the facts which the law prescribes as essential do not affirmatively appear. These observations are aimed at the pretensions of the Oregon Improvement Company and the Farmers' Loan & Trust Company, and, in disposing of the questions introduced into the case by the attempt of said corporations to remove it into this court, it is only necessary to add the statement that the court is unable to find in the record any facts upon which a separate controversy between the plaintiff and either of said corporations can be predicated. On the contrary, enough appears to show that the interests of the said corporations are so blended with the Columbia & Puget Sound Company that it will not be possible to determine any controversy affecting them without touching the last-named company.

In behalf of the Northern Pacific Railroad Company, it is insisted

that, upon the authority of the decision of the supreme court in the *Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113, especially the case of *Union Pac. Ry. Co. v. Kansas City*, the right of said defendant to remove the case to this court must be affirmed. In the case referred to (*Union Pac. Ry. Co. v. Kansas City*) the city government was endeavoring, in one proceeding against all the owners of real estate situated within a certain district, to fix the amounts to be paid as damages resulting from the widening of a street extending through the railway company's depot grounds; and also the amount of assessments to be levied upon property within the district, according to a scheme for providing a fund out of which to pay the damages by assessing the property benefited by the improvement. After an appraisalment had been made by a jury constituted according to special statutory authority, and their appraisalment had been confirmed by the mayor and common council of the city, appeals were taken, and thereupon the proceeding became a case pending in a court of the state of Missouri having authority conferred by the laws of said state to adjudicate all matters of difference between the parties. The Union Pacific Company then removed the case to the United States circuit court, a motion to remand was granted, and the case was then taken to the supreme court by a writ of error. The supreme court held that there appeared to be a distinct controversy as to the amount to be paid to the railway company as damages; and a second distinct controversy as to the amount of the assessment to be levied upon its property; and that there might be a third distinct controversy as to the right of the city to appropriate any part of the depot grounds for a street. The railway company being a corporation created by an act of congress, and all its rights to transact business, acquire and hold property, and prosecute and defend suits, being conferred by the laws of the United States, the case was considered to be one arising under the constitution and laws of the United States. On these grounds, the supreme court held that the case was one of which the circuit court had jurisdiction, and that the order remanding it was erroneous. But the case at bar is different. The record before me fails to disclose the nature of any controversy to which the Northern Pacific Railroad Company can be a party. Whatever interest said company has in the subject matter of the litigation is concealed, and the attitude which it will assume towards other parties to any controversy involved is a matter of mere conjecture. At present, the case appears to be complicated by the blended and the conflicting interests and claims of all the defendants, but how the Northern Pacific Railroad will be affected, or what interest it has to be protected, is not clear. It is my opinion that although said company is a federal corporation, for failure to show that it is concerned in the litigation, the record does not show that the case is one arising under the laws of the United States, or that it is within the jurisdiction of this court.

I have considered the point made by counsel for the plaintiff, that all the defendants did not join in petitioning for the removal of the cause to this court, but I am unwilling to rest my decision granting the mo-

tion to remand on that ground. The decisions of the supreme court, which were cited upon the argument, do not support counsel in the position taken. A case not cited by counsel on either side is to the contrary. *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840. True, the opinion does not in words declare that a case arising under the laws of the United States can be removed from a state court to a United States circuit court, by the petition of only one of several defendants, but the case was such a case, it was removed upon such a petition, the questions as to the sufficiency of the petition and the jurisdiction of the circuit court were contested and were squarely met and decided by the supreme court, and the effect of the decision is to affirm the right of one of several defendants to remove a cause, if it be a case at law or in equity, arising under the constitution or laws of the United States, and cognizable in a circuit court.

The motion to remand will be granted for reasons indicated, and which may be restated as follows: *First*, the grounds for removal alleged in the petitions of the Oregon Improvement Company and the Farmers' Loan & Trust Company do not appear to exist, as the record fails to show that there is any controversy involved in the case which can be maintained by either or both of said corporations without the aid or support of the other defendants; *second*, the case does appear to be one arising under the constitution or laws of the United States, as the record does not show that there is any disputed question which will require for its decision the application or interpretation of any provision of the constitution or laws of the United States, nor that the Northern Pacific Railroad Company is so related to the case as to be affected by the determination of any controverted question.

THE H. F. DIMOCK.

THE ALVA.

MORRISON v. METROPOLITAN S. S. Co. *et al.*

(District Court, S. D. New York. October 7, 1892.)

1. LIMITATION OF LIABILITY—WHO MAY INSTITUTE PROCEEDING.

Under the limitation of liability statutes, any damage creditor may institute proceedings to arrest the offending vessel, and to have the amount of all damages, as well as the value of the vessel, judicially ascertained, and the proceeds of the vessel and freight distributed *pro rata* among all claimants.

2. SAME—APPRAISEMENT AND STIPULATION—EX PARTE APPLICATION VALID—SUBSEQUENT SUIT DISMISSED.

Where, under admiralty rule 54, a stipulation is given for the value of the vessel, instead of the "transfer" provided for by statute, a "due appraisal" of the vessel is requisite to the validity of the proceeding. As, however, it is competent for a court, having ordered an *ex parte* appraisal, to order a reappraisal and further security on cause shown by any creditor, the mere fact that the first appraisal and giving of the stipulation were *ex parte* does not render the proceeding void, or invalidate an *ex parte* injunction against other suits; and a subsequent suit in another district, for the same cause, should be dismissed.

In Admiralty. Motion to set aside process and to dismiss libel. Granted.

G. E. P. Howard, for libellant.

Benedict & Benedict, for the H. F. Dimock and Metropolitan S. S. Co.
Root & Clarke, for W. K. Vanderbilt.

BROWN, District Judge. The libellant was master of the yacht Alva, the property of the respondent Vanderbilt, at the time of the collision between her and the steamship H. F. Dimock in Vineyard sound, on the morning of July 24, 1892. The yacht was so damaged by the collision that she sank and became a wreck. The libel alleges that before collision she was of the value of \$300,000; that her wreck was of very small value, realizing on the sale at public auction only \$3,500; that the collision was by the fault of the steamer; that the libellant thereby suffered the loss of his personal property on board to the amount of \$1,306.80; that divers other persons, besides the libellant and the owner of the yacht, suffered loss and damage to their property on board; that the loss and damage aforesaid were without the privity or knowledge of the steamship company; that its liability is limited to the value of the steamer and her freight, which was insufficient to pay the damages sustained by the libellant and others; and that the value of the Dimock and freight exceeded \$200,000. The relief prayed for is that the steamer be arrested and brought into court; that the whole amount of the losses and damages suffered through the collision be ascertained, as well as the value of the steamer; and that the proportionate amount of each damage

claimant may be ascertained and paid from the proceeds of the ship and freight. The libel was filed on September 30th, and on the same day the steamer was arrested under process issued to the marshal.

Such a proceeding by one creditor in behalf of all to obtain the relief afforded by the act limiting liability, though infrequent, is in accordance with the provisions of section 4284 of the Revised Statutes, as interpreted by the supreme court in the case of *The Scotland*, 105 U. S. 24, 33-35, this being one of the four modes in which the statute may be availed of, viz.: (1) By the simple answer of the shipowner when sued; (2) by his libel or petition, offering a transfer of the ship to a trustee appointed by the court under section 4285; (3) by a similar libel or petition offering instead of a transfer of the ship, a stipulation, under rule 54 of the supreme court in admiralty, to pay her value as appraised under the order of the court, or a deposit in court of the amount of such appraised value; or (4) by a creditors' suit for an apportionment and *pro rata* distribution, as in the present case. See *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. Rep. 41; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578, 591-595, 3 Sup. Ct. Rep. 379, 617.

A motion is now made to dismiss the libel, upon the ground that proceedings to limit liability had already been duly taken by the owners of the steamship in the district court of Massachusetts on the 16th of August last, in which court a stipulation for value was given after appraisement, and that that court has full jurisdiction of the cause, where it is now pending, and in which an injunction order, restraining all other suits, was issued on the 17th of August; of all which the libelant had notice before this libel was filed.

If the district court of Massachusetts had jurisdiction to issue the restraining order, or, what is the same thing, if it had full possession of the cause by a proper appraisement and stipulation given in conformity with the fifty-fourth rule of the supreme court in admiralty, then the relief of all persons interested must be sought in that court alone, and the present libel, being improperly filed, should be dismissed.

For the libelant it is contended that the district court of Massachusetts never acquired full jurisdiction or authority to issue any restraining order, because it is said (in the language of *Ex parte Slayton*, 105 U. S. 451, 452) that neither the motion nor the injunction could "properly issue either under the operation of the supreme court rules, or otherwise, until jurisdiction of the *res* had been in some way secured;" and that jurisdiction of the *res* was not secured in the Massachusetts court,—because the vessel had never been arrested by, nor surrendered to, that court, nor had any stipulation been given for its proper value, as a substitution for the *res*, under the 54th rule, since the stipulation was given in an *ex parte* proceeding, without notice of the application, or of the proceeding for appraisement, having been given, or attempted to be given to any creditor, although Mr. Vanderbilt, the principal creditor, was named as a defendant in that libel, and the appraisement being for less than half the value of the vessel. The appraisement of the vessel was

\$80,000, and of freight \$2,395.33. The present libel alleges their value to have been \$200,000; while in the shipowner's petition their value was stated to be "less than \$150,000." If the latter averment affords any clue, the appraisement was altogether inadequate. Such mode of procedure for appraisement, it is claimed, is not a "due appraisement," and not a compliance with the conditions of the fifty-fourth rule, upon which alone that court was authorized to take any further proceeding in the cause.

No doubt the creditors have a right, under the statute, to have the vessel and its full value applied upon their claims. The statute only provides in terms for a transfer of the vessel herself. Rule 54, in providing for the giving of a stipulation as a substitute for the vessel, was not designed to deprive a creditor of any substantial right. It should not, I think, be interpreted so as to compel him to accept an inferior substitute, through a purely *ex parte* appraisement, or one in which creditors can never be heard and have their proper day in court. The appraisement, as fixing the amount of liability, is a vital part of the proceeding. The vessel, if liable, is virtually the property of the creditors. The substitution of a stipulation allows the shipowner, in effect, to appropriate to himself the creditor's property, and to give an obligation in place of it. To deprive the creditor finally of due hearing, and of a proper defense of his interests, in the appraisement and in fixing the amount of the substituted stipulation, which is to limit the possible amount of recovery, would be, as it seems to me, to deny him a hearing on the most vital part of his case, and a violation of the principles of common right. *Windsor v. McVeigh*, 93 U. S. 274, 280. If, therefore, the original *ex parte* appraisement and stipulation were a finality, not capable of subsequent inquiry or correction by the court on due application, if inadequate, I should have great doubt whether such an appraisement could be deemed a "due appraisement," within the meaning of the fifty-fourth rule, so as to authorize the court to take the further proceedings authorized by that rule. But it is competent for the court, I think, having had an appraisement on an *ex parte* application, to order a reappraisement and further security upon application by any creditor, showing that the previous appraisement was mistaken and inadequate, and that the duty of the appraisers had been inadequately performed. See *The Union*, 4 Blatchf. 92, 94; Dist. Ct. Rule 55. This procedure would in most cases probably answer the ends of justice, though difficulties might occasionally arise. The vessel after an *ex parte* appraisement and stipulation given thereupon, might, as in the present case, at once depart from the jurisdiction; and she might never afterwards return, either from occupation abroad, or from subsequent loss; or she might be sold, or be subjected to new lien proceedings meantime. On the other hand, as the proceeding to limit liability may be lawfully instituted within the jurisdiction where the vessel is, it would be a great embarrassment, when the creditors were all in a different jurisdiction, if no appraisement could be taken at all until absent parties were legally

brought in by publication of process. Often the creditors are numerous; some are not ascertained, and actual notice to all is frequently impracticable.

The matter seems properly to fall, therefore, within the domain of practice, to be regulated by the district courts, in the absence of any express rule of the supreme court, as the interests of justice seem to demand. As rule 54 of the supreme court does not in terms require any notice to creditors of the original appraisement and stipulation, I am not prepared to hold that the "due appraisement" provided for by that rule, may not be, in the first instance, an *ex parte* one, to be supplemented thereafter, if unsatisfactory, by further inquiry on the application of the creditor.

For many years in this district, and in the eastern district, it has been the practice to require the names of the principal creditors to be stated in the petition, and a reasonable notice to be given by mail, or otherwise, to a sufficient number of creditors to afford a practical opportunity for the protection of their interests in the original appraisement and stipulation. In some other districts, including that of Massachusetts, the practice seems to be otherwise. As the creditor upon application is entitled to relief for any inadequacy of an *ex parte* appraisement, and the proceeding may fairly be said to fall within the department of practice, I cannot hold the want of notice in this instance to constitute a jurisdictional defect in the appraisement and stipulation, such as to render void the subsequent order for the issuing of a monition and other subsequent steps in the cause, including the injunction against all other suits for which the fifty-fourth rule provides, upon the analogy of the provision of the statute in the case of a transfer of the vessel, under section 4285. For this reason I must hold the prior proceeding in the Massachusetts district to be valid, and the present libel, therefore, improperly filed. It should, therefore, be dismissed. Motion granted.

THE WILHELM.

VANCE *et al.* v. THE WILHELM.

(Circuit Court, E. D. Michigan. December 30, 1891.

No. 7,352.

1. TOWAGE—DUTY OF MASTER—APPROACHING STORM.

A tug towing two lumber schooners, from Cheboygan to Buffalo passed Thunder bay when there were some indications of a storm. Three hours later she was struck by a heavy squall, and two hours thereafter, during a fierce gale, a heavy sea carried away her starboard deck load, giving her a list to port, which interfered with steering. She rounded to, trimmed her load, and then proceeded on her course. Later the towline broke, and the schooners were driven on shore and lost. *Held*, that the master was not negligent in not taking shelter in Thunder bay, under the circumstances then prevailing, or in failing to turn back after he was struck by the squall, being then many miles on his course to Tawas bay, where safe shelter was to be found. 47 Fed. Rep. 89, affirmed.

2. SAME.

Nor was it negligence to proceed on her voyage after rounding to and trimming her load, since the position was one of great exposure, and the storm of uncertain duration. 47 Fed. Rep. 89, affirmed.

In Admiralty. Libel by Emery J. Vance and others, owners of the barge Mears, against the propeller Wilhelm, to recover for the loss of the Mears while being towed by the Wilhelm. Decree in the district court dismissing the libel, with costs. 47 Fed. Rep. 89. Libelants appeal. Affirmed.

Simonson, Gillett & Courtwright and *H. D. Goulder*, for appellants.

F. H. Canfield and *H. C. Wisner*, for respondents.

JACKSON, Circuit Judge. The libel in this case was filed to recover the value of the barge Mears, of which libelants were the owners, and which was lost on November 27, 1889, while being towed by the propeller Wilhelm, on a voyage from Cheboygan, Mich., to Buffalo, N. Y. It is claimed in the libel that the Mears was lost through the negligence of the propeller or of those navigating her. The special acts of negligence and of careless and unskillful towage alleged against said propeller are: (1) That said propeller Wilhelm was not properly officered and manned; (2) that said propeller attempted to tow said schooners Mears and Midnight across Lake Huron during a violent and increasing storm, without regard to the condition of wind, weather, and sea, and the indications of the weather existing after passing Thunder Bay light, instead of taking said tow to a near, accessible, and safe shelter in Thunder bay, as she could have done without difficulty, and as was required by ordinary care and seamanship; (3) in negligently failing to come about and hold her said tow head into the wind and seas after the loss of said propeller's deck load; (4) in negligently hugging the west shore of Lake Huron in a thick, driving snowstorm, and with a heavy wind and sea from the eastward; and (5) in negligently turning at full speed into the lake so sharply as to part the towline of said Mears, whereby said schooner was necessarily ren-

dered helpless in such close proximity to a lee shore that her destruction thereafter was inevitable. The answer denies the faults alleged against the propeller, and denies that the Mears was lost by reason of any negligence or want of care on the part of the Wilhelm.

A statement of the facts as found by the district court, and on which the libel was dismissed, is contained in the opinion of the district judge, reported in 47 Fed. Rep. 89, and is as follows:

"At 4 A. M., November 27th, the tow passed Thunder bay, at which time the weather was unsettled, wind from the eastward, and the sea moderate. About 7 o'clock [A. M.] the tow was struck by a heavy squall from about E. N. E., accompanied by snow, and from that time until the loss of the barges on Fish point, at about 2 o'clock P. M., the wind blew a gale from E. N. E. to N. E., accompanied by frequent squalls and a heavy sea. At about 9 A. M., when off Sturgeon point, the Wilhelm lost her starboard deck load, causing her to list so much to port as to interfere with her steering, at which time a cast of her lead gave six fathoms of water; whereupon she rounded to and headed the wind, until her cargo was trimmed to right her, when she went off upon her course, which was a little to windward of the usual running course to Tawas. About 1:30 P. M. a cast of the lead gave six fathoms. A blinding snow storm was then raging, and the master of the Wilhelm, deeming himself far enough to the southward until he could ascertain his exact position, decided to haul into the wind, and hold there until it broke, so he could pick up the land. After rounding to, and while holding head to wind and sea, the line between the Mears and Wilhelm parted, and both schooners were driven on shore near Fish point, and became total wrecks."

The district court made no express or direct finding upon the first fault alleged against the Wilhem, viz., that she "was not properly officered and manned." The evidence in the case not only fails to support this charge, but clearly establishes the contrary.

The court below found that the Wilhelm was guilty of no fault or want of proper care and prudence in failing to carry her tow into Thunder bay. This finding is sustained by the testimony in the case. The proof fails to show that the indications of rough and stormy weather were so clear and unmistakable when passing Thunder Bay light and Thunder bay that ordinary prudence and good seamanship required the Wilhelm to take shelter in said bay with her tow. The storm which endangered the safety of the Wilhelm and her tow was encountered in its severity about 9 A. M., when the propeller had passed many miles beyond the point for turning into Thunder bay. She had, in fact, traversed about 26 miles of her voyage towards Tawas, which is about 60 miles from Thunder Bay light. Under such circumstances and conditions, there was no duty on the part of the propeller to turn back in the face of the storm, and attempt to seek shelter in Thunder bay.

Counsel for libelants insist that the district court proceeded upon a wrong theory or unsound principle in reaching this conclusion. It is urged that the opinion of the district judge practically makes or holds the decision of the master of the Wilhelm to continue his voyage instead of taking shelter in Thunder bay conclusive on the court; that is to say, that the exercise of his judgment and discretion as to pursuing his voyage instead of seeking shelter in said bay could not be inquired into or

be condemned by the court. We do not understand the learned district judge as having laid down any such broad proposition, or that he intended in any way to dispute the well-settled rule that, while the law does not impose upon the towing boat the obligation resting upon a common carrier, it does require upon the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill; and, if these are neglected, and disaster occurs, the towing boat must be held liable for the consequences. The language employed by the trial judge, as we read it, was not meant to question or disregard this general rule, but simply to assert that there was nothing in the state of the weather, the season, the situation of the tow, and all the attendant circumstances, to show that the master's determination to proceed on his voyage was, at the time, either improper, reckless, or wanting in proper nautical skill and judgment. Limited and applied to the facts of the case before him, the language of the opinion is not open to criticism. We concur fully with the district judge in the conclusion reached by him on this point,—that the evidence fails to establish any fault or negligence on the part of the Wilhelm in passing Thunder bay, or in his failure to turn back to said bay after encountering the storm.

The next fault charged against the Wilhelm is that, after heading to the wind to trim and right herself in consequence of the loss of her star-board deck load, when off Sturgeon point, she did not hold her tow in that position until the storm abated. The court below held, and, as we think, properly, that, having rounded to for the purpose of righting herself and readjusting her deck load, so that she could be properly steered and managed, the Wilhelm could resume her voyage without being chargeable with negligence. The storm was of uncertain duration, and she and her tow were greatly exposed, and we fail to perceive wherein she should be condemned for continuing her voyage towards her port of destination, where safe shelter was to be found.

The allegation that the propeller negligently hugged the west shore of Lake Huron too closely in the prevailing storm is not sustained by the proof, or at any rate the proof does not so preponderate in that direction as to warrant this court in revising the finding of the district court to the contrary.

The alleged fault of the Wilhelm in turning at full speed into the lake when off Fish point, where the towline of the Mears was parted, and her loss thereby occasioned, is the act of negligence on the part of the propeller most earnestly insisted on before this court. The court below found that the second rounding to the wind was accomplished not at full speed, but after the speed of the propeller had been slackened down; that it was performed carefully, and in a proper manner; that it was a proper maneuver under the circumstances; that, "after rounding to, and while holding head to wind and sea, the line between the Mears and Wilhelm parted." While there is some conflict in the evidence as to the time and circumstances when and under which the tow line parted, we cannot say that the court below has failed to reach a correct conclusion therefrom. Those in the best position to know the facts sustain the

lower court's finding. We concur with the district judge in the opinion that the parting of the towline was not caused by any improper movement, or undue speed, on the part of the propeller in rounding to the second time about 1:30 or 2 P. M., but that said parting of the towline was caused by the force and violence of the storm, without fault or negligence on the part of the Wilhelm or of her officers. It follows, therefore, that the decree of the court below should be affirmed, with costs of this court and the lower court to be taxed against libelants, and it is accordingly so ordered and adjudged.

THE WELLINGTON.

ROBERTSON *et al.* v. THE WELLINGTON.

HEWITT v. SAME.

(District Court, N. D. California. October 20, 1892.)

Nos. 10,383, 10,398.

1. SALVAGE—COMPENSATION—APPORTIONMENT BETWEEN VESSEL AND CREW.

Where the value of the salvaged ship is small, the salvors are entitled to a larger per cent. than where it is large; and where the value of the salvaging vessel, and therefore the risk, is large, the award should be greater, and the ratio of the owner's share to that of the master and crew larger, than where it is small.

2. SAME.

The steamer *W.*, en route from British Columbia to San Francisco with a cargo of coal, broke her shaft, and an attempt to tow her by the steamer *M.* failed for lack of suitable hawsers. She was thereafter sighted 90 miles south of Cape Flattery, in a helpless condition, with a southeast gale blowing, by the steamer *S. P.*, and, after two hours of skillful work, and some slight injuries to the master and crew of the latter, was taken in tow, and brought safely to Royal Roads, 150 miles distant, the gale continuing. The value of the salvaging vessel was \$350,000; that of the salvaged vessel \$100,000; her cargo, having been discharged before the libels were filed, was not considered in making the award. The salvage claim of the owners of the salvaging vessel was settled by agreement for \$10,000. *Held*, that an award of \$2,500 should be given to the master, and \$100 to each of the crew who had been made a party to the libel.

In Admiralty. Libels *in rem* against the steamship Wellington by C. H. Hewitt, master, and William Robertson and others, seamen, of the San Pedro, for salvage. Decree for libelants.

H. W. Hutton and *Walter G. Holmes*, for William Robertson and others.

J. C. Bates, for C. H. Hewitt.

Andros & Frank, for the Wellington.

MORROW, District Judge. The steamer Wellington, on a voyage from Departure Bay, British Columbia, to San Francisco, with a cargo of coal, broke her shaft, and was taken in tow by the Norwegian steamer

Marie. After a time the hawsers with which the Wellington had been made fast to the Marie parted, and, as the latter vessel was in ballast, it was found extremely difficult, in the heavy seaway prevailing, to pass other and additional hawsers for the purpose of again taking the Wellington in tow. The effort was accordingly abandoned, and the Marie proceeded on her voyage. When the accident occurred to the Wellington is not disclosed by the pleadings or the testimony in the case, nor does it appear when she was taken in tow by the Marie, or how long she remained in tow of that vessel. The case before the court relates to events that occurred a day or two later, when the steamer San Pedro, on a voyage from San Francisco to Tacoma, sighted the steamer Wellington, about 90 miles south of Cape Flattery, at 1 o'clock and 20 minutes on the afternoon of November 3, 1891. A southeast gale was blowing at the time, and occasionally heavy rain squalls obscured the Wellington from the view of those on board the San Pedro. It was observed, however, that the Wellington was hove to, and, upon the San Pedro approaching nearer to her, it was discovered that she had her ensign flying union down. The Wellington was disabled, and lying in the trough of the sea, in practically a helpless condition, with the waves breaking over her. She signaled to the San Pedro to be taken in tow. The latter vessel approached the Wellington very slowly, coming up under her stern, to get a heaving line from the Wellington to the San Pedro. This was accomplished after some effort, and, after the end of the heaving line had been passed forward on the Wellington, it was bent onto a four-inch steel hawser, which was hauled on board the San Pedro by a steam winch. This steel hawser was bent onto the end of a chain cable on the Wellington. The San Pedro then started ahead slowly, but as soon as the strain of the tow came on the steel hawser it parted at or near the Wellington, and the main part was hauled on board the San Pedro. The master of the Wellington immediately signaled, "Don't abandon me," whereupon the master of the San Pedro backed his vessel, stern foremost, up to the windward of the Wellington, for the purpose of making another effort to take her in tow. In the mean time the crew of the San Pedro got up a new 14-inch Manilla hawser, which was bent onto the steel hawser, and the other end of the Manilla hawser taken on board the Wellington, and made fast. It was then about 4 o'clock. The work of securing the Wellington, which has been briefly described, had occupied about two hours. During that time the sea was rough, and the situation one of imminent danger to both vessels. The master of the San Pedro displayed courage and skill in handling his vessel, and the crew, under his direction, acted promptly and energetically. The master received some personal injuries, and it is claimed also that Robertson and Johnson, of the crew, were hurt while handling one of the hawsers, but the character or extent of these injuries has not been clearly established. The Wellington, being secured by a sufficient hawser, was towed by the San Pedro to Royal Roads, a distance of about 150 miles, where the two vessels arrived about 4 o'clock on the follow-

ing day. The gale prevailed during the night. The Wellington had on board about 2,000 tons of coal, and steered badly. She sheered first to one quarter, and then to the other. Her steering gear was out of order, and when she was anchored at Royal Roads it was discovered that she had a slight list to starboard.

Capt. Hewitt, the master of the San Pedro, testified that the Wellington was about 20 miles from land, and drifting to the north, when he took her in tow, and it was his opinion that, if he had not rendered her that assistance, she would have foundered during the night. There is no controversy as to the character of the service rendered the Wellington by the San Pedro. It is admitted that it was a salvage service. The question is as to the award to be made in favor of the master and crew of the San Pedro. The owners of the latter vessel have settled their claim with the owner of the Wellington for \$10,000, but the master and crew of the San Pedro have not been compensated for their services. The value of the Wellington was about \$100,000. Her cargo of coal was discharged before the libels were filed, and cannot, therefore, be considered in making the award. The reference that is made to the failure of the steamer Marie to tow the Wellington indicates that the principal difficulty in that effort was in the lack of a sufficient towline. The Wellington was certainly deficient in this particular, and such was probably the condition of the Marie, while the San Pedro had a large, new hawser, suitable for towing purposes. The Wellington was undoubtedly in a critical condition, and in danger of being lost. She carried fore and aft sails, but they were not sufficient to put her in steerage way, or even get her out of the trough of the sea. Her rescue must be attributed largely to the power and equipment of the San Pedro, under the direction of a skillful master. The San Pedro was a powerful vessel of 3,000 tons register, valued at \$350,000.

It is claimed on behalf of libelants that the salvage award should be at least one third of the value of the Wellington, and that the master and crew of the San Pedro should be allowed the difference between that sum and \$10,000, the amount already paid to the owners of the San Pedro. This method of calculation would result in an award to the libelants of about \$23,000. The claimant contends, on the other hand, that, while the libelants are entitled to some compensation, the services rendered, taken in connection with the other circumstances in the case, do not call for any such allowance. Numerous cases are cited on both sides, showing a wide range in the judgments of the courts in making such awards, but no uniform rule has been found, directing the court to an absolutely certain and satisfactory result in every case.

The salvage service rendered by the Zambesi to the Charles Wetmore near the mouth of the Columbia river in December, 1891, (51 Fed. Rep. 449,) was, in some respects, similar to the services rendered in this case. The situation of the Wetmore was apparently quite as serious as that of the Wellington. The Wetmore had been disabled by the loss of her rudder plates. An attempt to rig a drag or jury rudder composed

of a lot of rope and chains had failed to be of any use. The vessel could not be steered. She was in about six or seven fathoms of water, and was drifting slowly but surely towards the shore, only four or five miles distant, when, after considerable effort, she was taken in tow by the *Zambesi*. The *Wetmore* and her cargo were valued at \$409,219.09. The *Zambesi* was valued at \$220,000. The court allowed a salvage compensation of \$20,000,—a little less than 5 per centum of the value of the *Wetmore* and her cargo,—and distributed this award as follows: To the crew, \$5,000; to the master, \$5,000; to the mate, \$1,000; to the pilot, \$2,000; and to the owners of the *Zambesi*, \$7,000. The master and crew were allowed one half of the total salvage compensation, or less than 2½ per centum of the value of the saved property, but this per centum allowance would not, of course, produce the same result in the case at bar, since the *Wellington* is only valued, as before stated, at \$100,000. Manifestly, a proper allowance, where the value of the saved property is small, would be a larger per centum for like services than where the value of the property is much greater. Then, again, the proportion of the allowance to the master and crew, as compared to the whole award, does not necessarily furnish a sufficient standard of compensation. The skill and services of the master, the labor of the crew, the risk to the salving steamer, and its value, are all elements to be considered according to their degree. In the present case, the *San Pedro* was valued at \$350,000, while the *Zambesi*, in the case cited, was valued at \$220,000. It requires no argument to show that, in the risk of these two vessels in a salvage service, the *San Pedro* would be entitled to a larger compensation than the *Zambesi*, and a larger proportion as compared with the allowance made to the master and crew. It follows from these considerations that each case should be determined by the weight and value of all the attending circumstances, and this appears to be about the only general rule sanctioned by authority for the exercise of the judicial discretion. I will, therefore, in view of all the circumstances attending this case, allow the master of the *San Pedro* the sum of \$2,500, and to the members of the crew who have been made parties to the pending libel \$100 each. A decree will be entered accordingly.

RANGER v. CHAMPION COTTON-PRESS Co. *et al.*

(Circuit Court, D. South Carolina. July 25, 1892.)

CORPORATIONS—APPOINTMENT OF RECEIVERS—RIGHTS OF STOCKHOLDER.

Where a bill by one stockholder against the corporation and the other stockholders charges that the president refuses to account for money intrusted to him for the interests of the company, or to allow any inspection of the books by complainant, and an affidavit filed with the bill charges that the president is insolvent, and since the inauguration of the suit has mortgaged all his real estate with intent to defeat the claim of the company, there being no allegation of fraud on the part of the other stockholders, but rather a distinct intimation that the president is sustained by them, and the solvency of the corporation being unquestioned, the court will not, before the time for answer has expired, grant a motion for the appointment of a receiver, and thereby take the corporation out of the control of the large majority of the stockholders.

In Equity. Bill by Louis Ranger, a stockholder, against the Champion Cotton-Press Company and all other stockholders. Heard on motion for the appointment of a receiver. Denied.

Mitchell & Smith and Smythe & Lee, for the motion.

J. N. Nathans, Lord & Burke, and Bryan & Bryan, opposed.

SIMONTON, District Judge. This is a motion for the appointment of a receiver. The time for answering has not yet expired, and no answers are in. The motion, therefore, is on the bill and affidavits. The suit is brought by Louis Ranger, the holder and owner of 20 shares in the Champion Cotton-Press Company, against that corporation and all the other stockholders. The capital stock of the company is subdivided into 120 shares. The corporation purchased some time ago 19 of these, and has recently acquired title to 20 more. The defendants to this bill represent 61 shares. The bill charges abuse of his authority on the part of B. F. McCabe, the president, refusal on his part to account for some \$25,000 intrusted to him by the company to be used in the promotion of its interests, the application of this money to his own use, and his repeated and obstinate refusal to give complainant an inspection of the books of the company, or any information whatever of its affairs. The affidavit with the bill charges that McCabe is insolvent, and that since the inauguration of this suit he has been mortgaging—has in fact mortgaged—all of his real estate, with manifest intent to defeat the claim of the company. There is no allegation of fraud or fraudulent collusion on the part of the other stockholders, and there is a distinct intimation in the bill that McCabe, as president, is sustained by the other stockholders. Upon these allegations is based the motion for a receiver. The solvency of the corporation is unquestionable. So far as appears, there are no creditors.

At this stage of the case we deal with the allegations of the bill as if they were true. They present a grave condition of things, and without doubt, even with the qualifying statements of Mr. McCabe's affidavit, there does seem reason for great apprehension in the mind of the complainant. But this motion is, in effect, to take the control of this company out of

the hands of the majority of its stockholders and put it under the control of the court and its receiver; this, too, at the request of a person who is in a minority of the stockholders. The majority entertain and favor a certain method in the management of the affairs of the company, by which a large, and perhaps uncontrolled, power is given to the president. He thinks this all wrong. The majority have confidence and trust—up to this stage of the case, a remarkable degree of confidence—in their president. He has no confidence in him whatever, and is willing to believe the worst of him. The complainant, therefore, invites the interference of the court to remove this president, and change this, to him, dangerous method. He bases his prayer for the favorable consideration of the court upon the fact that he is a stockholder. But so are the others. Each one of them has as much right to the aid of the court, and to its interference, as he; and, as the aggregate of them have a larger number of shares than he, this majority have a paramount claim upon the court. The bill seeks no relief against the stockholders; makes no charge against them. It attacks Mr. McCabe, and seeks judgment against him. If a receiver be appointed, this would be in effect a decree against all the other stockholders, and against the corporation. Were it necessary in order to secure a proper account from Mr. McCabe, and a judgment against him, that a receiver should be appointed, this would be done at once. He is a trustee, and, as such, he can and should be made to account at the instance of all or any of his *cestuis que trustent*. The inevitable result of this bill, assuming that its allegations are in the main correct, is to secure such an accounting. But this will not warrant the court, at this stage of the proceedings, against or without the consent of the majority of the stockholders in this solvent corporation, to take its property out of its hands, to assume control of its management, and to wind up its affairs as if it were dissolved. One of the results of membership in a corporation—one of the evils, we may say—is that the minority are largely under the control of the majority. So long as the latter act in good faith, and within the constitution and by-laws of the corporation, they can adopt any line of policy which commends itself to their judgment, however great may be the hostility of the minority to it, or however deep their conviction that it is destructive of their interests. If this minority were original stockholders, they are themselves responsible for the powers left with the majority. If they have acquired the stock after the organization of the company, they have voluntarily assumed the risk. In any event, they are bound to the life of the corporation during the term of its charter, unless the other stockholders concur with them to dissolve it. In no event, therefore, can the court, at this stage of these proceedings, upon the prayer of a minority, appoint a receiver, and so defeat and disappoint the majority of the stockholders, and practically put an end to the existence of the corporation.¹

The motion is dismissed.

¹ Mor. Corp. § 281; *Hardon v. Newton*, 14 Blatchf. 876; *Einstein v. Rosenfeld*, 83 N. J. Eq. 309; *La Grange v. State Treasurer*, 24 Mich. 468.

RANGER v. CHAMPION COTTON-PRESS Co. *et al.*

(Circuit Court, D. South Carolina. November 3, 1892.)

1. CORPORATIONS—RIGHTS OF STOCKHOLDERS—MISCONDUCT OF OFFICERS—EQUITABLE RELIEF.

A bill by a stockholder against the corporation, its president, and all the other stockholders, charged that the president was using for his own benefit moneys of the corporation applicable to a dividend, and refused to account therefor; that, aided by the secretary, he refused to entertain or allow to be voted on a motion properly made at a regular stockholders' meeting calling for such an account; that in violation of the by-laws he deposited the corporate moneys in his individual name; that he wasted \$3,300 of the corporate moneys by bad management; that he loaned \$10,000 to a stockholder, secured by a pledge of the latter's stock; that afterwards the stock was bought by the company against complainant's protest; that the officers declined to make a statement of the company's affairs, or to allow complainant to examine the books; and that the president was attempting to depress the company's stock so as to compel complainant to sell out to him. *Held*, that the bill stated a case for equitable relief, and was good as against a general demurrer.

2. SAME—EQUITY RULE 94.

The bill did not come within equity rule 94, relating to suits by stockholders, or, if its provisions could be considered as applicable, the allegations substantially complied therewith. *Hawes v. Oakland*, 104 U. S. 450, distinguished.

3. EQUITY PLEADING—MULTIFARIOUSNESS.

An objection to a bill for multifariousness cannot be taken merely at the hearing, but must be specifically stated by demurrer or other pleading.

In Equity. Bill by Louis Ranger against the Champion Cotton-Press Company, B. F. McCabe, and other stockholders, for the declaration of a dividend and other relief. A motion for the appointment of a receiver before the answers were due was denied. 52 Fed. Rep. 609. Heard on demurrer. Overruled.

Mitchell & Smith, for complainant.

Lord & Burke, J. N. Nathans, and J. P. K. Bryan, for defendants.

SIMONTON, District Judge. This case comes up on the bill and demurrers thereto. The bill is filed by Louis Ranger, alleging that he is a stockholder in the Champion Cotton-Press Company, a body corporate. That the number of shares was 120, at \$700 each. That the company purchased and owned 19 of these. That Mrs. Elizabeth Dowie, who is a defendant, owns 15 shares; Miss Margaret B. Mure, another defendant, owns 15 shares; William Mure, another defendant, 10 shares; R. D. Mure, also a defendant, 6 shares; William Fatman and B. F. McCabe, the other defendants, 20 shares and 15 shares, respectively. Thus all the stockholders are parties to the suit, and with them the corporation. The bill further alleges that, having been prevented by the failure to hold, in 1891, the meeting provided by the by-laws, and the consequent failure to make an exhibit of the affairs of the company by the officers thereof, complainant requested and demanded, at the annual meeting in 1892, a clear and full exhibit of the business and affairs of the company, and that this was peremptorily refused by the president and other officers. That he desired also to examine the books of the company so as to ascertain its condition, and that this also was peremp-

torily refused him. He charges that B. F. McCabe, the president of the company, and the other officers, have managed the affairs of the company, not in its interests, but for the personal interest and benefit of B. F. McCabe, or their own. He specially charges that B. F. McCabe used the funds of the company for his own purposes and use. That he had on 4th June, 1891, and still has in his hands \$25,640.95 in cash, the money of the company, and that he has used and is using this money for his own purposes, uses, and benefits, and not for those of the company. That this money should be divided as a dividend among the stockholders; and that McCabe and the other officers refuse so to divide it; and McCabe refuses to give any account of it, using the same as his own. That although the by-laws of the company require all funds of the corporation to be deposited in the name of the company, and to be checked out by the treasurer with the countersign of the president, this rule has been disregarded by McCabe, the president. All the moneys of the company are deposited in his private account, and drawn on by his own checks, and used by him as he sees fit. That at the annual meeting the complainant caused a resolution to be offered by William Fatman, his proxy, calling upon McCabe to render an account of moneys advanced by the company to him for the purpose of contracting business for the company, which necessity no longer exists; and that McCabe, as chairman, refused to allow the resolution to be put and voted on, and that William Mure, the secretary of the meeting, refused to receive the resolution or to enter a vote thereon. That this action was taken by the said defendant to evade and prevent any accounting by said McCabe for such moneys, or repayment of the same to the company. The bill charges a loss of \$3,300 to the company from the bad management of McCabe, and from the use by him of the company's moneys for his own purposes. The bill charges the loan of \$10,000 company's money under the guise of his own to William Fatman, secured by pledge of stock of the company, and the subsequent purchase by the company of this stock, which purchase was against the protest and vote of complainant, and is in itself unlawful, null, and void, beside depriving the stockholders of a dividend to that extent. He charges that an examination of the books would show ample funds applicable to a dividend. The bill also charges that the action of McCabe is intended so to depress the stock as to compel complainant to sell out to him, and that he is using his power as an officer of the company to this end. The prayer is for such an examination; that McCabe pay back all moneys due and owing by him to the company, and in his hands by reason of his official position; that the company declare a dividend from all funds applicable to dividends; and that the dividend due to the complainant be paid to him; that, if it appear from an accounting that McCabe and the other officers of the company have used the funds and business of the company for their own purposes, they be required to make good the same and the losses therefrom; and that a receiver be appointed, and all the assets of the company be realized and divided among the stockholders.

The defendant B. F. McCabe files a separate demurrer. So does the Champion Cotton-Press Company. Mrs. Dowie, Miss Mure, William Mure, and Robert D. Mure join in a demurrer. The demurrers each allege for cause that the complainant has not, by his bill, made such a case as entitles him, in a court of equity, to any relief against the defendants.

Let us examine the demurrer of the president, B. F. McCabe. The bill charges that he has taken possession and control of the moneys of the corporation, depositing them in bank in his own name, in defiance of the express provision of the by-laws, and drawing them out on his own check, in his own discretion, for his own purposes; that especially he has in his hands the sum of \$25,660, money of the company, which he has converted to his own use, and for which he fails and refuses to account; that by this action, and the further misuse of the company's funds by lending them in his own name, the complainant has failed to receive his proper share of the funds of the company in the shape of a dividend on his stock; that all of his efforts to ascertain the truth about this misuse of funds by the president in an examination of the books, or in calling the president to account therefor, have been baffled and defeated by the direct and active effort of the president himself, aided by the other officers, going so far as to refuse to receive and put a motion for investigation made at a stockholders' meeting; and that there is a definite purpose so to use the affairs of the company as to depress the stock so as to compel complainant to sell out at a loss. All of these charges are by this demurrer admitted by Mr. McCabe without qualification or explanation; and in this course the corporation, presumably under his control and management, concurs. The other defendants limit their demurrer to such relief as is sought against them. Here we have the admission that a complaining stockholder in a trading corporation has been defrauded and deprived of his share of its property applicable to dividends, by the action of the president in misusing for his own purposes the moneys of the company. That every effort made by him to ascertain the facts connected with this charge have been thwarted by the positive and distinct refusal at the hands of the president, made at an annual meeting of the stockholders, to give any information or explanation whatever. This admission is made. It is denied that a court of equity can give any relief. Strong, indeed, must be the formal or technical difficulties which will forbid this court from at least hearing such a complaint. At the hearing an objection was made to the bill because it was multifarious. No demurrer or other pleading setting up this special defense had been filed. An objection of this character must be specifically taken in the pleadings. If not so taken, it is deemed to be waived. *Oliver v. Piatt*, 3 How. 333.

Does the bill make out *prima facie* a case for equitable relief? There can be no doubt that on a proper showing this court will come to the aid of a minority of stockholders. *Dodge v. Woolsey*, 18 How. 331. The doctrine is well stated in *Waterman on Corporations*, (page 578, § 319:)

"A court of equity will enjoin on behalf of the stockholders any improper alienation or disposition of the property other than for corporate purposes, and will restrain the commission of acts which are contrary to law, and tend to the destruction of the franchises as well as the improper management of the business of the corporation, or a wrongful diversion of its funds; and in such cases equity may grant relief at the suit of a single stockholder."

There are three classes of cases in which stockholders may complain. A minority may object to the business policy pursued by the majority, as tending to injure, perhaps destroy, their interests. In such cases the court will seldom or never interfere. The majority must govern, unless there be a palpable abuse of power or an interference with vested rights. Another class of cases is where the rights and interests of a corporation as a whole are threatened by the action of a third party, an outsider, and the corporate authorities, through inadvertence, negligence, or willfulness, will not move in their defense. In such cases, following *Dodge v. Woolsey*, *supra*, the courts of the United States lent a ready ear to the complaint of stockholders who interfered in behalf of the corporate rights. But this indulgence of the courts was greatly abused. Many cases were brought into the United States courts in which the jurisdiction was secured by collusion between a nonresident stockholder and the corporation which itself could not come into this court. This abuse was rebuked in *Hawes v. Oakland*, 104 U. S. 450. The evil was cured by the passage of the ninety-fourth equity rule, consequent on this case. This rule, by its terms, is made applicable to "every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation." *Hawes v. Oakland* (page 454) shows that these words, "other parties," mean "an outsider." But this case, and the rule consequent upon it, do not apply to cases in which there is a real contest between the stockholder and his corporation. *Leo v. Railway Co.*, 17 Fed. Rep. 278. *Hawes v. Oakland* draws the distinction broadly and clearly:

"That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity is neither to be wondered at nor regretted; and this is specially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise in the name of the corporation of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. * * * The case before us goes beyond this."

After stating that case and the principle of *Dodge v. Woolsey*, in both of which the action of an outsider was the *gravamen* of complaint, the court add, (page 454:)

"This is a very different affair from a controversy between the shareholder of a corporation and the corporation itself, or its managing directors or trustees, or the other shareholders who may be violating his rights, or destroying the property in which he has an interest."

The bill in this case does not complain of any business policy on the part of the corporation or of the other stockholders; nor does it charge supineness or neglect or collusion with any attack on corporate rights, interests, or privileges, by an outsider. The complainant charges that the president has converted to his own use moneys of the company in which, as a stockholder, complainant has an interest because they were applicable to dividends; that the president misuses his powers, and conducts the business of the corporation to his own purposes; that he controls and uses, in his own private banking account and for his own private purposes, all the funds of the company, against the express provisions of the by-laws; and that in this he is sustained by the officers of the company, who aided him in a peremptory refusal even to consider a motion of inquiry on this subject, made at a general meeting of stockholders. He charges that his own personal rights are infringed, and for this he seeks his remedy. As his rights are similar to those of the other stockholders, he makes them parties to his suit as parties in interest, so that they may take sides as they are advised, and, at least, may be present at the division of the common property, and see that he gets his just share and no more. His prayer is that the money unlawfully converted be returned, and out of it a dividend be declared, and that he get his dividend. This is a suit within the corporation, concerning no one but the stockholders and the company, seeking rights claimed only as a stockholder against the company and the other stockholders. The complainant could not work out his case through the corporation. His bill discloses the fact that there are but five males in this company, —Messrs. McCabe, William Mure, R. D. Mure, Fatman, and himself; that Fatman's stock has been bought in by the company; that Mr. McCabe is president, in full control of the business and of the funds of the corporation; that Mr. William Mure is vice president, secretary, and treasurer, and that thus he and Mr. McCabe together control the business, the seal, and the moneys of the company; that these two, at an annual meeting of stockholders provided in its by-laws, peremptorily refused to entertain a resolution of inquiry, and successfully prevented even its introduction. Under these circumstances, it would be absurd to require the complainant to ask these gentlemen to institute in the name of the corporation a suit against Mr. McCabe, involving the grave charges of this suit. *Tazewell Co. v. Farmers' L. & T. Co.*, 12 Fed. Rep. 752; *Heath v. Railway Co.*, 8 Blatchf. 347.

I am of opinion that this court has jurisdiction over the subject-matter of this bill; that the allegations and form of the bill are sufficient to sustain this jurisdiction; that the cause is not within the mischief or the provisions of rule 94, equity rules; that, if it were, the statements of the bill comply substantially with all the requirements of this rule. He is *bona fide* a stockholder. There is no suspicion of any collusion to obtain the jurisdiction of this court. He sets forth his effort to obtain relief within the corporation, and his bill is suggestive of the cause of his failure. The demurrers severally are overruled. The defendants have leave to plead or answer over, as they may be advised.

MOULTON v. SIDLE *et al.*

(Circuit Court, D. Minnesota, Fourth Division. November 13, 1892.)

1. MORTGAGES—FORECLOSURE—NOTICE TO OCCUPANT.

Rev. St. Minn. 1878, c. 81, tit. 1, § 5, enacts that, when a mortgage is foreclosed by notice and advertisement in a newspaper, "a copy of such notice shall be served in like manner as summons in civil actions in the district court, * * * on the person in possession of the mortgaged premises, if the same are actually occupied." *Held*, that where there was no actual occupancy, within the meaning of the law, but mere acts of ownership, the statutory notice was not required.

2. SAME—WHAT CONSTITUTES OCCUPANCY.

The purchaser of land, having mortgaged it to secure balance of purchase money, entered upon it, and planted some fruit trees. There was no dwelling upon the land, but across the street was another tract owned by her, on which there was a house inhabited by laborers, who worked at intervals on the land in question. *Held*, that there was no such actual occupancy thereof as to require notice of foreclosure proceedings to be given, under said statute, to the "person in possession."

In Equity. Bill by Martha A. Moulton against Henry G. Sidle and others to redeem mortgaged premises foreclosed under a power of sale contained in the mortgage. Bill dismissed.

Seldon Bacon, for complainant.

J. W. Lawrence, for defendants.

NELSON, District Judge. This suit was commenced December 30, 1890, and is brought to redeem a tract of land mortgaged in April, 1878, by the complainant and her husband, to the defendant H. G. Sidle. It is set up as a defense that the mortgage was foreclosed under the power of sale therein by advertisement in 1880, and the time for redemption has long since expired; that the complainant abandoned the property ever since the foreclosure of the mortgage, and never claimed the possession or occupation of the same until it had largely increased in value.

FACTS FOUND.

The facts in this case are:

On April 1, 1878, H. G. Sidle owned the land, about 9 acres, involved in this controversy, and on that day he and his wife conveyed the same to the complainant for the consideration of \$880, and at the same time the complainant and husband gave their two certain joint and several promissory notes to the said H. G. Sidle for the purchase price,—one for \$440, and interest thereon at 10 per cent. per annum until paid, maturing six months after date thereof; and the other for the sum of \$440, and interest thereon at the rate of 10 per cent. per annum until paid, maturing one year after the date thereof. These notes were payable at the First National Bank of Minneapolis, and were secured by a mortgage upon the property, executed by the complainant and her husband, and duly recorded. Default was made in payment of the principal and interest by the complainant and her husband, and no taxes were paid upon the property by them, and pursuant to the statute, under the power of sale, the proceedings to foreclose the mortgage were taken as they appear in the defendants' Exhibit No. 6, and a record thereof was duly made. The foreclosure proceeding was commenced September 4, 1880. No notice of the proceeding was served on the complainant or any person. The property mortgaged was sold October 23, 1880, for the sum of \$1,170, the amount due

on the mortgage, and interest, and the costs and expenses of the foreclosure. The mortgagee, H. G. Sidle, was the purchaser at the sheriff's sale; and one year after the sale expired October 23, 1881, and no payment of any sum has ever been made. On January 5, 1882, H. G. Sidle and wife, claiming ownership, entered into a contract with Daniel B. Tompkins, and another contract with Clarence H. Tompkins, wherein they agreed to sell and convey the property to them for the consideration of \$2,085. The Tompkins agreed to sell the property to John T. Williamson, and, having discharged of record their contracts with Sidle, the latter and his wife, at their request, executed a contract whereby the property was agreed to be conveyed to Williamson for the consideration of \$2,085. Williamson shortly afterwards died, and his estate was distributed by a decree of the probate court of Hennepin county, and on August 1, 1887, pursuant to such decree, H. G. Sidle and wife conveyed the property to Jesse E. Williamson and John Thayer Williamson, in the proportions in which they were entitled to the same, for the consideration named, of \$2,085.

At the time of the conveyance to Mrs. Moulton, April 1, 1878, she entered upon the land and planted trees for a nursery, and at the time the foreclosure proceedings were instituted there were about 50,000 small fruit trees growing, covering about one quarter of the land. The nine acres were fenced, but there was no dwelling house on the land. Across the street, on a cultivated tract of 20 acres owned by the complainant, there was a dwelling used as a boarding house for laborers, and some of these men once or twice a month would work on this 9-acre tract, and during September, 1880, were working on the land several days; what particular days do not appear. On July 8, 1881, the complainant abandoned her residence in Minneapolis, and went to Denver, Colo., where she lived until 1887, and then went to Chicago, living in that city 22 months, when she went to live in Nashville, Miss., where she now resides, and is a citizen thereof. The complainant and her husband, after their removal to Colorado, and up to the time of the commencement of this suit, visited Minneapolis, but paid no attention to the property, and paid no portion of the amount due thereon, principal or interest, nor any taxes, or claimed any interest in the land. At the time of the sheriff's sale, in 1880, the property was worth not to exceed \$880, and had increased so that at the time of the hearing it was worth \$12,000 or 15,000.

CONCLUSIONS.

It is claimed that the foreclosure proceeding is void for the reason that no notice under the statute was served upon Mrs. Moulton, the mortgagor and owner of the premises in 1880. Gen. St. Minn. 1878, c. 81, tit. 1, p. 842, § 5, enacts that, when a mortgage is foreclosed by notice and advertisement in a newspaper under the statute, "in all cases, a copy of such notice shall be served, in like manner as summons in civil actions in the district court, [Gen. St. Minn. 1878, p. 715, § 59, sub. 4,] * * * on the person in possession of the mortgaged premises, if the same are actually occupied." The object of the statute may be, as stated by counsel, to give the owner of the mortgaged premises notice of the steps that are taken to foreclose the mortgage. That may be true, and, if there is a person *in pedis possessio*, such notice must be served upon him, "not for his benefit solely, but for the owner, as well as others interested in the land."

The evidence in this case fails to show that the mortgaged premises were actually occupied, within the meaning of the law, so as to entitle

the complainant to notice. Acts of ownership, without actual occupancy, are not sufficient to put in operation the statutory provision in regard to notice. The bill is dismissed, with costs, and a decree accordingly will be entered.

TILLEY *et ux.* v. AMERICAN BLDG. & LOAN ASS'N.

(Circuit Court, W. D. Arkansas. October 31, 1892.)

1. BUILDING AND LOAN ASSOCIATIONS—LOANS TO MEMBERS ON STOCK—USURY.

T. subscribed for 800 shares of stock in the American Building & Loan Association, having its business headquarters at Minneapolis, Minn. By his contract and by the by-laws of the association he was to pay \$360 per month as dues on the 800 shares of stock, or \$4,320 per year, or \$38,880 in nine years. Desiring an advancement or loan on his stock, he made an application to the association to advance him \$30,000 on his stock, which was done. By the contract he was to pay 6 per cent. interest per annum on the same. In considering the question as to whether the loan was a usurious one under the laws of Arkansas, payments to be made by T. on account of his stock are not to be considered as interest on the \$30,000 borrowed, and not to be computed as such, since such payments are not made for the use of the money borrowed, but in order to acquire an interest in the nature of a partnership interest in the property of the association.

2. EQUITY—RELIEF AGAINST UNCONSCIONABLE STIPULATIONS—PENALTY OR LIQUIDATED DAMAGES.

If a contract is either founded in fraud, imposition, mistake, or when it works a hardship, or is harsh upon a party to it because it gives the other party to it an undue advantage, in a suit to enforce it, when a defendant comes into court and asks affirmative relief, such relief as is in harmony with equity and good conscience may be afforded him, when the contract is in the nature of a partnership, because the defendant in effect prays a dissolution of the partnership, and the court will ascertain the true interests of the parties, and will make such a decree as is just and right, upon the ground that a court of equity will take every one's act according to conscience, and will not suffer undue advantage to be taken of the strict terms of the law, or of positive rules, and will refuse to enforce the contract. Or, if the court can consider the amount named in the contract as a penalty, rather than liquidated damages, when the payment of money is the principal object of the contract, and the amount named is only accessory thereto, it will afford such relief as is just and proper, when full compensation can be readily ascertained.

3. SAME.

When the sum named in an agreement is to secure the performance of a collateral object, to wit, the payment of money, and that is the principal object, and the sum named is only collateral thereto, and the real damages would be disproportionate to the sum named, and such real damages can be readily ascertained, then a court of equity will consider the sum named as a penalty, and will afford such relief as in equity and good conscience is appropriate, considering the real injury sustained.

4. SAME.

Courts of equity will not permit parties to fix a sum specified in a contract as liquidated damages by naming it as such, and thus prevent the court from considering it as a penalty.

(Syllabus by the Court.)

In Equity. Suit by J. L. Tilley and Vesta Tilley, his wife, against the American Building & Loan Association, to cancel a bond and mortgage executed by plaintiffs to defendant. Defendant filed an answer and a cross bill asking a decree for the amount claimed to be due to it, and foreclosure of the mortgage. Decree for defendant for the amount advanced by it on the bond and mortgage and foreclosure of the mortgage therefor, and for cancellation of the remaining part of the contract.

Tabor, Humphries & Silverman and Rogers & Read, for plaintiffs.
Sandels & Hill and Chas. M. Cooley, for defendant.

PARKER, District Judge. This is a suit in equity to cancel a bond containing a contract between plaintiffs and defendant. The plaintiffs, by the terms of said bond, acknowledged themselves to be indebted to the defendant in the sum of \$60,000, for the payment of which they bound themselves. It was stipulated in said bond that if the said plaintiffs should pay or cause to be paid unto the defendant association, as its home office in the city of Minneapolis, state of Minnesota, on or before 9 years from the date thereof, the sum of \$60,000, being the amount of the said advancement and premium bid, with interest on \$30,000, being the amount actually advanced, at the rate of 6 per cent. per annum from October 7, 1889, payable monthly; or if they should pay or cause to be paid to the defendant association at its home office as aforesaid the sum of \$360 on the 21st day of each and every month thereafter, as and for the monthly dues on the said J. L. Tilley's 600 shares of the capital stock of said defendant association, and should pay all the installments of interest as aforesaid, and all fines which should become due on said stock, until said stock should have become fully paid in and of the value of \$100 per share, and should then surrender said stock to said association,—the obligation should then become null and void. It was further expressly agreed that, if at any time default should be made in the payment of said interest or of the said monthly dues on said stock for the space of six months after the same or any part thereof should become due, then the whole principal sum aforesaid should, at the election of said defendant association, immediately become due and payable, and that the sum of \$38,880, less whatever sum had been paid to said association, as and for the monthly dues on said 600 shares of said capital stock at the time of said default, might be enforced and recovered at once as liquidated damages, together with, and in addition to, all interest and fines then due. The enforcement of the contract was secured by a mortgage of even date with the above-named bond, given by plaintiffs upon a large amount of their real estate situated in Sebastian county, Ark., and fully described in the mortgage. It is claimed by plaintiffs that both the bond and mortgage are null, for the contract in the bond was void, because it is a contract for a greater amount of interest than 10 per centum per annum, and that the same, under the laws of the state of Arkansas, is usurious and void, and should be held for naught, and canceled; that the mortgage should also be canceled because given to secure the enforcement of a void contract; and that the same casts a cloud upon the title of the plaintiffs' real estate. The defendant claims that the contract is not usurious under the laws of the state of Arkansas, for the reason that the plaintiff J. L. Tilley became a member of the defendant association before the loan was made to him. The defendant association files its answer and cross bill. It therein asks for affirmative relief, to wit, a decree against the plaintiffs for the sum of \$34,560, being the sum of \$38,880, the total amount of nine

years' dues, less \$4,320, the amount of one year's dues, paid by plaintiff J. L. Tilley in advance. Defendant also asks for interest on the \$30,000 from October 7, 1890, at the rate of 6 per centum per annum, and fines at the rate of \$60 per month from and including July 21, 1890; and, further, that the mortgage be foreclosed; that the plaintiffs be barred of any equity of redemption; and that the premises so mortgaged be sold, or so much thereof as may be necessary, and the proceeds applied to the payment of defendant's debt.

From the evidence it appears that on June 17, 1889, J. L. Tilley, one of the plaintiffs, made his written application for membership in the defendant association, and subscribed for 600 shares of the capital stock of said association. That said application was on the 21st day of June, 1889, duly approved and accepted by the board of directors of defendant. That it, by its proper officers, on the 21st of June, 1889, issued to J. L. Tilley a certificate of stock for 600 shares of the capital stock of said association. That the same was duly delivered and accepted by the said J. L. Tilley. That by such acts of the defendant association and J. L. Tilley he became, on June 21, 1889, a member of said association. By the terms of said certificate of stock, and the rules, regulations, and by-laws of said corporation, the said plaintiff J. L. Tilley was required and agreed to pay as dues to the defendant association, on or before the 21st day of every month from the date of said certificate, the sum of 60 cents on each share of stock subscribed and held by him, until such stock should be fully matured and of the value of \$100 per share, or be withdrawn. Sixty cents dues on each share of stock is \$360 per month on 600 shares, which would be \$4,320 for one year on that amount of stock, and \$38,880 for nine years. That on June 27, 1889, the plaintiff J. L. Tilley made to the defendant association his application for an advancement of \$30,000 on his 600 shares of the capital stock in the association. That he bid as a premium for the privilege of obtaining said advancement the sum of \$50 per share. That this was done in accordance with the by-laws, rules, and regulations of the defendant. That the same was accepted by the defendant's board of directors, and the advancement applied for was duly made to Mr. Tilley, and that amount of money was paid him. He agreed to pay as interest on said advancement the sum of 6 per centum per annum. He paid out of this loan, as an admission fee, which went to the promoter of this company, Mr. Hurd, the sum of \$600. He paid also out of this loan the sum of \$4,320 as one year's dues on the 600 shares paid in advance, and he paid out of the loan the sum of \$1,800, the first year's interest at 6 per centum on the advancement of \$30,000. The defendant discounted the advanced payment of dues and interest. There is no doubt that the advancement of \$30,000 was made by defendant to J. L. Tilley on the faith that he would, in accordance with his contract, as shown by his bond, continue the monthly payment of dues on his 600 shares of stock until such stock should have fully matured,—that is, worth 100 cents on the dollar,—which, by estimate, would occur in nine years. It might occur sooner, although nine years seems by the

contracting parties to be considered as the time when the stock should fully ripen.

There can be no question in my mind that Mr. Tilley at the time of securing the advancement of \$30,000 was a member of the defendant association. That, in order to secure said loan, he bid \$50 per share on his stock subscribed. This was, in effect, a sale of his stock back to the defendant for \$50 per share, Tilley agreeing to pay 6 per cent. interest on the amount advanced to him. In addition to the payment of this 6 per cent. interest, which on the \$30,000 would be \$1,800 per year, he agreed to pay \$360 per month dues on his stock, which would be \$4,320 per year, or \$38,880 for nine years. He agreed to pay all fines assessed against him by the company for the nonpayment of dues. He was promptly to pay each month the 6 per cent. interest on the \$30,000 advanced. The defendant, in effect, when Tilley executed his contract with it, already owned his stock, for he conveyed it to the defendant, as expressed in the bonds, to secure the faithful performance of the obligations of the contract. And then he agreed to surrender the stock to the defendant for cancellation, when the same is fully paid up, and is of the value of \$100 per share. Mr. Tilley further agreed by his bond, if default was made in the payment of his monthly dues on his 600 shares of stock for the period of six months, that the whole of the dues, to wit, \$38,880, that by the terms of the contract were to be paid only so much per month and so much per year during the period of nine years, it might be, and the interest on the \$30,000 advanced, which was to be paid so much per month and so much per year, should at once become due and payable at the election of defendant as liquidated damages. Much has been said in the argument and brief of counsel filed in this case about whether it is a contract governed by the laws of this state or by the laws of the state of Minnesota. I am inclined to the opinion from the facts in the case that it is a contract governed by the laws of Arkansas. But, with my view of Mr. Tilley's relations to this association, and of the effect of this contract, I do not consider that the contract is usurious under the laws of this state, for the reason that at the time that he secured the advance or loan of \$30,000 the same was an advancement made to him on the 600 shares of stock as a member of the association. The \$30,000 loaned to him, with 6 per cent. interest thereon, was considered as the present value of his stock, and the defendant loaned him this much on the stock, he agreeing to pay 60 cents on each share of stock each month to keep the same alive. Upon this agreement alone there could be no taint of usury. So far it could not be considered usurious. But if we are to consider what Tilley was to pay on account of his stock, called "dues" in the contract, as a payment made by him for the use of the \$30,000, then there is usury in the contract. But I do not think the true rule of interpretation will authorize us to interpret the contract in that way, but that its true meaning is that Tilley was to pay the stipulated dues to acquire an interest in the property of the association. When Mr. Tilley became a borrower he occupied a double relation to the association,—that of a

borrower and a shareholder. If he was a shareholder alone, he would pay for his stock on the same terms as though he had become a borrower as well as a shareholder. The two relations are consistent. If he had not become a borrower, when his stock matured he would withdraw from the association its full value. But when he becomes a borrower he uses his stock to pay his debt with. In a contract of this kind, whether or not the debt is tainted with usury will depend upon the amount agreed in good faith to be paid as interest on the sum made as a loan or advancement on the stock. *Reeve v. Association*, (Sup. Ct. Ark.) 19 S. W. Rep. 917; *Taylor v. Association*, Id. 918; *Association v. Abbott*, (Tex. Sup.) 20 S. W. Rep. 118. If a so-called "payment of dues" on stock is a mere device to cover the payment, for the use of money, of more than the law recognizes as legal interest, of course the contract is a usurious one. It is claimed that the payment of dues on stock was, in this contract, a mere device to cover usury. I do not think the interpretation of the contract will warrant that conclusion. It may be a hard contract for Tilley and wife. It may be unfair to them. It may be one-sided, unjust, unconscionable, or affected by any other inequitable feature, and still not be usurious. I reach the conclusion that the advancement made to Tilley by the defendant association is a dealing in partnership funds. This view is supported by high authorities, both English and American. *Silver v. Barnes*, 37 E. C. L. 571; *Burbidge v. Cotton*, 8 Eng. Law & Eq. 57; *Shannon v. Dunn*, 43 N. H. 194; *Pattison v. Association*, 63 Ga. 373; *Parker v. Association*, 46 Ga. 166; *Delano v. Wild*, 6 Allen, 1. This loan or advancement was made to Tilley on the pledge of the shares of the association. In such a case the statutory rule for computing interest on partial payments has no application to the monthly dues paid on the shares so pledged, and such payments do not bear interest, or in any way reduce the amount on which interest is to be paid. *Reeve v. Association*, *supra*. The contract may be considered valid, because it was a dealing in partnership funds in such a way that the transaction was one where there was a sale of shares in anticipation of their ultimate value, or an advancement by the association to the member thereof of the matured value of his shares. This view of the nature of this contract will prevent the conclusion that it was tainted with usury. It really, therefore, becomes unnecessary to pass on the question whether it was a contract governed by the usury laws of Arkansas.

Mr. Tilley, for the sake of getting a loan of \$30,000 for nine years, agreed to pay interest at the rate of 6 per cent. for that time, making \$16,200 he was to pay as interest, and in shape of dues on his stock subscribed he was to pay in the course of nine years \$38,880 in monthly installments at the rate of \$360 per month,—making a total sum he was to pay the association at the end of nine years of \$55,080, aside from fines that might be assessed against him for not promptly paying his dues; and for these large sums of money he gets \$30,000 advanced to him at the time of the contract. Then the \$38,880 to be paid in dues is not paid at the end of the nine years, but its payment is monthly from the execution of the contract. The association may derive large bene-

fits during the nine years from these dues so paid in advance in the shape of interest. But Mr. Tilley is to have none of this benefit, as he, by the contract, is to deliver up his stock to be canceled, and is to have nothing but the \$30,000. It is equity and justice that Tilley should pay back the \$30,000 advanced to him, with interest on the same at 6 per cent., because he received this amount of money from defendant, and used the same. His mortgage should be foreclosed to enforce the payment of the above amount; but in view of the nature of this contract in reference to the amount of dues to be paid, and the time of their payment, and of the further fact that the contract puts it in the power of the defendant to declare the whole of the \$38,880 of dues to be due at once on the failure of Tilley for six months to pay dues, should Tilley be required to do more than this? Should he be required to pay the \$38,880, which he agreed to pay to secure an advancement of \$30,000, and agreed to pay in such a way as that defendant should make a large profit out of it, in which Tilley was to have no share, for he was to have no interest whatever in any gains arising from the monthly payment of his dues? I consider that the mere statement of the contract, as affecting Tilley, shows it to be a hard one, and one which conferred on the association large benefits.

Can the court afford him any relief in the face of his contract? If we consider the contract, as we should do,—as one dealing in partnership funds,—when the defendant comes into a court of equity and asks for the relief it prays for in this suit, does not this conduct of defendant in effect work a dissolution of the partnership relation? Is it not to be taken by the court as a determination by defendant to have that relation broken up? If so, may not a court of equity make such a decree touching the funds of the partnership, as affecting Tilley and this defendant, as justice and good conscience should require? This is a ground upon which a court of equity may stand, and do the very right in the premises. Again, if this contract is grossly unreasonable and harsh, cannot relief be had by the court refusing to enforce that part of it which is grossly unreasonable and harsh? It seems to me, for the reasons above named, that the contract providing for the payment—it may be, in six months after its execution—of the \$38,880, and 6 per cent. interest on the \$30,000, and \$60 per month as fines upon 600 shares of stock for nonpayment of dues, is unfair to the plaintiff Tilley; that it is to the above-named extent largely one-sided as to him, and therefore unjust and unconscionable. It thus becomes inequitable to the extent of the part providing for the payment of \$38,880 as dues, it may be, shortly after the making of the contract; that its enforcement to the extent of collecting that sum from him would be oppressive and hard on him, and would work an injustice against him. If this was a suit for the specific performance of the contract, and such facts existed, the court would certainly exercise a sound discretion, and a specific performance would be refused. When the suit is to recover on a contract that is of the above nature, to enforce the payment of a stipulated amount, growing out of an inequitable and harshly unjust contract, in

justice and equity, why should not the same rule prevail? The oppression and hardship in this case results from the contract itself. I think the rules applicable—if this was a suit to enforce specific performance of this contract—apply when the defendant comes into a court of equity, and by cross bill asks affirmative relief on the contract. The court may exercise a sound discretion, and refuse to give such relief as to such part of the contract as shall appear to be harsh, oppressive, and unjust. The principles announced in the cases where specific performance is asked should be applicable where the contract is sought to be enforced by the collection of that which results from its oppressive and unjust provisions. As remarked by Mr. Justice BRADLEY in *Railroad Co. v. Cromwell*, 91 U. S. 643:

"The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain. This has been so often held on bills for specific performance and in other analogous cases that it is unnecessary to spend argument on the subject."

If this was in a court of law, it would have to give judgment for the whole of the \$38,880 and the 6 per cent. interest on the \$30,000, and the amount due in the shape of fines, because it is so denominated in the bond. But it is a court of equity, and it can do what conscience, equity, and justice demand shall be done, and give such relief as these guardians of right demand shall be given. In *Willard v. Tayloe*, 8 Wall. 557, Mr. Justice FIELD said:

"In general, it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties."

The English authorities referred to in the above case fully sustain the principles therein declared. Mr. Story, in section 750 of his *Equity Jurisprudence*, says:

"Indeed, the proposition may be more generally stated, that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree."

Again, at section 750a, he says:

"Upon grounds still stronger, courts of equity will not proceed to decree a specific performance when the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension. * * *"

Again, at section 331, he says:

"And here we may apply the remark that the proper jurisdiction of courts of equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law or of positive rules. Hence it is that, even if there be no proof of fraud or imposition, yet if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere, and grant relief."

Mr. Pomeroy, in his *Equity Jurisprudence*, (section 1404,) when referring to classes of contracts named in a previous section, says:

"The object of the foregoing paragraph is to formulate the general rule which determines the classes of contracts in which the equitable jurisdiction may be exercised. But even when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, matter of discretion, * * * controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case."

The above principles are fully sustained by *Seymour v. Delancey*, 6 Johns. Ch. 222, and the many English authorities referred to in the case, as well as the American authorities referred to in the notes to the same. Mr. Pomeroy, in his *Equity Jurisprudence*, in his note to section 1405, says:

"If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature, or if its enforcement would be oppressive or hard on the defendant, or would prevent the enjoyment of his own rights, or would work any injustice, * * * its specific performance will be refused."

In note 1, on page 449, he says:

"This rule generally operates in favor of defendants, but may be invoked by a plaintiff when a defendant demands the remedy by a counterclaim or cross complaint. The oppression or hardship may result from the unconscionable provisions of the contract itself."

There is still another method which may be adopted by the court to enable it to grant just such relief as equity and justice may require. It is to consider the \$38,880 named in the bond a penalty to secure the performance of a collateral object, to wit, the payment of money advanced, and not as liquidated damages, although named as such in the bond. The payment of money is the principal intent of the contract, and the amount named, to wit, \$38,880, is only accessory thereto, and therefore only intended largely to secure the payment of the amount advanced. If the amount prayed for is given, the damages would be disproportionate to the nature of the injury sustained. Full compensation can be readily ascertained and made in equity. When the above conditions exist, the amount named in the bond, although designated as "liquidated damages," may be considered by a court of equity as a penalty, and the court may afford such relief as equity and good conscience demand. Courts of equity will not permit their jurisdiction to be evaded merely by the fact that the parties have called a sum "liquidated damages," which in fact may be considered as a penalty. Here, then, the sum named is in excess of the probable injury. The real injury may be ascertained, and full compensation can readily be made, and therefore full and adequate relief can be afforded in equity. When such conditions exist, courts of equity will consider the sum named a penalty, rather than liquidated damages, and give the proper relief. The above rule is sustained by sections 381, 433, Pom. Eq. Jur. Judge Story, in section 1314 of his *Equity Jurisprudence*, says:

"The general principle now adopted is that, whenever a penalty is inserted merely to secure the performance of the enjoyment of a collateral object, the

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latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof of the damage really incurred by the nonperformance. In every such case, the true test, generally, (if not universally,) by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere; if it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party on paying the principal and interest."

Sedgwick on Damages, § 407, says:

"In every case where a fixed sum is stipulated as damages the court will look to see whether the stipulated compensation is a reasonable one; and, if not, they will require damages to be assessed, as if no stipulated sum was named in the contract."

Speaking of the way courts have regarded this question, he continued:

"All seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach."

The supreme court of Michigan, in *Myer v. Hart*, 40 Mich. 517-523, says:

"Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted by express stipulation to set this principle aside."

In *Harris v. Miller*, 11 Fed. Rep. 118, Judge DEADY says:

"When the contract is explicit that the sum named shall be considered as liquidated damages, the contract is to be enforced according to its terms, unless qualified by some other circumstance; as, when one agrees to pay a larger sum upon the failure to pay a smaller one, or when the damages resulting from the failure to perform a contract are certain, or can be reasonably ascertained by a jury. But whenever the contract is for the doing or not doing of a particular act or acts, and there is no certain pecuniary standard by which to measure the damages resulting from a breach thereof, an agreement to pay a stipulated sum as damages for such breach will be enforced literally."

In *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. Rep. 878, the above principle is fully recognized, and Mr. Justice MATTHEWS quotes the saying of Lord Chancellor MACCLESFIELD in *Peachy v. Duke of Somerset*, 1 Strange, 447: "It is the recompense that gives this court a handle to grant relief." In determining the character of the bond in this case there are two views that may be taken of it. We may without question consider the \$60,000 named in it as a penalty, and the naming by the parties of the \$38,880 as an attempt to fix the amount of injury or damages, upon the principle above mentioned; or we may consider the \$38,880 as a penalty, bearing in mind that parties cannot deprive a court of equity of the right to consider the bond a penal one when the \$60,000 is a penalty by naming the amount of injury sustained, provided the conditions exist which give a court of equity the right to go behind the designation of the party. Nor can they prevent the court from considering the \$38,880 as a penalty when the conditions exist which give the court the right to disregard the designation of the parties.

I think in this case we may consider the \$38,880 as a penalty, and we may go behind its designation, and see what the actual damages are, and award them. Then, either on the ground that this is a partnership transaction, the court may give such relief as is right and just, or on the ground that when the court has jurisdiction—has the case—it may refuse to enforce so much of the contract as is inequitable or harsh, or will work a hardship on the plaintiff J. L. Tilley; or, because the court may construe the sum named in the bond as a penalty, it may give such relief as may be responsive to the demands of equity and good conscience. The relief that would meet this demand would be to decree the amount of the \$30,000 advanced, with 6 per cent. interest on the same, less the year's interest already paid in advance, and to decree the foreclosure of the mortgage given to secure the payment of the debt, and to cancel the remaining part of the contract; and such will therefore be the decree in this case.

ST. LOUIS & S. F. R. CO. v. FOLTZ.

(Circuit Court, W. D. Arkansas. Oct. 31, 1892.)

MARRIED WOMAN'S SEPARATE ESTATE—CONVEYANCES.

Under the constitution and laws of Arkansas, a married woman may own real and personal property separate and apart from her husband, and she may devise, bequeath, and convey the same as if she were a *feme sole*. As to such property she is *sui juris*.

EMINENT DOMAIN—POWERS OF NONRESIDENT RAILROAD COMPANY.

A nonresident railroad company, which has not become domesticated under the constitution of Arkansas, cannot condemn or appropriate lands for a right of way, for depot grounds, car yards, or machine shops.

SAME—COMPENSATION FOR LANDS OF MARRIED WOMAN—ESTOPPEL BY ACCEPTANCE OF AWARD.

If such a railroad company acquires a right to come into the state to do business, but still remains a nonresident corporation, and it undertakes to acquire a right of way, etc., by condemnation proceedings against a married woman, who owns real estate as her separate property, and such married woman takes part in such condemnation proceedings, and accepts the award, she is estopped from recovering by a suit of ejectment the lands condemned after she has retained the money for a number of years, and still retains it, although the lands were condemned illegally.

SAME—ACQUIRING LANDS BY AGREEMENT.

Although a constitutional provision of a state may prohibit a nonresident railroad company from acquiring lands for the use of its road by condemnation or appropriation, still it may acquire such lands by an agreement with any citizen having a right to contract.

SAME—CONSTITUTIONAL PROVISION FOR CONDEMNATION.

The words "condemn or appropriate," used in the constitution of the state, mean a taking of private property under the right of eminent domain, and not by contract.

SAME—IMPLIED CONTRACT—ESTOPPEL BY ACQUIESCENCE.

A married woman may, under the laws of the state, make a contract with a nonresident railroad company having a right to do business in the state, by which she may convey to it a right of way for its roadbed, car yards, machine shops, etc. If she takes part in condemnation proceedings which may be illegal, and accepts the damages awarded, and retains the same for over six years, when she brings suit to recover the land, still retaining its value found by the jury in the condemnation proceedings, her conduct will be construed as amounting to an implied contract with the railroad company for a right of way, etc., out of her separate property. It will be held as an acquiescence by her, and in equity she will be estopped.

7. SAME—ESTOPPEL OF MARRIED WOMAN AS TO HER SEPARATE PROPERTY.

When, under the laws of a state, the common-law disabilities of a married woman have been so far removed as to place her in a position where she is *sui juris* as to her separate property, she is subject to the law of estoppel *in pais*, and she is estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. The law presumes the party knew her rights. Her silence for that length of time, with possession and enjoyment of the money, and a failure to return it when the property was her separate property, makes up a state of case which creates an estoppel, because it amounts to a condition which must in equity and good conscience be construed as a ratification of the act of the railroad company in paying her the money and taking possession of the property.

8. SAME.

When she contracts as if unmarried she can be estopped as if sole.

9. SAME:

A married woman who can under the law hold property in her own right becomes *sui juris*, and she may be bound by an estoppel *in pais*, created by her silence.

(*Syllabus by the Court.*)

In Equity. Suit by the St. Louis & San Francisco Railroad Company against Mary A. Foltz to restrain the prosecution by her of an action of ejectment against the railroad company. Heard upon bill and answer and on the pleadings and exhibits in the action of ejectment as exhibits. Decree in favor of complainant for a perpetual injunction.

Defendant set up in her complaint in the action of ejectment that she was entitled to the immediate possession of certain lands therein described, for the reason that plaintiff undertook, in the state circuit court of Sebastian county, Ark., to condemn, under the laws of the state, the said lands to be used for a roadbed and right of way for its said railroad, as well as for car and machine shop purposes. Said suit was removed to this court on the application of plaintiff, on the ground that it was a nonresident corporation,—a citizen of the state of Missouri. At the November term, 1883, on January 15, 1884, of this court, condemnation proceedings were had in this court, and the jury assessed the damages of plaintiff at \$4,180.84. Said amount was paid into court by plaintiff, and paid by order of the court to defendant, and accepted by her, and the judgment of the court was entered vesting the said lands in plaintiff, to be used by it for the purposes aforesaid. The defendant in her original and amended complaint claims that plaintiff has forfeited the right to the use of about 24 acres of said land, because it has not used it for the purpose for which it was condemned; again, that the plaintiff had no right to condemn, because it was a nonresident corporation, and it could not, under the constitution of the state, take property by condemnation proceedings; that the right of eminent domain cannot be exercised in favor of such a corporation; that all the condemnation proceedings were a nullity, and that no right or title passed to plaintiff by them. Pending the suit in ejectment, the plaintiff filed its bill in equity, praying that defendant be restrained from proceeding any further with her suit at bar, for the reason that her conduct in accepting the sum of \$4,180.84,—the amount awarded by the jury in the condemnation proceedings,—and holding the same, and not returning said sum into court, amounts to an estoppel *in pais*. Plaintiff, in its bill in equity, further asks that its title be quieted to said

land, and that the cloud growing out of the claim of defendant be removed. To this bill in equity defendant filed an answer. By agreement of parties the case was heard by the court upon the bill and answer, and the complaint and answer in the action of ejectment, and all exhibits in said suit were considered as exhibits in the equity case. Mrs. Foltz did not claim the right to recover the whole of the 31.07 acres, but that amount, less 7 acres, used by the railroad for its roadbed and car track.

Tabor, Hendrick & Horton, for plaintiff.

B. R. Davidson, for defendant.

PARKER, District Judge. The first question is: Did the St. Louis & San Francisco Railroad Company, at the time this property was condemned, have a right to take property by condemnation proceedings, it being a railroad corporation residing in Missouri? Section 11, art. 12, of the state constitution, provides that no foreign corporation shall "have power to condemn or appropriate property." This means that a corporation which is not a domestic one cannot use the power of eminent domain to acquire property for its uses; that a railroad company which does not become domesticated cannot use the right of eminent domain to acquire necessary real estate for its right of way, depot grounds, machine shops, etc. The St. Louis & San Francisco Railroad Company was, at the time of the condemnation proceedings, a foreign corporation, the same being chartered by the state of Missouri; but by the laws of the state of Arkansas (Sess. Acts, approved March 16, 1881, § 5) the St. Louis & San Francisco Railroad Company had a right to come into the state upon certain conditions. A part of said section 5 of said act is as follows:

"Any railroad company incorporated by or under the laws of any other state, and having a line of railroad built or partly built to or near any boundary of this state, and desiring to continue its line of railroad into or through this state, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property, rights, privileges, lands, tenements, immunities, and franchises of any railroad company organized under the laws of this state, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own, and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this state might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose, and the building of said line of railroad. * * *

We find the facts to be that in September, 1880, a railroad company, called the Missouri, Arkansas & Southern Railroad Company, was incorporated under the laws of Arkansas for the purpose of constructing a railroad from a junction with the St. Louis, Arkansas & Texas Railroad Company, organized under the laws of the state of Arkansas, at Fayetteville, Ark., through a portion of the counties of Washington, Crawford, and Sebastian, to a junction with the Little Rock & Ft. Smith Railway

at or near Ft. Smith, in Sebastian county; that in January, 1882, said Missouri, Arkansas & Southern Railroad Company sold and conveyed to the St. Louis & San Francisco Railroad Company all its railroad, completed and uncompleted, with all its rights, privileges, franchises, and immunities belonging or in any wise appertaining to the running, operation, or maintenance of the same, together with all the depots, etc., and rolling stock and other chattels, etc., connected with and used in or about the same, and all of its real estate, etc., which it had any interest in. This the Missouri, Arkansas & Southern Railroad Company, under the law above set out, could rightfully do; and although, by such sale, the property in controversy did not pass by the conveyance to defendant of the Missouri, Arkansas & Southern Railroad Company and its rights and privileges and franchises, because such company had not yet exercised the right of eminent domain as to the property in controversy, yet the effect of such conveyance was to give the defendant a legal status in the state, with a full right to do business as a railroad corporation therein, although it was still a foreign corporation.

We are here brought face to face with the question whether Mrs. Foltz, a married woman, holding the property in her own right as her separate property, after she has taken part in the condemnation proceedings instituted by plaintiff, which was legally in the state to do business, but not a citizen thereof, and therefore, under the constitution, having no right to condemn property for its uses, and after she has taken the money found by the jury to be the value of the land, and keeps the same, is prevented by an estoppel *in pais* from recovering the land in controversy. To the lay mind, controlled by a sense of justice and right, it would look as though she ought not to have both money and land. She has had the use of the \$4,180.84 for six years, seven months, and five days, up to the time she brought her suit; and this use, at 10 per cent., would be worth \$2,758.29. It does not look hardly right that she should have this money, the interest on the same, and the land as well. Still, if the law gives it to her, it is right she should have it. The railroad company, being rightfully in the state, could make an agreement with Mrs. Foltz, or any one else, for a right of way; for although the law may prohibit a party from acquiring a right, yet, if not against public policy or immoral to do the act conferring the right, the same may be acquired by agreement with a citizen. There is nothing in the constitutional provision prohibiting a nonresident railroad company from agreeing with citizens of a state, when it is rightfully in the state to do business, for a right of way. If Mrs. Foltz could agree with the company for a right of way, could she, as a married woman, do that which amounts to an implied agreement? While under the common-law disability of coverture, I do not think she could waive the constitutional provision, which, in effect, is one in her favor. But her common-law disability of coverture has been removed by article 9, § 7, of the constitution of the state, which is that "the real and personal property of a *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and re-

main her separate estate and property, and may be devised, bequeathed, or conveyed by her, the same as if she was a *feme sole*; and the same shall not be subject to the debts of her husband." The act of April 28, 1873, (sections 4623-4631, Mansf. Dig.,) passed in pursuance of this constitutional provision, gives to a married woman sole and entire control over her property, and authorized her to sue and be sued alone in the courts in respect to her property. It repealed by implication so much of the act of December 14, 1844, as exempted married women from the operation of the statute of limitations. *Garland Co. v. Gaines*, 47 Ark. 558, 2 S. W. Rep. 460. From my examination of the law I conclude that Mrs. Foltz, under the law of this state removing the disabilities of married women, has imposed on her corresponding liabilities; that, as to the property in controversy, she is *sui juris*. I think that Herman on Estoppel and Res Judicata, at section 1105, expresses the true rule when he says:

"Under the various statutes removing the common-law disabilities from married women, corresponding liabilities have necessarily been imposed on them. They take the civil rights and privileges conferred subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are to be determined under like circumstances. To the extent and in the matter of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner, as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts when they have statutory capacity to act. A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves."

The above doctrine is fully sustained by Dr. Pomeroy's Equity Jurisprudence, section 814, which says:

"Upon the question how far the doctrine of equitable estoppel by contract applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single."

In *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. Rep. 870, the supreme court of Minnesota said:

"Married women cannot enjoy their enlarged rights of action and of property and remain irresponsible for the ordinary legal and equitable results of their conduct. Incident to this power of married women to deal with others is the capacity to be bound and to be estopped by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal. * * *

I take it that it is a true principle that Mrs. Foltz could have made a contract with the railroad company to sell them the land she held in her own right. If she could make such a contract, then she may, by her

conduct, make a contract by implication. Her conduct may amount to an equitable estoppel, and thus create in this case an implied executed contract,—executed because the railroad has the land, and she has the value thereof. If she can make an agreement, and be bound by it when executed, she may renounce any constitutional provision prohibiting the railroad company from becoming the owner of real estate by condemnation. She may waive such a constitutional provision, as it has nothing in it prohibiting a private citizen from giving or selling lands for right of way, etc., to a nonresident railroad company. *Embury v. Conner*, 3 N. Y. 511, 53 Amer. Dec. 325. Principal case and notes and authorities therein cited. Mrs. Foltz, in this case, could act as though she was a *feme sole*. She was *sui juris*; and when she entered into the condemnation suit, and accepted the award made, and has kept the same, she is not in position to assail or deny the validity of the proceedings. Her action in that regard amounts to an equitable estoppel. In *Water Co. v. Middaugh*, 12 Colo. 434,¹ it was held that a party accepting and retaining the fund of a void judgment is estopped from assailing the judgment itself. That was a case very much like this, as it was a condemnation proceeding where the court had no right to condemn because of want of jurisdiction. It is a maxim that all are presumed to know the law. Then, in legal contemplation, Mrs. Foltz knew the illegality of this condemnation at the time it was made, and, knowing this, she accepted the value of her land as found by the jury, and kept it from the time of the condemnation to the time of bringing this suit, when she for the first time offered to repudiate the proceeding by assailing its legality. Her conduct must be taken as an acquiescence by her in the validity of the proceedings, and as creating a condition out of which springs into existence an implied contract between herself and the railroad company, which has been executed by her receiving and retaining the money and the railroad company receiving the land. In *Pryzbylowicz v. Railroad Co.*, 3 McCrary, 586, 17 Fed. Rep. 492, it was decided that "the owner of land which has been taken by a railroad for its right of way may by his own act estop himself from demanding actual payment of the compensation as a condition precedent to the taking for the public use. If the owner gives license, either expressed or fairly implied; if he expressly consents, or with full knowledge of the taking makes no objection, but permits a public corporation to enter upon the land and expend money, and carry into operation the purposes for which it is taken,—he may not then be permitted to eject the parties from the possession for want of payment." That was a case where there was no compensation paid. This is a case where full compensation was paid. Lord Chancellor CORTENHAM, in the case of *Duke of Leeds v. Earl of Amherst*, 2 Phil. Ch. 117-123, said: "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain."

It is claimed in this case that the railroad company has lost its right

¹21 Pac. Rep. 565.

to this property by nonuser for the purpose for which it was obtained. There is no evidence of the intention of the railroad company to abandon the use of the land for the purpose for which it was obtained, except its nonuser for that purpose up to this time. Under the circumstances of this case, that is not enough to show an abandonment. *Johnston v. Hyde*, 33 N. J. Eq. 632. At the time the railroad company obtained the property from Mrs. Foltz there was no condition that it was to be used for machine shops, etc., within a certain time. A railroad may properly provide for future requirements of a more extended traffic, and may condemn more land than it at present needs, but only what may in good faith be presumed necessary when its traffic shall be extended. *Mills*, Em. Dom. § 58; note, p. 352, 27 Amer. & Eng. R. Cas., (*In re Staten Island Rapid Transit R. Co.*, [N. Y. App.] 8 N. E. Rep. 548.) The acts of Mrs. Foltz are of a character to create a condition where the railroad company holds the property by an implied contract. This is equivalent to a grant by Mrs. Foltz. This property, obtained by grant, expressed or implied, is not lost by a mere nonuser for the length of time the railroad company has held the property. *Barnes v. Lloyd*, 112 Mass. 224. In *Eddy v. Chace*, 140 Mass. 471, 5 N. E. Rep. 306, the supreme court of Massachusetts said:

"Mere nonuser of an easement like the one in question, though continued for more than 20 years, will not extinguish it. The owner of an easement may abandon it, but mere nonuser does not show an abandonment. To effect this the nonuser must originate in or be accompanied by some decided and unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it."

There may have been a nonuser of the part of the land in controversy for the time the railroad company has had it, but that does not of itself amount to an abandonment of the land. There must be other evidence of an intention to abandon it. *Johnston v. Hyde*, 33 N. J. Eq. 642.

I think that the injunction should be made perpetual to restrain Mrs. Foltz from proceeding with her action of ejectment for the recovery of the lands in controversy, and it is so decreed.

WHITEHURST *et al.* v. McDONALD.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 20.

BOUNDARIES—NATURAL STREAM—RIPARIAN RIGHTS.

Where the calls in a conveyance of land are for two corners, one at high-water mark on the bank of a stream, and the other at the stream, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, and all riparian rights pass, unless a different intention of the parties is shown by either their conduct or the conveyance. *County of St. Clair v. Lovington*, 23 Wall. 46, and *Railroad Co. v. Schurmeier*, 7 Wall. 272, followed. 47 Fed. Rep. 757, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Equity. Bill by Richard H. McDonald against O. E. Whitehurst, Daniel J. Turner, Dennis Ethridge, and Frank Dusch, trustees of the Norfolk Classified Building Association, the said Norfolk Classified Building Association, and Joseph B. Allen, to remove cloud from and to quiet title. Judgment for complainant. 47 Fed. Rep. 757. Defendants appeal. Affirmed.

Wm. W. Old, for appellants.

Robert M. Hughes, for appellee.

Before BOND and GORR, Circuit Judges, and SIMONTON, District Judge.

BOND, Circuit Judge. In 1857 Mary Tarrant died seised of certain real estate in Virginia. She left surviving her three children and two grandchildren, one of whom was Mary E. O. Tarrant. The original Mary Tarrant died intestate, and Mary E. O. Tarrant was one of her heirs at law. The real estate of Mary Tarrant, by proper proceedings in the circuit court of the city of Norfolk, was duly partitioned among her heirs, and among other property allotted to Mary E. O. Tarrant was a certain tract of land in the county of Norfolk, Va., part of the original tract of which Mary Tarrant died seised. After this partition Mary E. O. Tarrant intermarried with one Charles Dashiell, and, still being seised of the real estate, by deed dated August 24, 1869, duly recorded, she and her husband conveyed it to George A. Martin and to E. J. Bennett and Robert McCurdy, with general warranty. By a deed of even date and delivery with the last-mentioned deed, and as a part of the same transaction, the parties grantees in it conveyed to T. F. Owens, as trustee, the lands so conveyed to them, to secure the purchase money for which notes had been given. Martin & Elliott, Bennett, and McCurdy having defaulted in payment of these notes, T. F. Owens sold the property at public auction to Gilbert Elliot. Gilbert Elliot, November 8, 1871, conveyed the land to Charles Stewart, who by deed dated April 8, 1880, conveyed the same to Richard H. McDonald, the complainant, who took undisturbed possession of the land. On the 26th of June, 1884, Charles Dashiell and his wife, Mary E. O. Dashiell, conveyed to Obed E. Whitehurst one undivided half interest in so much of said tract awarded to her in the partition of her grandmother's estate as lies between high-water mark and the channel of the Elizabeth river, and by another deed, in 1887, they conveyed the other undivided half to Joseph B. Allen. This bill is filed to remove this cloud from and to quiet title.

It is altogether likely, if not quite certain, though it does not distinctly appear in the record, that when Mary E. O. Tarrant and Charles Dashiell, her husband, conveyed to Elliot, Martin, Bennett, and McCurdy their interest in the 37½ acres of land allotted to Mary E. O. Tarrant by the circuit court of Norfolk, the description in that deed followed the metes and bounds in the commissioner's report. They make no reservation of any riparian rights in the deed, and if she had any rights riparian

derived from the fact that she was seised of the land back of the water front, and bounded by the river, when she conveyed by the same metes and bounds the land in partition acquired, she conveyed, unless the deed made some reservation, all the rights, privileges, and appurtenances which title to the land gave her. By the law of Virginia, the rights of riparian owners extend to low-water mark. *French v. Bankhead*, 11 Grat. 136. But whether or not the description of the land made in the deed from Mary E. O. Tarrant and her husband, Dashiell, to Elliot, Martin, Bennett, and McCurdy, corresponded exactly with the metes and bounds given in the report of the commissioners, the description in that deed is sufficient to convey to the grantees all the riparian rights which the ownership of the land could give, incident and appurtenant to adjacent land. One of the boundaries in this deed is in the following words: "Thence south, 32 degrees west, 12.15 chains," to a stake at high-water mark on the Elizabeth river; thence north, 57 degrees 15 seconds west, 17.90 chains, to the corner of J. W. Brinton's land. The only corner which Brinton's land there makes is with the Elizabeth river. The supreme court in *County of St. Clair v. Lovington*, 23 Wall. 46, and *Railroad Co. v. Schurmeir*, 7 Wall. 272, has settled this question for us. "It may be considered," say the court, "a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream, or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing the intention of the parties was otherwise." There is nothing here, either in the deeds themselves or in the conduct of the parties, who waited 15 years before finding out that they had any claim to riparian rights, to show any reason to exclude the operation of this canon of American jurisprudence, or that the grantors in the deed to Elliot, Martin *et al.* did not intend to come under it. We have not answered *seriatim* the errors assigned, but what we have said answers them all. We think the decree of the court below was the proper one to make, and it is affirmed, with costs.

COLUMBUS CONSTRUCTION CO. v. CRANE CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1892.)

No. 28.

1. CONTRACTS—SALE—AGENCY.

Plaintiff and defendant entered into a written agreement, in which the defendant agreed to purchase in its own name and upon its own credit, as the agent irrevocable of the plaintiff, certain goods, and to deliver the same at a specified time. Held, that defendant was liable to plaintiff, as a vendor, for failure to deliver the goods according to the agreement.

2. SAME—CONSTRUCTION.

The fact that there was attached to such agreement an exhibit showing a form of contract with a manufacturer for the manufacture and sale of such goods does not bind the defendant to procure the goods under such contract.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action by the Columbus Construction Company against the Crane Company. A demurrer was sustained to the third and fourth counts of the declaration. Plaintiff brings error. Reversed.

Statement by Woods, Circuit Judge:

The nature and ground of the ruling upon which error is assigned are well stated in the following brief opinion of the judge who presided in the circuit court:

"BLODGETT, District Judge. This is a demurrer to the third and fourth counts of plaintiff's declaration, which charge the defendant with a breach of the contract, attached to the declaration, and made a part of these counts, while acting as agent of the plaintiff. I have no doubt that this contract is a contract for the employment of the defendant by the plaintiff as a broker or agent of the plaintiff for the purchase of the wrought-iron pipe mentioned in the contract. It is not a contract for the sale of the pipe by the defendant to the plaintiff, nor does it contain any guaranty, expressed or implied, of the quality of the pipe on the part of the defendant, if defendant was only acting as agent or broker for the plaintiff. The contract makes the defendant merely the broker or agent of the plaintiff to purchase this pipe for the plaintiff. Both the letters attached to the contract, and made a part thereof, and the terms of the contract itself, exclude any other construction than that this is a contract for brokerage. And, as there is no allegation in either of these counts charging the defendant with any breach of duty as a broker or agent of the plaintiff in the purchase of this pipe, such as that the defendant failed to purchase pipe of the required quality for delivery to the plaintiff, I do not see that there is any cause of action made by these two counts. The demurrer is therefore sustained to the third and fourth counts."

The following is the agreement in question, with the exhibits attached, excepting parts omitted, which are not relevant to any question discussed by counsel:

"This agreement, made this twenty-eighth day of June, A. D. 1890, between the Columbus Construction Company, a corporation existing under and by virtue of the laws of the state of New Jersey, party of the first part, and the Crane Company, a corporation existing under and by virtue of the laws of the state of Illinois, party of the second part, witnesseth, that for and in consideration of the facilities and representations of the party of the second part, more fully shown by 'Exhibit A,' hereto attached, and made a part hereof, to effect for the party of the first part, upon desirable terms, the purchase of the standard wrought-iron line pipe hereinafter specified, and the sum of one dollar in hand paid by each of the parties hereto, the one to the other, the receipt whereof is hereby mutually acknowledged, it is agreed between the parties hereto as follows, to wit: The party of the second part will purchase in its own name and upon its own credit, as the agent irrevocable of the party of the first part, and secure the delivery to the party of the first part during the months of July, August, and September, as hereinafter specified, at such places as may be designated hereafter by the party of the first part, at the earliest practicable dates, but not later than October 1, 1890, barring strikes and causes beyond control, for the lowest obtainable price, (which price shall include freights to the points of delivery, same not to exceed the current rate of freight from point of shipment to Chicago,) and the party of the first part will take all wrought-iron standard line pipe hereinafter specified in conformity with the specifications, and subject to the conditions

and tests, more fully set forth and specified in the contract and specifications for standard eight-inch line pipe, hereunto attached, (subject, however, to change as to size and weight as hereinafter stated,) marked 'Exhibit B,' hereunto attached, and made a part hereof, at a price, including commissions to be paid party of the second part of two and one-half ($2\frac{1}{2}$) per cent., not exceeding ninety-one cents (91) per lineal foot for eight (8) inch standard line pipe, and price on the following sizes to be in proportion to price given on eight-inch as above and as hereinafter specified: * * * The party of the second part will, barring strikes and causes beyond their control, deliver all the eight-inch pipe before mentioned in amount not less than thirty-seven miles in July, not less than 123 miles in August, and all remaining undelivered in September, 1890, prior to the 15th of September, if possible. The party of the first part agrees to pay the party of the second part, upon delivery of each and every invoice of pipe at such delivery points as the party of the first part shall designate, spot cash therefor, including commission of two and one-half ($2\frac{1}{2}$) per cent. over and above the amount of each original invoice rendered party of the second part by the manufacturer, but in no case agreeing to pay any sum or sums in excess of (including pipe, freight, and commission or other charge) the prices hereinbefore fixed for each size of pipe. In witness whereof, the parties hereto have caused this instrument to be executed in duplicate by their respective presidents and attested by their respective secretaries, under their respective corporate seals, this 30th day of June, 1890.

COLUMBUS CONSTRUCTION COMPANY.

"By C. E. HEQUEMBOURG, President.

"Attest: C. K. WOOSTER, Secretary Crane Company.

"R. T. CRANE, President.

"EXHIBIT A.

"CHICAGO, June 20, 1890.

"*C. E. Hequembourg, Esq.*—DEAR SIR: As members of the Pipe Association, with a representative on the board of managers, we feel confident of our ability, in fact know that we can purchase the pipe in question at least 5 per cent. less than any outsider. Especially is this true in the face of the legislation enacted by the board of managers at a meeting held in Pittsburg on Wednesday, the 18th inst., at which meeting it was agreed that cash forfeits of large amounts be put up, the same to be forfeited in the event of the agreed price being cut. It will be necessary for the board of managers to take special legislation, in effect, to throw the market open in the interest of our company, to enable us to secure the material wanted at a price satisfactory to you, and, acting merely as your agent, the price made us would naturally be yours. Our position in the association is such that we feel confident of bringing this about. Should you have sufficient confidence in our company to appoint us your agents in this matter, the actual placing of the order—in itself quite a task, to our minds—would only be the beginning of a large line of work that we would be necessarily called upon to do for you in the handling of a dozen mills, more or less, that would have to participate in the completion of such an order. In consequence of which, we think, in tendering our services to you, as we do, that $2\frac{1}{2}$ per cent. brokerage would only be a reasonable charge. Should you decide to accept our offer, your wishes will be our instructions.

Very respectfully, yours,

[Signed]

"CRANE COMPANY.

"GEORGE L. FORMAN, Secretary.

"EXHIBIT B.

"This agreement, made and entered into the — of — by and between —, part— of the first part, and the — part— of the second part, witnesseth, that the said party of the first part, for and in consideration

of one dollar to it in hand well and truly paid by the party of the second part, at and before the sealing and delivery hereof, the receipt of which is hereby acknowledged, and of the payments hereinafter mentioned to be made by the said party of the second part, has covenanted and agreed, and by these presents does covenant and agree: *First*, to furnish and deliver to the said party of the second part, — miles of eight-inch standard nominal weight line pipe, made from soft iron, free from blisters and other imperfections, and guaranteed to stand a working line pressure of one thousand pounds to the square inch when proved and tested in lines as hereinafter provided; * * * *seventh*, that it will pay to the party of the second part all damages and expenses of every kind which second party shall sustain by reason of any defect or defects in the pipe delivered, up to and including the time when said pipe is tested by the second party under working pressure not in excess of one thousand (1,000) pounds to the square inch, and proved tight in the line, and which working test shall be made with reasonable promptness; and, *eighth*, that it will pay to the party of the second part, as liquidation damages, the sum of fifty (\$50) dollars per day, for each and every day after said * * * and until the amount of pipe agreed to be furnished, as above provided, has been furnished; and second party may deduct the amount of such damages from any money in its hands due first party for pipe furnished under this contract. In consideration of the premises the said party of the second part covenants and agrees to pay to the party of the first part the sum of * * * per foot for each and every foot of pipe received by it under this contract, said payments to be made on each car load of pipe within fifteen days after the receipt of the same, unless counterbalanced by damages due to second party. It is expressly understood and agreed by and between the parties hereto that the representative of the second party at first party's mill is there only for the purpose of seeing that the said pipe comes up to the guaranteed weight, and that the threads and sockets are not manifestly defective, and said pipe shall not be construed to be accepted by second party by reason of any payments made therefor, so as to relieve first party from liability on account of its defective character until the same has been laid and tested in the line and proved. In witness whereof, the parties to this agreement have hereunto set their hands and seals, the day and year first above written."

In each paragraph of the declaration it is alleged that under this contract the defendant company furnished to the plaintiff a statement showing the prices at which it would deliver to the plaintiff the pipe so agreed to be bought and delivered, and naming the companies by which specified quantities thereof, of sizes and at prices stated, would be manufactured; and that thereafter, at times and places stated, the defendant did deliver and cause pipe to be delivered, "as in compliance with the contract," but that the defendant had failed of full performance of the contract, in this: "that all of said pipe was not delivered within the times limited by the contract for the delivery thereof," of which failure a specific statement is made, "and that said pipe was not made from soft iron, free from blisters and other imperfections, and sufficiently strong and of a quality such as to stand a working line pressure of one thousand pounds to the square inch when proved and tested in lines, but on the contrary, was of a weak, imperfect, poor, and defective quality, and wholly unable to stand a pressure not in excess of one thousand pounds to the square inch, and was not such pipe, nor was any of it, as when subjected to such pressure would prove tight." The difference between the two counts is that one is drawn upon the theory of a rescission

of the contract, and seeks a recovery of the moneys paid thereon, while the other is for damages on account of the breaches alleged. The additional averments of each are framed according to the theory on which it proceeds. The other counts were withdrawn, and judgment rendered against the plaintiff.

William W. Booth, James S. Harlan, and S. S. Gregory, for plaintiff in error.

Before HARLAN, Circuit Justice, and GRESHAM and WOODS, Circuit Judges.

WOODS, Circuit Judge, (*after stating the facts.*) The decision of the circuit court rests upon the proposition that the defendant was merely the agent of the plaintiff; and, if that be conceded, the ruling is, of course, right. It seems to us, however, that, while the contract created an agency, it did more. It constituted the defendant an agent with special obligations beyond the duties which, in the absence of express stipulation, are attributed by law to that relation. It was, of course, competent for the parties to so frame their contract, and, in our opinion, they so framed this one, by whatever name it should be called, that the defendant became an agent in respect to the proposed purchases; but in respect to the subsequent transfer and delivery of the goods to the plaintiff it became obligated substantially as a vendor. An apt illustration is found in the case of *Ireland v. Livingston*, L. R. 5 H. L. 395, 406, wherein, in respect to an action by a commission merchant against his principal to recover on a contract for the purchase of sugar, which the defendant had refused to accept because the quantity was less than the amount ordered, Lord BLACKBURN said:

"My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could."

And so, under the contract before us, the defendant, though required to purchase in its own name and upon its own credit, became bound to use reasonable diligence to procure the pipe to be purchased at the lowest obtainable price not in excess of the maximum limit; this to be followed by a transfer of the property to the plaintiff at actual cost and commission, which the plaintiff was to pay in "spot cash" to the defendant. And the fact that the agency is declared irrevocable involves no inconsistency. On the contrary, the two phases of the contract are in distinct harmony, and by reason of their connection were doubtless, for all the purposes of the agreement, incapable of revocation or termination by one party without the consent of the other, even though nothing had been expressed to that effect. The stipulation, which in effect binds the defendant as a vendor, is unequivocal and occurs twice in the con-

tract: *first*, that "it will secure the delivery;" and, *second*, that "it will deliver" the pipe "specified in conformity with the specifications, and subject to the conditions and tests more fully set forth" in the exhibit attached to the agreement. This does not mean, and cannot reasonably be construed to mean, that, in respect to the transfer and delivery of the pipe to the plaintiff, the defendant was an agent merely, and bound to do no more than exercise reasonable diligence to procure of manufacturers comprising the pipe association (of which defendant was itself a member) contracts for the delivery of such pipe as was required. That the parties understood this when settling the terms of their agreement is indicated by the saving clause, twice used, against "strikes and causes beyond control,"—a clause which, when employed in respect to an agency, is superfluous and meaningless, because in no event could a mere agent be responsible for the consequences of a strike, or other cause beyond control.

It is an unwarranted assumption, often repeated or implied in the argument made in support of the ruling below, that by force of the contract the defendant was required to obtain of the manufacturers contracts in the form of the exhibit, and that for the matters complained of the plaintiff's remedy should, and, as nothing to the contrary is averred, presumably could be sought of the manufacturers upon those contracts, and not of the defendant upon the contract in suit. There is no support for this proposition, except in the fact that an exhibit showing a form of contract with a manufacturer is attached to and made a part of the contract between these parties. But manifestly that was done only for the purpose of defining the specifications, conditions, and tests under which the defendant undertook to make delivery of pipe to the plaintiff. That is the purpose stated, and no other is fairly inferable. In respect to its own purchases, therefore, the defendant was at liberty to buy on credit or for cash, and with or without warranty, express or implied, as it chose. It could buy or bargain for the quantities of pipe necessary to supply the plaintiff, or it could purchase in larger quantities, and for the supply of other customers, being bound to the plaintiff, whatever the contract made with the manufacturer, to produce no evidence of the transaction except the manufacturer's original invoice, showing the purchase price. And of such contracts it is difficult to see how the plaintiff could take advantage, even if they happened to contain provisions which, if available, would afford relief. Counsel have discussed with exhaustive research and learning the question whether or not, in the contracts of purchase made by the defendant for the purpose of complying with this contract, there was privity of contract between an original vendor and the plaintiff, by reason of which either of them might have an action against the other for any breach to its injury. We do not deem it necessary to consider that question. If the affirmative of the proposition were conceded, there could be no right of action except for an infraction of the contract actually made by the agent; and that, as we have seen, might or might not extend to the subject of complaint. The contract of these parties, as we view it, instead of leaving the plaintiff to a circuitous and

uncertain quest for relief, affords for the breaches alleged, and upon the theory of either paragraph, a right of action directly against the defendant. The judgment of the circuit court is therefore reversed, and the cause remanded, with instructions to overrule the demurrer to the third and fourth paragraphs of the declaration respectively, and for further proceedings.

REED v. STAPP.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1892.)

1. REVIEW ON APPEAL—JURISDICTION OF CIRCUIT COURT OF APPEALS.

Under Rev. St. § 700, which provides that, where there is a special finding of facts, the review on appeal may extend to the sufficiency of the facts found to support the judgment, the circuit court of appeals cannot examine the evidence to ascertain whether it justifies the finding.

2. SAME—HARMLESS ERROR.

Where there is a special finding of facts sufficient to support the judgment, the admission of immaterial evidence, not affecting such finding, is harmless error.

3. NEGOTIABLE INSTRUMENTS—TRANSFER AFTER DISHONOR.

Where one pays the note of another to a bank, and has the bank cancel the note, and deliver to him a dishonored certificate of deposit held by it as collateral security, which certificate he takes as collateral security for a new note given to him by the debtor, he takes such certificate subject to equities existing against the original payee, even though the bank was an innocent holder for value before dishonor.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by Willet B. Jenks against Guy Stapp, receiver of the First National Bank of Monmouth, Ill. Plaintiff died pending suit, and his administrator, Frank F. Reed, was substituted as party plaintiff. Defendant obtained judgment. Plaintiff brings error. Affirmed.

F. F. Reed, for plaintiff in error.

Kirkpatrick & Alexander, for defendant in error.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge. This suit was brought at law by Willet B. Jenks, since deceased, to recover the amount of a certificate of deposit, of which a copy follows:

"No. 26,161. THE FIRST NATIONAL BANK OF MONMOUTH, ILL.

"\$10,000.

Nov. 5th, 1881.

"Wm. M. Gregg has deposited in this bank ten thousand dollars, payable to the order of himself six months after date, on return of this certificate.

"B. T. D. HUBBARD, Cashier."

Endorsed: "Pay to bearer. W. M. GREGG."

The case, as disclosed by the record, was this: The First National Bank of Monmouth was organized under the national banking law in the year 1863. The period of legal existence granted by law was about to expire, and could not be extended. Thereupon, in June, 1882, the bank went into voluntary liquidation, and adopted the necessary legal

steps to wind up its affairs. A new bank with the same name was formed by substantially the same persons who owned the stock of the former bank, and with the same persons as officers who held similar positions in the old bank. The stockholders of the old bank distributed among themselves the accumulated profits of this business, amounting to 66 per cent. of its capital. On the 5th day of July, 1882, the old bank transferred to the new bank its bank building, and all the fixtures, books, and appurtenances of the bank, its redemption fund with the United States treasurer, its bills receivable as shown by its books, and, in consideration thereof, the new bank agreed in writing to pay off and discharge all the debts and liabilities of the old bank to its depositors of all kinds upon book account and certificates of deposit "to the extent and amount as shown by the books," whenever and as they should be demanded. The new bank continued business until April 8, 1884, when it closed its doors, being compelled thereto by the acts of its cashier, who proved a defaulter to the amount of upwards of \$100,000.

The certificate of deposit upon which suit is brought was issued by the cashier of the old bank, without consideration, without deposit of the amount therein stated by Gregg or by any other person, and solely by way of margins to speculative transactions between Hubbard, the cashier, and the payee, William M. Gregg, or his firm of Gregg, Son & Co., of Chicago. The certificate was not entered upon the books of the old bank. The bank number borne by the certificate was in fact the number of a certificate issued on the 23d day of February, 1881, to one Langdon, for the sum of \$100, and which was duly entered upon the books, and paid by the bank shortly after its issue, and before the date of the Gregg certificate. The certificate here in question was first pledged by Gregg, Son & Co., on September 6, 1883, to the Continental National Bank of Chicago, as collateral to a loan of \$10,000. That loan was paid in October, 1883. It was then used on December 27, 1883, as collateral with the same bank for a loan which was paid January 26, 1884. It was again pledged by Gregg, Son & Co. to the Continental National Bank as collateral to two notes of that firm, each for \$5,000, payable on demand; one dated March 7, 1884, and the other dated March 24, 1884. After the loan of December 27, 1883, and before its payment, the cashier of the Continental National Bank, becoming suspicious of the certificate by reason of its age, had an interview concerning it with Hubbard, the cashier. He asked Hubbard "if the certificate was good; if it was genuine; and he said it was a genuine certificate;" that it was a private matter with Gregg, and was connected with his (Gregg's) family affairs. Payment of the certificate was demanded of the new bank on the 8th day of April, 1884,—the date of its failure,—and the certificate protested for nonpayment on the following day. On the 11th day of April, 1884, a transaction was had by which Willet B. Jenks, the intestate of the plaintiff in error, paid to the Continental National Bank the amount of the indebtedness of Gregg, Son & Co., and received from the bank the certificate of deposit in question.

The right to recover upon the certificate is claimed upon the ground that the Continental National Bank was a *bona fide* holder for value of the certificate, and that the defendant bank is estopped to assert either the invalidity of the certificate, or its nonliability therefor by reason of the declarations of its cashier to the cashier of the Continental National Bank upon the faith of which the loans of March 7th and March 27th were made; and that Jenks, by purchase from the bank, although after dishonor of the certificate, stands in the shoes of the bank, and takes its title to the certificate, unaffected by equities as between the maker and Gregg.

The contention on the part of the defendant is that the certificate was issued by the former First National Bank of Monmouth, and not by the defendant bank; that the latter never assumed its payment, the certificate not appearing upon the books of the old bank; that the certificate was fraudulent in its inception, and of no effect in the hands of Gregg, the payee; that the Continental National Bank took it after its maturity, and charged with the equities attaching to it in the hands of Gregg; that the old bank could not be estopped by the declarations of Hubbard, made after the bank had ceased to exist; that the defendant bank is not estopped, because, among other reasons, the declarations only went to the genuineness of the certificate as the paper of the former bank, and not to the liability of the defendant bank thereon; and that the transaction between the Continental National Bank and Willet B. Jenks was a payment by Jenks of the debt of Gregg, Son & Co. at their request, and not a purchase of that debt and its collateral. The cause was tried by the court without the intervention of a jury, and the issues found in favor of the defendant.

The record declares that at the close of the evidence the plaintiff submitted to the court certain propositions of law, and requested the court to hold them as the law of the case, but the court disregarded and overruled "certain of the same," and found the law and the facts in the case as follows. Then follows the opinion of the presiding judge, reciting certain facts stated to be conceded, and holding that the certificate was fraudulently issued; that the defendant bank was liable for the valid debts of the old bank; that the certificate was a valid security in the hands of the Continental National Bank by reason of the estoppel stated above; and that the transaction between Willet B. Jenks and the Continental National Bank was a payment by the former of the debt of Gregg, Son & Co. at their request, a payment, cancellation, and surrender by that bank of that firm's notes held by it, and that Jenks took a new note from the firm for the money paid by him, and that he did not succeed to the right of the Continental National Bank, but held the certificate as collateral to the new note of Gregg, Son & Co., taken by him after payment by him of their debt, after maturity of the certificate, and after its dishonor; and so, in his hands, the certificate stood charged with all the equities attaching to it in the hands of Gregg.

The findings of a trial court, whether general or special, have the effect of a verdict of a jury. Rev. St. § 649. When the finding is spe-

cial, the review on appeal may extend to the sufficiency of the facts found to support the judgment. *Id.* § 700. It may well be doubted whether the opinion of the judge which here is said to constitute the special findings of fact can be so considered. *Dickinson v. Bank*, 16 Wall. 250. The opinion states certain concessions of facts. It also advances by way of argument certain other facts said to be proven by the evidence, and also certain evidence as grounds for the conclusion of the court. The practice adopted by counsel in this case of seeking to have the opinion of the court fulfill the office of a finding is not to be commended. The special finding of the statute is a specific statement of the ultimate facts proven by the evidence, determining the issues, and essential to sustain the judgment. It corresponds to the special verdict of a jury, and should be equally specific and comprehensive. It should declare all the ultimate facts established by the evidence, so that if they do not in law warrant the judgment, an appellate tribunal may direct such judgment thereon as the law adjudges upon the facts determined, and without the need of a new trial, as was done in *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56. Treating the opinion, however, as a special finding of facts, the court below found as conceded facts that, after dishonor of the certificate in question, the Continental National Bank demanded of Gregg, Son & Co. payment of the loan, for which it held the certificate as collateral; that Jenks, at the request of Gregg, paid the debt; that the notes of Gregg, Son & Co. were canceled and surrendered; that the certificate was delivered to Jenks, who took notes from Gregg, Son & Co. for the amount of the principal of the loan paid by him, and held the certificate as collateral to such notes. The court also found as proven by the evidence that Jenks was a brother-in-law of Gregg, and acted for him, and to protect his credit; that Jenks "did not even keep alive the bank paper for which the certificate stood as security in the hands of the Continental National Bank, but allowed that to be canceled, and merely took Gregg, Son & Co.'s paper as a new transaction between himself and Gregg, Son & Co., the transaction being in effect a loan by Jenks to Gregg, Son & Co. of \$10,000, with this certificate of deposit as security." This finding is challenged as not sustained by the evidence, and we are urged to so declare. We have no authority to do that. Treating the opinion as a special finding, we are only at liberty to consider whether the facts found in law support the judgment. The findings of the trial court upon questions of fact are conclusive. We are not permitted to examine the evidence to ascertain whether the finding of fact be thereby justified. *Copelin v. Insurance Co.*, 9 Wall. 461, 467; *The Abbotsford*, 98 U. S. 440, 443; *Zeckendorf v. Johnson*, 123 U. S. 617, 8 Sup. Ct. Rep. 261. The review permitted extends only to the question whether the facts found support the judgment rendered. *Tyng v. Grinnell*, 92 U. S. 467.

It cannot be seriously urged that, the facts being as found, the judgment is unwarranted. The question of the liability of the defendant bank hinged upon the further question whether Jenks stood in the light

of an innocent purchaser for value. The court held that the Continental National Bank was a *bona fide* holder for value, taking the certificate upon representations of the cashier of the defendant bank, which worked an estoppel. Conceding that a *bona fide* holder for value of commercial paper can, by endorsement and delivery after maturity of the paper, confer his title upon a third person having knowledge of its inherent imperfections, it is found as a fact that this was not done. It is conclusively determined that Jenks paid Gregg's debt; that the notes were canceled and surrendered, not endorsed or transferred by the Continental National Bank. For the amount paid, Jenks took notes of Gregg, Son & Co. running to himself, with the certificate as collateral. At the time of the payment by him the defendant bank had failed; the certificate had been protested for nonpayment. He took it, therefore, with notice of dishonor, and cannot be held an innocent purchaser. In view of the finding that this certificate was fraudulently issued, and was without consideration to the knowledge of Gregg, who was found by the court to have been "a knowing and willing party to the fraud" sought to be perpetrated by the issuance of this certificate, one taking the certificate from him after dishonor cannot be accounted an innocent holder. The judgment was therefore justified by the finding.

In this view it seems unnecessary to consider the other errors assigned. If the exceptions were sustained, the substantial facts would remain unquestioned and unquestionable that this certificate was fraudulently issued, and without any consideration, to Gregg's knowledge, and that Jenks took it as collateral to Gregg's debt after its dishonor. These facts are sufficient to bar a recovery. The admission of immaterial evidence not affecting that finding could not, therefore, injure the plaintiff, and constitutes no ground for reversal, (*Mining Co. v. Taylor*, 100 U. S. 37; *Hornbuckle v. Stafford*, 111 U. S. 389, 4 Sup. Ct. Rep. 515;) nor would the reception of incompetent evidence going to that finding, when there is competent evidence uncontradicted on the same point, (*Cooper v. Coats*, 21 Wall. 105.) The judgment is affirmed.

Mr. Justice HARLAN was not present when this decision was announced, but he participated in the hearing and decision of the case, and concurs in the opinion.

UNITED STATES *v.* NELSON *et al.*

(District Court, D. Minnesota. October 10, 1892.)

1. MONOPOLIES.—SUFFICIENCY OF INDICTMENT.—WORDS OF STATUTE.

An indictment under the act of congress, "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) must contain a certain description of the offense, and a statement of facts constituting same, and it is not sufficient simply to follow the language of the statute.

2. SAME.—WHAT CONSTITUTES.—AGREEMENT TO RAISE PRICE.

An agreement between a number of lumber dealers to raise the price of lumber 50 cents per thousand feet, in advance of the market price, cannot operate as a restraint upon trade, within the meaning of the act of congress "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) unless such agreement involves an absorption of the entire traffic, and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion.

At Law. Indictment under the act of July 2, 1890, (26 St. at Large, p. 209,) "to protect trade and commerce against unlawful restraints and monopolies." Demurrer to all the counts sustained.

The United States District Attorney.

W. E. Hale, for defendants.

NELSON, District Judge. In the case of *United States v. Benjamin F. Nelson, Sumner T. McKnight, William H. H. Day, et al.*, a demurrer is interposed to the indictment. Pressure of business in court has prevented an earlier decision, and I can now only give my reasons briefly for sustaining the demurrer. The indictment intends to charge offenses under the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies." This statute declares contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce among the several states and foreign nations, illegal, and makes them offenses, and affixes the punishment. The indictment purports to charge the defendants with violating the law by entering into a contract, and unlawfully engaging in a combination in the form of a trust, and confederating together in a conspiracy in restraint of trade among the several states. There are 12 counts in the indictment. The first 6 counts charge the offense in the language of the statute, and the others set forth facts which are claimed to constitute the offense. The federal courts by this act are given jurisdiction to apply remedies in cases where interstate commerce is injuriously affected by combinations and contracts which the state courts had formerly applied to protect local interests. In order to administer the law, the court must determine what is an unreasonable and unlawful restraint of trade or commerce by contracts, trusts, and conspiracies, and whether a contract is injurious to the public. In all cases at common law, it must be made to appear that the acts complained of threatened the interests of the public, and this is true whether the remedy sought to be applied is by civil or criminal proceedings. It is urged by the district attorney that, the offense being statutory, the general rule in such cases, to wit,

that it is sufficient to allege the offense in the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. See *U. S. v. Cruikshank*, 92 U. S. 558. The charge must contain a statement of facts constituting the offense, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained.

Do the facts set forth in the last six counts describe an offense which the statute forbids? The first of these counts charges, in substance, that the defendants were each dealers in lumber in the United States, and each transacted business at numerous towns and cities in different states, and on September 7th, at the city of Minneapolis, they agreed together that they would raise the price of lumber 50 cents per thousand feet in advance of the market price of pine lumber in the states of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber 50 cents per thousand feet in each of said states in which they transacted business. How this advance in price by these parties in the several states mentioned could regulate thereby the price for all dealers is not set forth. It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of the lumber owned or manufactured by themselves 50 cents per thousand feet above the market price necessarily advanced the price of all the pine lumber for sale in those states to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.

An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least. What has been said in regard to this count applies to the remaining five, in which

wrongful combinations and conspiracies in restraint of trade are alleged, and a monopoly of the whole or a part of the trade and commerce in lumber in the several states mentioned. The allegations are too indefinite and uncertain, and the demurrer to all the counts is sustained.

STAHL v. WILLIAMS.

(Circuit Court, D. Connecticut. September 23, 1932.)

No. 708.

1. PATENTS FOR INVENTIONS—ACQUIESCENCE—EVIDENCE.

On a motion for preliminary injunction the patentee made affidavit that he put the invention into practical use about the time of the application, and it had been in practical use ever since; that the rights of the owner of the patent had been acquiesced in by the public; that the invention had been applied to many hundred machines; that he had never given any licenses, or sold any manufacturing rights; and that the validity of the patent had never been questioned. The assignee of the patent made affidavit that he had applied the patent since January, 1932. *Held*, that this was insufficient to show public acquiescence.

2. SAME—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

On a motion for a preliminary injunction, complainant introduced the record of another circuit court, showing that in a suit by him against a third person the court found infringement, and granted a restraining order; that subsequently this injunction was made perpetual, but there was nothing to show that any question as to patentable novelty, the prior state of the art, or public acquiescence, were raised therein. *Held*, that such an adjudication was not of controlling weight.

3. SAME.

On a motion for preliminary injunction, a prior adjudication in another circuit, finding infringement, and awarding a perpetual injunction, is not conclusive, when the alleged infringing devices are materially different in the two cases.

4. SAME—PRELIMINARY INJUNCTION—INFRINGEMENT.

Letters patent No. 258,295, issued to Halstead, May 23, 1932, cover an egg-holding tray for incubators, having wires or cross bars, in combination with a muslin web below the same, on which the eggs rest, and which is movable by means of rollers so as to turn the eggs. In his application the patentee claimed as his improvement an arrangement whereby the eggs rested between cross bars not supporting the eggs, and disclaimed cross rollers on which the eggs rest. In defendant's incubator the eggs rest upon a cloth supported by cross bars, and the cloth revolves on rollers, but the rollers serve both to support the eggs and to hold them in place while the cloth is moved to turn them. Defendant's device had greater likeness to a prior patent than to that of complainant. There was no evidence that serious injury would be caused by withholding a preliminary injunction. *Held*, that the same should be denied.

5. SAME—DISCLAIMER.

Letters patent No. 368,249, issued in 1937 to George H. Stahl, covers in claim 3 an incubator in which uniform heating is secured by a flat tank overlying the chamber, and divided by two partitions extending from one end nearly to the other, the hot water being discharged by pipes into the outer divisions, and carried off by a single return pipe, leading from a point between the partitions. Defendant substitutes pipes for the partitions, and it appeared that the patentee originally claimed substantially similar pipes, but, the same being rejected, he disclaimed the use of pipes for maintaining an even temperature. *Held*, that the claim should be strictly construed against him, and that a preliminary injunction should be denied, especially as it appeared that both pipes and partitions had been used prior to the patent.

In Equity. Bill by George H. Stahl against Albert F. Williams for infringement of patents. On motion for preliminary injunction. Denied.

J. J. Jennings, for complainant.

TOWNSEND, District Judge. The complainant claims under six patents for certain improvements in incubators, but only two of these are relied on as the foundation of the prayer for a preliminary injunction. The patent No. 258,295, known as the "Halstead Patent," was issued to Halstead on May 23, 1882, and was assigned to complainant on February 1, 1892. The claims Nos. 6 and 7, which complainant alleges are infringed by defendant, are as follows:

"(6) In an egg-holding tray, the combination, with the wires or cross bars, of a web of muslin or similar material, on which the eggs rest, and which is movable, so as to turn the eggs, substantially as set forth. (7) The combination, in an egg-holding and turning tray, of cross wires or bars, a web, and a roller, upon which the web may be wound, substantially as set forth."

The eggs are kept in position, while turning in said tray, by wires stretched across it. The advantage of this arrangement lies in the fact that the eggs can be turned without the danger of breakage. In defendant's incubator the eggs rest upon a cloth supported by parallel bars of wood. Said cloth revolves on rollers as in complainant's tray, but in defendant's tray the rollers serve both as a support for the eggs, and to hold them in place while the cloth is revolved to turn them. Complainant claims that this device for supporting and turning eggs is a mechanical equivalent of his invention, and an infringement thereof. Complainant further introduced the affidavit of Halstead, the patentee, for the purpose of showing acquiescence of the public in the validity of said patent. The material part of the affidavit is as follows:

"That applicant put the same into practical use about the time the application for patent was made; that the same has been in practical use ever since, and the rights of the owner of said letters patent in said invention have been acquiesced in by the public, and that this invention has been applied to a great many hundred machines; that he has never licensed any one to make it, and had never sold any manufacturing rights to make it, and the validity of said letters patent has never been questioned."

The complainant also introduced in evidence an order of the circuit court of the United States for the southern district of Illinois, dated April 4, 1892, granted in a suit brought by the complainant against A. L. Chase *et al.*, wherein the court found the egg tray of the defendants in that case to be an infringement of complainant's patent, and restrained and enjoined the defendants therein from further manufacture of said trays until the further order of the court; the cause being continued for further hearing to April 23, 1892. On June 9, 1892, and after the hearing in this case had been closed, complainant, by leave of court, filed certain exhibits introduced upon the hearing in said case in Illinois, and a copy of the final decree of said court, making said temporary injunction perpetual.

The defendant introduced several patents for the purpose of showing the state of the art at the time when complainant obtained his patent, and the lack of patentable novelty therein. One of these—the Renwick patent, No. 224,224, granted in 1880—described a tray in which the eggs rested on bars or rollers, or "on an endless apron, carried upon the supporting roller." The eggs were turned by means of the revolving

rollers, with or without said apron. Another patent—the Martin patent, No. 237,689, granted in 1881—described a series of rollers supporting the eggs, which revolved upon their axes, and turned the eggs. Other patents, granted prior to that of complainant, described egg trays with grating covered with cloth, as claimed by complainant. The device of the defendant more nearly resembles the devices employed in certain of these earlier patents than those claimed in the Halstead patent. There the cross wires and wire netting are distinct, and used for entirely different purposes. The wires above the cloth, and, as the patentee describes them, “near the top of the tray,” prevent the eggs from moving along when the cloth is turned while the eggs rest upon the netting. Neither in defendant’s device nor in the Renwick patent are there any wires above the cloth, but the rollers below it serve the double purpose of supporting the cloth and of holding the eggs in place while turning. It further appeared that Halstead, in his application for a patent, claimed as his improvement an arrangement whereby the eggs rested between cross bars not supporting the eggs, and disclaimed cross rollers on which the eggs rested.

The affidavit of complainant that he applied the patent since January, 1892, and that of the patentee, quoted above, are the only evidences of public acquiescence. None of the cases cited by complainant’s counsel show that such use would be sufficient to establish the claim of public acquiescence.

A suitable adjudication of another federal court, on final hearing, upon the validity of this patent and the infringements thereof, would have great, if not controlling, weight in the determination of the same question in this court. But it does not seem to me that this is such an adjudication, for the following reasons: The restraining order or injunction originally granted was made perpetual at the final hearing but no further finding was made thereon. Although this case was reopened to permit complainant to introduce evidence as to said decree, none was offered to show that the questions as to the state of the art or public acquiescence were presented for the consideration of the court. It does not even appear that the question of patentable novelty was before the court, except as it may be inferred from the decree of the court. The decision seems to be based simply upon “the bill of complaint, the affidavits of the respective parties, and arguments of counsel.” No opinion of the court was filed with the papers.

But there is another reason why said decree is not binding in this case. An examination of the exhibits in the case in Illinois shows that the infringing device differed materially from that of the defendant, in having both the wire netting below, and the cross wires above, the cloth apron, as in complainant’s patent. For these reasons I think complainant has failed to show that the decree of the Illinois court controls this case.

The other patent against the infringement of which an injunction is asked is No. 368,249, granted in 1887, to complainant. The claim No. 3, of which defendant’s device is alleged to be an infringement, is as follows:

"In an incubator, as a means of uniformly heating its interior chamber, the flat tank overlying said chamber, and provided with the two partitions extending from one end nearly to the other on opposite sides of its middle, in combination with the external heating vessel, the two pipes, *a*, leading from its top into opposite sides of the tank outside of the partitions, and the return pipe, *a*, located at the same end of the tank, and extending from a point between the partitions to the base of the heater, whereby the hot water is delivered in two currents along the sides of the tank, and returned through its middle to the heater."

This claim No. 3 also was held valid, and a perpetual injunction granted against defendants, by the court in the decree hereinbefore referred to in the suit in Illinois. The reasons already stated why that judgment is not conclusive herein as to the Halstead patent apply to this patent. The defendant substitutes pipes for the partitions patented by complainant. Complainant claims that said pipes are a mechanical equivalent for said partitions. But defendants showed, by the copy of the file wrapper in the matter of the above patent, that the complainant originally claimed pipes, substantially as used in defendant's incubator, and that, the patent office having rejected such claim, complainant inserted in his application the following disclaimer:

"I am aware that heating pipes have been variously arranged to maintain a uniform temperature in an incubator; but a flat tank, with partitions, such as herein shown and described, has been found to give the result desired in a more satisfactory manner, and at less cost."

After such acquiescence, the claim of the patentee as allowed must be construed strictly against him and in favor of the public. *Mott Iron Works v. Standard Manufg Co.*, 59 O. G. 2067, 51 Fed. Rep. 81, and cases cited.

The defendant further showed by the patent to Cantelo, No. 5,204, granted 1847; the patent to Davis, No. 193,490, granted in 1877; the patent No. 245,121, granted in 1881; and the patent to Rosebrook, No. 349,749, granted in 1886; that both pipes and partitions had been used prior to the issuance of complainant's patent, and for the purposes claimed by complainant.

On the other hand, complainant claims that the patents introduced by defendant are mere paper patents, which never had any practical value, while his patents are of great utility. Where the question of patentable novelty is doubtful, an extensive use by the public may resolve the doubt in favor of the patentee. *Topliff v. Topliff*, 59 O. G. 1257, 12 Sup. Ct. Rep. 825. On the whole, however, the evidence presented has raised in my mind such a substantial doubt in regard to infringement in either case, that, in the absence of any evidence that complainant will be seriously injured by withholding the preliminary injunction, I do not feel justified in granting it. "A preliminary injunction ought never to be issued unless the right of a patentee is an established or admitted one, and unless the invasion of the right is proved beyond a reasonable doubt." *Pavement Co. v. City of Elizabeth*, 4 Fish. Pat. Cas. 189. It does not seem to me that the questions raised can be fully and fairly disposed of on the hearing of

the application for a temporary injunction, and I think no injunction should issue until after a full and final hearing.

The motion for a preliminary injunction is denied.

THE LOUIS OLSEN.

HARITWEN v. THE LOUIS OLSEN.

(District Court, N. D. California. October 7, 1892.)

No. 10,424.

1. MARITIME LIENS—STATE STATUTES—FEDERAL COURTS.

United States district courts having jurisdiction of a contract, as a maritime one, can, under admiralty rule 12, enforce liens given for its security by state laws. *The Lottawanna*, 21 Wall. 558, followed.

2. STATUTES—CONSTRUCTION—CONFLICTING PROVISIONS.

The constitution of California provides that no law shall be amended by reference to its title, but shall be re-enacted and published at length as amended. Code Civil Proc. Cal. § 813, was amended and re-enacted by an act which amended the Code generally, and provided that all laws inconsistent therewith should be repealed. *Held*, that a clause of this section which remained unchanged was not so re-enacted as to make it a later statute than one prevailing before such re-enactment. *Railroad Co. v. Shackelford*, 63 Cal. 261-265, followed.

3. SAME.

Pol. Code Cal. § 4481, provides that, if the provisions of any title of the California Codes conflict with the provisions of another, the provision of each must prevail as to all questions arising out of the subject-matter of such title. Code Civil Proc. § 5, provides that provisions of this Code, so far as they are substantially the same as the existing statutes, must be construed as a continuation thereof, and not as new enactments. *Held*, that section 5 of the Code of Civil Procedure prevails over section 4481 of the Political Code in the construction of Code Civil Proc. § 813, and Civil Code, § 3055, which are in conflict. *People v. Freese*, 18 Pac. Rep. 812, 76 Cal. 694, followed.

4. SAME—MARITIME LIENS—MASTER'S WAGES.

The common law of England, (which gave a master no lien on a ship for his wages,) by Act Cal. April 13, 1850, was adopted as to all courts of the state. By Pr. Act Cal. § 317, adopted April 29, 1851, a master was given such a lien. This was re-enacted in Code Civil Proc. § 813. Civil Code, § 3055, which took effect January 1, 1873, provided that a master should have no such lien. Pol. Code, § 4480, provides that the provisions of the Codes shall be construed as if enacted at the same moment of time. *Held*, that under Code Civil Proc. § 5, section 3055 of the Civil Code and section 813 of the Code of Civil Procedure are re-enactments of the acts of 1850 (the common law) and 1851, respectively, and section 813 of the Code of Civil Procedure, being the latest declaration of the will of the legislature, should therefore prevail.

In Admiralty. Suit by Charles Haritwen against the steam schooner Louis Olsen for wages as master. Exceptions to libel. Overruled.

Page & Ellis, for libellant.

W. W. Davidson, for respondent.

MORROW, District Judge. This suit is brought by Charles Haritwen against the steam schooner Louis Olsen, to recover the sum of \$1,396.30, claimed to be due the libellant as wages. The claimant excepts to the libel on the ground that it appears from the libel that whatever wages

were earned for any services performed or rendered by the libelant were so earned by him while he was acting in the capacity of master of the vessel. The lien is claimed by the libelant under the provisions of section 812 of the Code of Civil Procedure of this state, which, among other things, provides that "all steamers, vessels, and boats are liable (1) for services rendered on board at the request of, or on contract with, their respective owners, agents, masters, or consignees." In the case of *The Lot-tawanna*, 21 Wall. 558-580, it was held by the supreme court that the district courts of the United States, having jurisdiction of a contract as a maritime one, might, under the provisions of the twelfth admiralty rule, as promulgated in 1872, enforce liens, given for its security, when created by the state laws. In the case of *The Mary Gratwick*, 2 Sawy. 342, the late Judge HOFFMAN held that the master of a vessel, engaged in navigating the interior waters of this state, might proceed *in rem* in this court to recover his wages upon the lien created by the law of this state. This decision was affirmed by Judge FIELD, sitting in the circuit court. It is not denied that such was the law at that time, but it is said, on behalf of the claimant, that the state lien no longer exists. At the time *The Mary Gratwick Case* arose in this court, in 1872, the domestic lien was contained in section 317 of the practice act of this state. The Codes (Civil, Civil Procedure, Penal, and Political) took effect January 1, 1873. The practice act was incorporated into the Code of Civil Procedure, and section 317 of the former act became section 813 of the latter Code. But in the Civil Code it was provided, in section 3055: "The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages." Here is a conflict between provisions of the Code of Civil Procedure and the Civil Code, and the question is, which is now the law of this state?

The first inquiry would naturally be to ascertain which of these two sections was the last expression of the will of the legislature; but section 4480 of the Political Code provides that, "with relation to each other, the provisions of the four Codes must be construed * * * as though all such Codes had been passed at the same moment of time, and were parts of the same statute." This provision disposes of any question as to which section was the later enactment. The location of two sections, in an ordinary statute, would afford a rule of construction in the presumption that the later section in number was the last in time, and intended to repeal the provisions of a prior conflicting section; but, in the present case, the conflicting sections belong to different Codes, and, under the foregoing rule of construction, we are not at liberty to assume that these two sections were passed otherwise than at the same moment of time.

We find, however, that section 813 of the Code of Civil Procedure was amended and re-enacted in 1874 by an act which amended the Code generally, and which provided that "all provisions of law inconsistent with the provisions of this act are hereby repealed;" but, in this re-enactment, there was no change made in the subdivision of the section now under

consideration. The amendment was in another subdivision and upon a different subject. The constitution of this state requires that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length, as revised or amended." Is such a re-enactment a sufficient expression of the will of the legislature to authorize us to hold that a lien in favor of the master for his wages, created by the first subdivision of section 813 of the Code of Civil Procedure, has been re-enacted so as to repeal that part of section 3055 of the Civil Code which declares that he has no lien?

In Sutherland on Statutory Construction, (section 133,) the rule respecting the effect of amendments of this character is stated as follows:

"The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed, it must receive a new operation; but so far as it is not changed, it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized. The amendment operates to repeal all of the section amended, not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act."

This rule is supported by abundant authority, and was approved by the supreme court of this state in *Railroad Co. v. Shackelford*, 63 Cal. 261-265. The re-enactment of section 813 of the Code of Civil Procedure is therefore without value in determining this question of conflict.

It is next claimed that section 4481 of the Political Code furnishes the proper rule of construction, as follows:

"If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title."

It is urged that section 3055 is found in a title of the Civil Code which treats of liens in general, whereas section 813 is found in a special place in the Code of Civil Procedure which treats of actions against steamers, vessels, and boats; and, as the question in controversy relates to a lien, it is claimed that the former section must prevail; but in *People v. Freese*, 76 Cal. 634, 18 Pac. Rep. 812, the supreme court of this state rejected this rule of construction in favor of a rule provided in section 5 of the Political Code, which is as follows:

"The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

This is precisely the language of section 5 of the Code of Civil Procedure, and the question involved in *People v. Freese*, as to the superiority of certain conflicting sections of the Political Code, makes the deci-

sion in that case authority; but, in making the application, we must notice, also, the rule of construction provided by section 5 of the Civil Code, as follows:

"The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

The common law gave no lien to the master for his wages. Section 3055 of the Civil Code, declaring that the master has no lien for his wages, is therefore a declaration of the common law, and not a new enactment. Section 317 of the practice act, as we have seen, gave the master a lien for his wages. This was therefore a new right, created by statute, continued in the Code of Civil Procedure. In the practice act, it was in derogation of the common law; so it is in the Code of Civil Procedure. It is therefore claimed that the presence of the declaration, in section 3055 of the Civil Code, that the master has no lien for his wages, cannot be construed as an expression of a legislative intent to deprive him of his right of lien, expressly conferred by statute, and continued in its appropriate place in the other Code. The rule relied upon to justify this conclusion is this:

"Where two statutes *in pari materia*, originally enacted at different periods of time, are subsequently incorporated in a revision and re-enacted in substantially the same language, with the design to accomplish the purpose they were originally intended to produce, the time when they first took effect will be ascertained by the courts, and effect will be given to that which was the latest declaration of the will of the legislature, if they are not harmonious." Suth. St. Const. § 161.

Now, if we go behind the Codes in this case, and look at the date of the original enactments, we find that the common law of England was adopted as the rule of decision in all the courts of this state by the act of April 13, 1850, while the practice act, giving the master a lien for his wages, was passed by the legislature, April 29, 1851. This last act, as before stated, has been continued in section 813 of the Code of Civil Procedure, and, as it is the last enactment in point of time, it should control as the last expressed will of the legislature. This rule of construction was adopted in *Bank v. Patty*, 16 Fed. Rep. 751, with respect to the conflicting provisions of two different Alabama statutes. The act of 1867, (Alabama statutes) declared that bills of exchange and promissory notes, payable at a bank or private banking house, should be governed by the commercial law. The act of 1863 declared that such documents, payable at a bank or banking house "or a certain place of payment therein designated," should be so governed. Under the first statute, a note payable at a specified place, not a bank or banking house, was not negotiable; under the other, such a note was negotiable. These two statutes were incorporated into a Code,—the later statute being section 2094, the earlier being section 2100. If the latter section were adopted as the last expression of the legislative will, the court would have to hold that the act of 1867, so far as it conflicted with the act of 1873, would control. But, it having been held by the supreme court of the United States

(*Oates v. Bank*, 100 U. S. 239,) that the act of 1873 repealed the act of 1867, the circuit court now held that the presence, in the Code, of the act of 1867, "was clearly an oversight in the codifiers, which was not observed by the legislature when it was adopted. The supreme court of Alabama, in such cases, has decided that, in determining the legislative intent, the date of the enactment will be looked to, and the last one in time will be held to be the law."

In 1877 the question as to the master's lien for wages under these Code provisions arose in this court in the case of *E. D. Wheeler v. The Kate*. From the notes of the argument, taken by the late Judge HOFFMAN, it appears that substantially the same argument was made in favor of the master's lien as was made in the present case; and, while the learned judge left no opinion on file, it is said that he gave such oral intimations in favor of the lien that it was accepted as the law, and the owner of the tug paid the claim, and the libel was dismissed. In the case of *John A. Wilson v. The Free Trade*,¹ argued before me in February last, I endeavored to reconcile the conflicting sections of the two Codes by assuming that section 817 of the Code of Civil Procedure would operate, according to its terms, in favor of all persons rendering services on board of domestic steamers, vessels, and boats, except the master, who was made the subject of a special exclusion by the terms of section 3055 of the Civil Code. It appeared to me that, as the Codes are required to be treated as having been passed at the same moment of time, the presumption was that the provisions of all the Codes were intended to operate, and to give effect to this presumption, I held that the provisions of section 3055 of the Civil Code, declaring that the master had no lien for his wages, should be construed as an exception to the general provisions of section 817 of the Code of Civil Procedure. But, in the argument of that case, my attention was not called to the provisions of sections 5 of the Civil Code and Code of Civil Procedure, and the rule of construction based upon those sections, as has been done in this case; nor was my attention called to the case of *Wheeler v. The Kate*. On the contrary, I was informed that it had not been the practice in this court to recognize the state statute as giving the master a lien for his wages, and, following what I supposed to be the established law of this district and the rule of construction just mentioned, I refused to entertain the master's claim to a lien. Much may be said on either side of the question; but, in the light of the argument in the present case, the authorities cited, and the fact the law of this district appears to have been in favor of the domestic lien, I am of the opinion that section 813 of the Code of Civil Procedure declares the last expressed will of the legislature of this state, and establishes the master's lien for his wages.

The exceptions to the libel will therefore be overruled.

¹The opinion in this case was oral, and has not been reported.

MCGILLIN v. CLAFLIN *et al.*

(Circuit Court, N. D. Ohio, E. D. December 8, 1892.)

No. 5,012.

1. REMOVAL OF CAUSES—SPECIAL APPEARANCE IN STATE COURT—EFFECT OF REMOVAL.

A nonresident defendant, who files in the state court a special appearance, for the purpose of objecting to the jurisdiction, and subsequently removes the cause to a federal court, expressly disclaiming in his petition for removal any purpose to enter a general appearance, does not by such removal waive the jurisdictional question, but may renew the same, and have it determined by the federal court.

2. APPEARANCE—SPECIAL AND GENERAL.

In an action commenced in an Ohio court by attachment and garnishment proceedings, supplemented by publication of service, defendants, being nonresidents, entered a special appearance, as follows: "And now come the defendants, [naming them,] for the purpose of this motion only, and disclaiming any and all intention of entering an appearance to this action except for the purpose of this motion, and move the court for an order dismissing this action, quashing the process of garnishment herein and the service of notice upon them by publication, for the reason that this court has acquired no jurisdiction in this action of either the persons or the property of these defendants, or either of them, none of them having been served with summons herein, and no property belonging to them, or either of them, having been seized upon such order of attachment, and none of the garnishees named therein, or served therewith, having property of these defendants, or either of them, in their possession or under their control, or being indebted to these defendants, or either of them, in any way, and these defendants being nonresidents of and absent from said state; and also move the quashing of said process of garnishment upon the further ground that the affidavit of the plaintiff filed herein was not sufficient to authorize the issuing of said process." *Held*, that this motion was not broader than that contemplated by the Ohio statute, and did not operate as a general appearance. *Smith v. Hoover*, 39 Ohio St. 249, followed.

3. SERVICE BY PUBLICATION—RES TO SUPPORT.

In an action in an Ohio court against a nonresident, commenced by the issuance of attachment and garnishment process, and supplemented by publication of service, the sheriff's return on the summons and garnishment showed that neither defendant nor any of his property had been found in the county. Each of the garnishees answered that he had no property or credits belonging to defendant, and these answers were not controverted by plaintiff, as allowed by the Ohio law, though sufficient time had elapsed for him to do so. *Held* that, as the case stood, there being no personal service and no *res* to support the publication, defendant was entitled to a dismissal of the cause, on special appearance and motion therefor.

At Law. On motion to quash service and dismiss the action.

J. M. Jones and Foran & Dawley, for plaintiff.

Henderson, Kline & Tolles, for defendants.

RICKS, District Judge. This suit was instituted against the defendants in the court of common pleas of Cuyahoga county, Ohio, to recover the sum of \$2,093,000, upon nine different causes of action, set forth in the plaintiff's petition. The controversy between the parties involves a large number of transactions growing out of the sale of dry goods, investment in cattle ranches, real estate, notes, accounts, and other choses in action. The suit was instituted in the state court on the 31st of March, 1892, by the filing of the petition and an affidavit for attachment. Summons for the defendants was issued on the same day. On the 11th of April, 1892, the summons was returned by the sheriff, "Defendants not found in my county." On April 11th the sheriff returned the order of attachment, showing service and order to answer as such garnishee in the form provided by law made upon each of the insurance

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companies named in the exhibit to the plaintiff's affidavit for attachment, and further returns that "defendants had no goods and chattels, lands, and tenements belonging to them, found in my county." On the 8th of June, 1892, an affidavit for publication was filed by the plaintiff, setting forth the nonresidence of the defendants, that an order of attachment and garnishment had been issued and levied upon the property of the defendants, and that their creditors had been garnished. On the 11th of June, 1892, the record certifies that copies of the paper containing such publication were mailed to the defendants at their post office address in the state of New York. On the 11th of June, 1892, the Cleveland Dry Goods Company filed its answer, denying any indebtedness of any kind to the defendants, or that it had any property of any kind under its control belonging to the defendants. On the 12th of July, 1892, the answer of some 48 fire insurance companies, as garnishees, was filed, in which, after protesting against the right to serve the several agents of the garnished parties with process by garnishment, they proceed, and deny, each for itself, that it has any property of the defendants in its custody, or was at any time before or since the plaintiff's suit was filed in any way indebted to any of the defendants, sets forth that each had policies of insurance on the stock of a certain firm of the E. M. McGillin Dry Goods Company, and, without conceding any liability on such policies, avers that such liability is now in dispute, that no notice of any assignment or a transfer of any interest in said goods so insured was ever made to defendants, and therefore denies all indebtedness to them, or either of them. On the 12th of July, 1892, the E. M. McGillin Dry Goods Company filed its answer, denying all indebtedness or liability to the defendants, or either of them. On the 26th of July, 1892, proof of publication was filed, in which the defendants were notified to appear and answer plaintiff's petition in said court on the 6th day of August, 1892. On August 1, 1892, the Guardian Assurance Company, of England, filed its motion to quash the service by garnishment. On August 4, 1892, the defendants entered the following special appearance:

"And now come the defendants, John Clafin, Ed. E. Eames, Daniel Robinson, Horace J. Fairchild, and Dexter N. Force, for the purpose of this motion only, and disclaiming any and all intention of entering an appearance to this action, except for the purpose of this motion, and move the court for an order dismissing this action, quashing the process of garnishment herein and the service of notice upon them by publication, for the reason that this court has acquired no jurisdiction in this action of either the persons or the property of these defendants, or either of them, none of them having been served with summons herein, and no property belonging to them, or either of them, having been seized upon such order of attachment, and none of the garnishees named therein, or served therewith, having property of these defendants, or either of them, in their possession or under their control, or being indebted to these defendants, or either of them, in any way, and these defendants being nonresidents of and absent from said state; and also move the quashing of said process of garnishment upon the further ground that the affidavit of the plaintiff filed herein was not sufficient to authorize the issuing of said process."

On the 5th of August, 1892, the defendants filed their petition for the removal of said suit to this court, and in such petition referred to the pendency of the motion to dismiss for want of proper service; and, disclaiming any intention of entering an appearance to the action generally, the petition was filed. The defendants, having filed their transcript in this court, now renew the motion filed in the state court to quash the service in this case and dismiss the action.

This motion presents a question as to which there has been great diversity of opinion in the reported cases from the various circuit courts of the United States. The defendants, having entered their appearance in the state court for the sole purpose of moving to dismiss the pending proceedings and to quash the process of garnishment, and for no other purpose, and having so filed their motion, afterwards presented their petition for the removal of the suit to this court, and in said petition again disclaimed any intention thereby to enter an appearance in the case, reciting in said petition the nature of the motion to the jurisdiction pending, thereupon tendered their bond, and asked for an order to remove the case to the federal court.

It is now contended by the plaintiff that, notwithstanding all these precautions and disclaimers, the defendants, by filing their petition for the removal of the controversy from the state court, thereby entered a general appearance in said court, and waived all right to controvert in this court the question as to whether or not they were properly and legally in the state court by the garnishment process and publication thereon. As before stated, there is great conflict in the decisions of the federal courts on this question, and, in view of this conflict in the various circuits, it may perhaps be instructive and of value to note the principal decisions made upon this question.

In the case of *Atchison v. Morris*, 11 Fed. Rep. 582, the motion to set aside the service of summons made by an officer of the state court was first entered in the United States circuit court for the northern district of Illinois, after the case had been removed to that court. The defendant had been attending the United States court at Chicago as a witness, under service of process, and while so attending was served with summons issued out of the superior court of Cook county. He filed his petition for removal, and, upon docketing the case in the United States court, moved to set aside the service. Judge DRUMMOND held that by such removal the defendant did not enter "such an appearance as to deprive him of the right to make objection in this court to the service of summons."

In the case of *Small v. Montgomery*, 17 Fed. Rep. 865, the conditions were similar to those above cited. The defendant resided in Tennessee, and was under indictment in a Missouri court, and while there, under process of such court, was served with process from the St. Louis circuit court. He filed his petition for removal, and entered his special appearance for that purpose. After the removal the defendant filed a plea in abatement, setting forth the facts of service as above stated, and raising the question of the sufficiency of the service for the first time in

the United States court. The case was dismissed, the service having been held to be insufficient by Judge TREAT, Circuit Judge McCrARY concurring.

The case of *Miner v. Markham*, in the eastern district of Wisconsin, reported in 28 Fed. Rep. 387, presents substantially the same questions as both the above cases cited. A member of congress was served with process while on his way to attend a session of congress. A motion to set aside the service was entered after the special appearance in the state court. Motion denied in the state court without prejudice to his right to renew the same in the United States court. Judge DYER held that filing petition for removal and bond did not waive the privilege of contesting service in the federal court. The case was dismissed.

In the case of *Perkins v. Hendryx*, in the district of Massachusetts, 40 Fed. Rep. 657, the suit was brought in the state court, and service by attachment and publication made. No personal service had. Suit removed, and motion to dismiss for want of jurisdiction first made in the United States court, and sustained by Judge COLT; the opinion of Judge DRUMMOND in *Atchison v. Morris* approved and followed.

In the case of *Golden v. Morning News of New Haven*, 42 Fed. Rep. 112, the motion to vacate service on the president of the defendant corporation, served while temporarily in New York on business, but when the corporation had no office or place of business in said district, first made in the United States court, was sustained by Judge LACOMBE.

In the case of *Bentlif v. Finance Corp.*, 44 Fed. Rep. 667, motion to dismiss, because the state court had no jurisdiction, filed and presented, after removal, in United States circuit court, Judge WALLACE held that the state court did not acquire jurisdiction, and could not have rendered a judgment that would have had any validity. The suit was dismissed.

In the case of *Ahlhauser v. Butler*, 50 Fed. Rep. 705, motion to dismiss was made in the United States court after the case was removed, based on the ground that the state court was without jurisdiction of the cause for the want of personal service of process, and of a *res* to support service by publication. The motion was denied, but the court held that the filing of the petition to remove was not a waiver of a right to contest this jurisdictional question.

These are the principal cases relied upon to sustain the motion in this case. In this circuit the senior circuit judge, in the case of *New York Const. Co. v. Simon*, pending at Toledo, in the western division of this district, filed his opinion upon this question, which is as follows:

"The settled rule of this circuit is that a defendant who removes a suit from the state court to the circuit court of the United States will not be heard in this court to question the fact that he was properly before the state court when such removal was effected. The right of removal involves, by necessary implication, the assumption that there is a valid and subsisting suit pending in the state court against the removing parties. It is only the controversy involved in such state suit that is intended to be removed. There is nothing in the removal section of the acts of 1887, 1888, or of previous acts, to warrant the idea that a defendant could remove a cause from the state court

to the circuit court of the United States in order merely to have the latter court pass upon and determine the question whether such defendant was properly before the state court. If the defendant does not raise the question in the state court as to whether he has been properly served or is properly before such court before presenting his application and obtaining a removal of such suit to the United States circuit court, he should, it seems to us, be deemed to have waived or abandoned such objection. The federal statutes do not make the question of the validity or invalidity of the service under which a defendant is brought before the state court any ground for removing a suit. The right of removal depends upon the existence of an actual pending suit, which may determine the matter of controversy involved in the litigation between the plaintiff and the removing defendant. The removing party is required to state in his petition the pendency of the suit, the diverse citizenship of the parties at the commencement of the suit and at the date of application for removal, the controversy, and the amount involved, etc. If, after effecting the removal of the suit, with the controversy or controversies it involves, the defendant may then successfully, in this court, impeach the validity of the service under which he was brought into the state court, and thereby cause the suit to be dismissed as to him, it will result that the jurisdiction of the court which he has voluntarily invoked to hear and determine the matter of controversy between the plaintiff and himself will be defeated. Having, of his own motion, transferred the suit to this court, the defendant should not be heard here to say that he was not properly brought into the state court, and that the suit against him should therefore be dismissed from the circuit court to which he had it removed for trial upon its merits. With great deference for the opinion of Judge WALLACE, who in the case of *Bentlif v. Finance Corp.*, reported in 44 Fed. Rep. 667, held that a removing defendant had the right in the circuit court to move to quash the service under which he was brought before the state court from which the suit was removed, this court is of the opinion that the contrary rule, as laid down and enforced in this circuit, presents the sound view on this question, and should be adhered to."

In the case above decided the Chase National Bank did not file the motion to quash the service of summons until after the case had been removed to the federal court, and the motion would then have been after the rule day for appearance in the state court; so that in holding that the defendant in that case had waived his right to test this question of jurisdiction by thus failing to file his motion in the state court before asking for its removal to this court, the learned circuit judge did not establish a precedent in this circuit which will preclude nonresident defendants from still having the right to have this important and oftentimes vital question passed upon in this court, when the proper motions are filed in the state court before removal. In this case, when the petition for removal was filed, as heretofore stated, the issue was distinctly made, and the controversy then pending was as to the jurisdiction of the court over the defendants. The summons issued in the case had been returned by the sheriff, showing that the defendants were not found in his county. No personal service of the process had been made, and no further writ to secure such service was issued. The return of the sheriff on the writ of attachment showed no property found, and the answers of the garnishees showed no credits to the defendants, as before recited. Notwithstanding this return of the sheriff and these answers of the garnishees, affida-

vit for publication was filed, and such publication was made, requiring the defendants to appear on the 6th day of August, 1892. On the 4th day of August the special appearance of the defendants was entered, as before stated, and on the 5th the petition for removal was filed, as aforesaid. After the transcript was filed in this court, the defendants presented affidavits in support of the pending motion that they were residents of the state of New York; that they were not partners, but were members of a corporation organized June 4, 1890; that they had examined the list of defendants served with garnishee process; and the defendant John Claffin avers in his affidavit that neither of said defendants had, at the time of the institution of said suit, or at any time thereafter, in their possession or under their control, any property, rights, credits, or property rights of any nature belonging to H. B. Claffin & Co.

The controversy, therefore, as removed to this court by these proceedings, is primarily one of jurisdiction. It is not as to the mere regularity of service upon the parties within the proper jurisdiction of the court, but it relates to the sufficiency of the proceedings by which it is claimed nonresidents of the state were brought into that court. The controversy is one the defendants ought to have the right to make in this court. Our opinion upon this question is as important to them as our opinion upon the merits of the case would be. Having distinctly made the issue, by proper motion in the state court, within the time prescribed by the laws of Ohio, and having distinctly disclaimed any purpose or intent to waive that question by filing their petition for removal, upon what just principle can it be said that these defendants are now foreclosed from invoking our decision upon this very vital and primary question? The exemption from service of process in this state in the manner attempted in this case is a privilege and right of the highest order and greatest value to these defendants, and one which they ought to have the right to have passed upon by this court. The amount in controversy and the nature of the issues to be joined make this a case peculiarly subject to be affected by those local influences and prejudices against which it is manifestly the intent and purport of all removal acts to protect nonresident defendants. The question of proper service of process and jurisdiction is as much subject to such influences as any other. Why, then, deny to a nonresident defendant the right to controvert such questions in the federal court, and put him at once to issue upon the merits? Is there anything in the acts of congress to support such a claim?

The judiciary act of 1789, par. 12, provides that the defendant shall, "at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court," etc. The decision of the supreme court in the case of *Bushnell v. Kennedy*, 9 Wall. 387, was made under this act of 1789, which seemed to require an entry of appearance in the state court contemporaneous with the filing of the petition for removal. This provision is exceptional, and is found alone in this act. The act of July 27, 1866, (14 St. at Large, p. 306,) provides that nonresident defendants "may at any

time before the trial or final hearing of the cause file a petition for the removal of the cause," etc. The act of March 2, 1867, (14 St. at Large, p. 558,) after providing for a removal by either plaintiff or defendant, if a nonresident, upon filing affidavit as to local prejudice, further provides that such nonresident may, "at any time before the final hearing or trial of the suit, file a petition in such state court for the removal," etc. The act of March 3, 1875, (18 St. at Large, p. 470,) provides that the party entitled to a removal under said act "may make and file a petition in such suit in such state court before or at the time at which said cause can be first tried, and before the trial thereof, for the removal of such suit," etc. The act of August 13, 1888, amending and making intelligible the act of March, 1887, (see 25 St. at Large, p. 434,) provides that the party entitled to removal "may make and file a petition in such state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which suit is brought, to answer or plead."

The language of the chief justice, therefore, in the case cited in 10 Wall., though not pertinent to the question decided or before the court for consideration, would seem to be based upon a construction of the act which required the removing defendant to enter his appearance in the state court before or contemporaneously with the filing of his petition for removal. Such appearance might, without a strained construction, be held to be a waiver of the insufficiency of, or irregularity in, the service of process, and to preclude the removing party from such contention thereafter. But it is significant that all the subsequent acts relating to this subject do not require the entry of appearance by the removing party either before or at the time of filing his petition for removal. The acts differ as to the time when such petition shall be filed, but none of them contain the provision of the act of 1789, above stated. It may be suggested that this language refers only to the time when the petition for removal should be filed. It may bear that construction, but the more natural and reasonable reading of the words is that an appearance is to be entered. It does not say "at the time for entering his appearance," or "at the time fixed for entering his appearance," but says "at the time of entering his appearance." The wording is certainly quite different from that used in all the other acts, and the construction evidently given to it is such as I have stated, and seemed to contemplate such an act by the petitioner. It is fair, therefore, to infer that by such omission in subsequent acts the congress did not intend the filing of a petition for removal to act as a general appearance, and to preclude the removing party from the right to invoke the opinion of the federal court upon all questions involved in his controversy so removed. The petition for removal, then, under all these subsequent acts, brought the controversy, as it existed at the time the petition was filed, to the federal court.

Is it fair to say that the application for removal assumes that a valid and subsisting suit is pending in the state court against the removing party? The petition recites that a controversy exists between citizens

of different states. A controversy as to what? Why not a controversy as to the jurisdiction, when that is a substantial and well-founded subject for contention? It would be manifestly unjust to deny to the removing party the privilege to contest jurisdictional questions in the federal court for the reason, as frequently given, that such questions ought to have been disposed of in the state court before the order for removal was made. The removing party cannot delay the removal of the cause to await such action by the state court. He may file the proper motions to present such questions, and should do so before the time prescribed for filing his petition for removal has elapsed, but if the state court, for any reason, does not dispose of such motions before the statutory time for filing the petition for removal, the fault is not that of the removing party. The petition for removal must be filed at the time fixed. To delay such proceeding is to lose the right to remove, and therefore the removing defendant cannot be held responsible for the failure of the state court to pass upon the motions filed. The time prescribed by the statute is short, and in the usual course of business in the state courts such motions are not heard before the time for filing the petition for removal is reached, and are therefore not disposed of when the prayer for removal is made, and when, by the laws, all further proceedings in that court are suspended. To foreclose such defendant from those questions in the federal courts for such reasons would therefore be manifestly unjust.

But it is urged that, if such questions are reserved for controversy in the federal court after removal, it will often result in hardships, because the jurisdiction of the state court might be defeated for mere irregularity of service, which could have been cured in the state court by an amendment of the officer's return on the process, or by amendment in the writ. Such cases frequently arise in this district, where some 40 or more law cases, removed from the state courts, are now pending, and it has been a source of considerable perplexity to me to know how to pass upon them. But in almost every case of this kind the defective service has been the result of carelessness or ignorance in the return made on the process by the sheriff, and such defect should have been promptly detected by a diligent attorney for the plaintiff, and cured by prompt attention on his part, before any petition for removal was filed. With proper diligence on the part of plaintiff's attorneys, all such questions can and should be eliminated in the state court before the removal is effected, and, if negligence or ignorance of such attorneys leaves such privileges and rights undisposed of, the removing defendants are not responsible for delays that may result; for in most cases the only hardship imposed by disposing of such questions in the federal courts is to dismiss the suits without prejudice to the right of the plaintiff to begin a new action in the state court, and obviate the defects fatal in the dismissed case.

But the principle involved is too important to removing defendants to have it adversely decided upon the ground of any hardship to the plaintiff of the character just considered. They can be obviated, as

suggested; but to preclude the defendants from invoking the judgment of the federal courts upon the jurisdictional question is to deny them a right and privilege which is the foundation and corner stone of just and legal defenses. When, by proper action, they have presented this contention in the state court, and for reasons for which they are in no way responsible the contention has not been decided, and they remove the controversy to the federal court, they bring this primary and vital question into that court for its decision. When the contention goes to the jurisdiction of the court over the defendants, as nonresidents, the federal court can pass upon it with all the aids and authority of the state court. If the jurisdiction must fail for want of proper service, either personal or constructive, there is no greater hardship to the plaintiff to have such question decided in the federal courts than in the state courts. It is the defendants' right and privilege to have that contention decided here, and to deny it to them because they had removed their case is to deprive them in both tribunals of a decision of this vital question; for, if they must dispose of their contention in the state tribunal, they will, in the usual course of litigation, lose their right of removal, and, if their removal of the cause is a waiver of jurisdictional questions, they are foreclosed on that subject in the federal court, so that they are denied in both courts their right to contest the jurisdiction, and must try on the merits alone in the federal court, or submit their whole controversy to the state tribunals in case they hold adversely to them on the jurisdictional question. This is a denial to nonresidents of a great privilege and right, for the federal courts were principally organized for the protection of nonresident litigants. In the case of *Gordon v. Longest*, 16 Pet. 97, the supreme court of the United States said: "One great object in the establishment of the courts of the United States, and regulating their jurisdiction, was to have a tribunal in each state presumed to be free from local influence, and to which all who were nonresidents or aliens might resort for legal redress."

Briefly, then, what is the effect of a decision that a nonresident defendant waives all right to contest the jurisdiction of a state court by exercising his right to remove a controversy pending therein? Fairly stated, it is this: A suit is pending against him in a state court in which proceedings have been taken to enforce his personal appearance by attachment and publication, which proceedings are defective and void, and which suit by law he has a right to remove to the federal court. He is advised and believes that such service is defective, but, in order to avail himself of the right to remove said controversy to the federal court for trial upon its merits, he must waive the jurisdictional question, and relinquish all contention as to his exemption from suit by such proceedings. This is certainly imposing harsh conditions upon nonresidents as the price for exercising a long-conceded right and privilege. But it may be said in reply that if such nonresident defendant is satisfied the proceedings by which constructive service upon him has been attempted are defective and void, he should be content to controvert such questions in the state court. But why compel him to submit that controversy to a local court, which, according to the spirit and theory

of all removal acts, is supposed to be subject more or less to local influences and prejudices, while for exactly the same reasons and objections his right to remove the controversy in the same suit, involving its merits, to a federal court is conceded and established. I can see no just reason for such distinction and discrimination. The reasons which are held valid and satisfactory to support the right of removal of the case as to its merits are equally of force to support the claim that the removal carries the whole controversy with it. Such a conclusion confers upon the removing party the protection and benefits of the removal act, free from conditions, and involves no hardships upon the plaintiff. His controversy as to the sufficiency of the proceedings by which he claims jurisdiction was acquired over the defendant is carried to the tribunal which by law it is conceded is invested with jurisdiction and power to hear and determine the case on its merits, and I fail to see how he is in any way prejudiced by holding that such removal carries the whole controversy with it. Having thus fully reviewed the statutes and decisions bearing upon this question, because of the great diversity of opinion relating thereto, I am of the opinion, for the reasons stated, that the defendants did not waive their right to controvert the jurisdiction of the state court by filing their petition for removal, and that this motion is now properly before this court for our opinion.

It is contended by the plaintiff that the motion to the jurisdiction filed by the defendants in the state court was broader than the statute contemplated, and that thereby defendants entered an appearance, and are now estopped from questioning the sufficiency of the service. I think the motion filed in this case is formed after the motion of similar character cited and approved in the case of *Smith v. Hoover*, 39 Ohio St. 249, and properly enters a special appearance for the purposes of the motion. The return of the sheriff upon the summons issued as hereinbefore quoted shows that none of the defendants were found in Cuyahoga county, where plaintiff's suit was instituted. The return of the same officer on the attachment issued as before quoted shows that "defendants had no goods and chattels, lands and tenements, belonging to them, found in my county." The answers of all the defendants upon whom garnishee process was served disclose that none of them had any credits or property belonging to defendants, or either of them, or was in any way indebted to them. There was therefore no personal service upon the defendants, no *res* to support service by publication, and how can it be claimed they are before the court? In the case of *Cooper v. Reynolds*, 10 Wall. 308, Mr. Justice MILLER, delivering the opinion of the supreme court, said:

"The court in such a suit cannot proceed unless the officer find some property of defendants upon which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

But in the case now under consideration counsel contend that the plaintiff is not concluded by the answers of the garnishees, but may test the truth and sufficiency of such return, denying indebtedness. This is

true in Ohio. But plaintiff has not attempted to controvert these returns of the sheriff, or the answers of the garnishees. The case has been pending in this court quite long enough for the plaintiff to begin his proceedings to show that some property or credits have been attached or garnished.

As the case now stands on the evidence and returns, the motion to dismiss should be allowed, but as counsel for the plaintiff claim they have learned of evidence which will enable them to impeach the truthfulness of the answers of the garnishees, and be able to show that when served with process they had in fact property and credits due the defendants, I will continue the motion to dismiss for 20 days, to enable them to offer such evidence.

HEATON PENINSULAR BUTTON-FASTENER CO. v. DICK *et al.*

(Circuit Court, N. D. Illinois, N. D. July, 1892.)

No. 870.

INJUNCTION—PROCUREMENT OF BREACH OF CONTRACT—CONTRIBUTORY INFRINGEMENT OF PATENT.

A bill alleged that complainant, owning patents for button-fastening machines, had sold the patented machines upon condition that they should be used only with fasteners made by complainant from the sale of which a profit was derived; and that defendants were manufacturing similar button fasteners, capable of and intended by them for use in complainant's machines, and were inducing purchasers of those machines to use such fasteners therein, to the exclusion of complainant's fasteners; and it prayed that defendants be restrained from making for sale, selling, or offering or advertising for sale, any fasteners, intended for use or capable of being used in the machines sold by complainant under such condition, and from persuading or inducing vendees of such machines to purchase or use in such machines any fasteners other than those made and sold by complainants. *Held*, that the bill should be sustained, on general demurrer, and a preliminary injunction should be granted on the bill and affidavits substantiating the charges therein.

In Equity. Suit by the Heaton Peninsular Button-Fastener Company against Joseph C. F. Dick and others to restrain defendants from procuring or inducing purchasers of button-fastening machines from complainant to violate their contracts with complainant entered into on the purchase of such machines. Heard on general demurrer to the bill and on motion for preliminary injunction. Demurrer overruled, and injunction granted.

The facts alleged in the bill were in general purport and substance as follows: Complainant is the owner of several letters patent granted for improvements in button-setting machines, the validity of which has been sustained twice in the United States courts, and under these patents manufactures and sells button-fastening machines called "Peninsular" machines. These machines are sold outright to the users thereof, with the condition that the machines shall be used only with button fasteners made and sold by the complainant, and known as "Peninsu-

lar" fasteners. This condition is expressed on the bills of sale on tags attached to each machine, and also by a caution plate attached to each machine, which reads: "This machine is sold and purchased for use only with fasteners made by the Heaton Peninsular Button-Fastener Company, to whom the title to said machine immediately reverts upon violation of this condition of sale." The price asked and received for each Peninsular machine is an amount barely covering the cost of manufacture and transportation. The complainant seeks its royalty in the profit derived from the sale of Peninsular fasteners, and derives benefit from the patented inventions embodied in the Peninsular machines in this and no other way. The Peninsular machine was and is the only efficient machine in use capable of setting the Peninsular fastener. In 1890 the defendants entered into the manufacture of a metallic button fastener, called by them the "Shoe Dealers' Staple," identical in all essential respects with the Peninsular fastener, capable of use in Peninsular machines, and intended by the defendants for such use. The defendants, from the beginning of the manufacture of Shoe Dealers' Staples, by solicitation and advertisement, procured and persuaded large numbers of users of Peninsular machines to use in those machines the Shoe Dealers' Staple, to the exclusion of the Peninsular fastener, which by their agreement and acquiescence in the condition appended to the sale of Peninsular machines they were under obligation to use. Thus the complainant, since 1890, was deprived of the benefits accruing to it from the sale of Peninsular fasteners, and ceased to obtain the income which it should have received from the use of many Peninsular machines, while the defendants diverted to themselves the profits arising out of the use of their Shoe Dealers' Staples, which never were capable of any use except in Peninsular machines.

The bill prayed, among other things:

"That the defendants may be perpetually enjoined and restrained from directly or indirectly procuring or attempting to procure, inducing or attempting to induce, or causing, any breach or violation of the contracts, or of either or any of the contracts, now or hereafter existing or subsisting between your orator and the vendees, or either or any of the vendees of button-setting machines sold by your orator, or to be sold by your orator, under condition that such vendees shall use in the button-setting machines so sold no other button fasteners than those made and furnished by your orator; and especially from directly or indirectly making or causing to be made for sale, selling or causing to be sold, or offering or causing to be offered for sale, to any person or persons, firm or firms, corporation or corporations whatsoever, any button fasteners intended or adapted for use, or capable of being used, in button-setting machines manufactured by your orator and sold by your orator under the conditions aforesaid; from directly or indirectly persuading or inducing the vendees, or either or any of the vendees of button-setting machines, sold by your orator and held by such vendee or vendees under the conditions aforesaid, to purchase any button fasteners designed or adapted for use in such machines, other than the button fasteners made and sold by your orator for use in such machines by the possessors thereof in conformity to the conditions aforesaid under which said machines are held; and from advertising or causing to be advertised for sale any button fasteners intended or adapted for use in button-setting machines manufactured and sold by your orator, and

held by purchasers under the conditions aforesaid, other than the button fasteners made and sold by your orator to be used in such machines by the possessors thereof in conformity to the conditions aforesaid, under which such machines are held; and from publishing or causing to be published any offer, promise, or inducement, designed or intended to procure the vendees, or either or any of them, of button-setting machines manufactured and sold by your orator, and held and used subject to the conditions of sale aforesaid, to use or to purchase for use in such button-setting machines, in violation of the contracts, or either or any of them, wherein such vendees have been and are bound to your orator as aforesaid, any button fasteners other than those made and furnished by your orator for use in the said button-setting machines."

Upon the bill, and upon affidavits stating facts substantiating its allegations of fact and charges in detail, complainant moved for a preliminary injunction. Defendants demurred to the bill generally, and the cause was contested both on the demurrer and on the motion for injunction.

Hamlin, Holland & Boyden, (James H. Lange and Odin B. Roberts, of counsel,) for complainant.

(1) Action lies for maliciously procuring a breach of contract, whereby a contracting party is injured. Any one who interferes with a contractual relation, to benefit himself at the expense of the contracting party, does so maliciously, within the intent and meaning of the law. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Haskins v. Royster*, 16 Amer. Rep. 780; *Bisby v. Dunlap*, 22 Amer. Rep. 475; *Walker v. Cronin*, 107 Mass. 555; *Gunter v. Astor*, 4 Moore, C. P. 12; *Sheperd v. Wakeman*, Sid. 79; *Keeble v. Hickeringill*, Holt, 14, 17, 19; *Carrington v. Taylor*, 11 East, 571; *Tarleton v. McGawley*, Peake, 270; *Green v. Button*, 2 Crompt. M. & R. 707; *Hart v. Aldridge*, Cowp. 54; *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. Rep. 717; *De Francesco v. Barnum*, 39 Wkly. Rep. 5; *Benton v. Pratt*, 2 Wend. 385. The only case not in harmony with the doctrine as expressed is *Chambers v. Baldwin*, (Ky.) 15 S. W. Rep. 57.

(2) A patentee may parcel his monopoly in any way he sees fit according to the natural subdivision of his monopoly into the three exclusive rights to make, to sell, and to use. It rests with the patentee to define the limitations under which he allows others to enjoy his invention. *Dorsey, etc., Rake Co. v. Bradley Manuf'g Co.*, 12 Blatchf. 202; *Adams v. Burke*, 17 Wall. 453.

(3) When a patented article is sold subject to an express restriction as to its use, disregard of such limitation is an infringement of the patent, and all assignees or vendees of the article are charged with constructive notice of the restriction. *Hawley v. Mitchell*, 4 Fish. Pat. Cas. 388, affirmed 16 Wall. 544; *Burr v. Duryee*, 2 Fish. Pat. Cas. 275.

(4) The circumstance that the structure embodying the patented invention is sold absolutely by the patentee is not inconsistent with a continuing control over the use of the structure, to be exercised by the patentee. *Tie Co. v. Simmons*, 3 Ban. & A. 320; *Tie Supply Co. v. Bullard*, 4 Ban. & A. 520; *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 40 Fed. Rep. 577.

(5) It is generally true that if by contract or covenant a condition or servitude is attached to the ownership of property which is the subject-matter of the covenant, and which is of such peculiar value that the covenantee can invoke the aid of a court of equity to enforce the contract or covenant specifically as against the obligor or covenantor, then to that property in the hands of a purchaser from the obligor or covenantor, with notice of the condition or servitude, the equity raised in favor of the covenantee by the cove-

nant adheres, and prevails against such a purchaser. *Talk v. Moxhay*, 2 Phil. Ch. 774; *Western v. MacDermott*, L. R. 2 Ch. App. 72; *Whitney v. Railway Co.*, 11 Gray, 359; *Clements v. Welles*, L. R. 1 Eq. 200; *De Mattos v. Gibson*, 4 De Gex & J. 276; *Clark v. Flint*, 22 Pick. 281.

(6) The complainant's licensees, the users of Peninsular machines, by dealing with those patented machines in a manner contrary to the conditions and limitations of the license, infringe the patents for the inventions embodied in the machines. *Cohn v. Rubber Co.*, 3 Ban. & A. 568; *Starling v. Plow Works*, 32 Fed. Rep. 290; *Fetter v. Newhall*, 17 Fed. Rep. 841; *Willis v. McCullen*, 29 Fed. Rep. 641.

(7) One who assists in an infringement of patent rights by designedly furnishing to the actual infringer the means by which his infringement is effected, and for the intended purpose of promoting such infringement, is a contributory infringer, and is liable to the extent of his contribution to the infringement. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 40 Fed. Rep. 577.

(8) Any act, done with intent to contribute directly to an infringement of patent rights, is wrongful, and will be enjoined by a court of equity, although in itself, and considered apart from its intended purpose, such act might be lawful. *Wallace v. Holmes*, 9 Blatchf. 65; *Holly v. Machine Co.*, 18 Blatchf. 327, 4 Fed. Rep. 74; *Bowker v. Dows*, 15 O. G. 510; *Travers v. Beyer*, 26 Fed. Rep. 450; *Willis v. McCullen*, *supra*; *Celluloid Manuf'g Co. v. American Zylonite Co.*, 30 Fed. Rep. 437; *Alabastine Co. v. Payne*, 27 Fed. Rep. 559; *Tie Supply Co. v. McCready*, 4 Ban. & A. 588; *Boyd v. Cherry*, 50 Fed. Rep. 279.

Dyrenforth & Dyrenforth, for defendants.

(1) The remedy of a party to a contract, in case of breach, is against the other party thereto. The law gives this mode of redress, and, though the breach of contract may be induced by a third party, yet the act of breach is not his, and the injured party has no cause of action against such a third party.

(2) By the restriction placed upon the use of its Peninsular machines, the complainant seeks to establish a monopoly of the manufacture of unpatented articles, namely, the button fasteners. This is unconscionable, in restraint of trade, and the alleged contract is void. *Machine Co. v. Earle*, 3 Wall. Jr. 320; *Wilcox & Gibbs Sewing-Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Manufacturing Co. v. Gormully*, 12 Sup. Ct. Rep. 632.

JENKINS, District Judge, directed an interlocutory decree to be entered as follows: "An order will be entered overruling the demurrer, and requiring an answer by the first Monday of August. An order will also be entered allowing an injunction *pendente lite* to issue pursuant to the prayer of the bill." Subsequently the defendants submitted to a final decree making the injunction perpetual.

CAREY *et al.* v. HOUSTON & T. C. RY. Co. *et al.*

(Circuit Court, E. D. Texas. November 12, 1892.)

1. FEDERAL COURTS—JURISDICTION—RAILROAD FORECLOSURE—RECEIVERS.

A federal court having jurisdiction and possession, through its receiver, of all the property of a railroad company, thereby acquires jurisdiction of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto, and may enter therein a binding decree of foreclosure and sale. *Morgan's L. & T. R. & S. Co. v. Texas Cent. Ry. Co.*, 11 Sup. Ct. Rep. 61, 137 U. S. 171, followed.

2. JUDGMENT—VACATING CONSENT DECREE—RAILROAD FORECLOSURE.

A decree of foreclosure and sale of a railroad, entered by consent of the creditors and the company, without fraud, in pursuance of a plan of reorganization, will not be set aside at the suit of some of the stockholders merely because the principal of one mortgage was not yet due, when it appears that the sums due for interest thereon, for floating indebtedness, and on other mortgages, then due, were so great as to render foreclosure inevitable, and in that case to deprive the stockholders of all their equity in the property; especially when complainants do not offer to do equity by paying the floating debt, and have not been diligent in opposing the plan of reorganization, or in attacking the decree complained of.

In Equity. Bill by S. W. Carey and others, stockholders in the Houston & Texas Central Railway Company, against the company and various other parties, to set aside a foreclosure decree entered by consent in pursuance of a plan to reorganize the company, and to enjoin the carrying out of the scheme of reorganization. A motion for an injunction *pendente lite* was denied. 45 Fed. Rep. 438. Bill dismissed.

R. H. Landale and Jefferson Chandler, for complainants.

Butler, Stillman & Hubbard, A. H. Joline, and Farrar, Jonas & Kruttschnitt, for defendants.

PARDEE, Circuit Judge. This cause was before the court in the first instance on a motion for an injunction *pendente lite*. The motion was denied for reasons given at some length. 45 Fed. Rep. 438. Both parties having taken such evidence as suited, the cause now comes on for final hearing on the proofs, which change very little the aspect of the case as presented by the pleadings. It has been most thoroughly and exhaustively argued on both sides, both orally and by brief; the discussion ranging over a wide field, covering many propositions of law and equity and of equity practice. Were it at all likely that the present decision would be taken as a finality in the case, I should be disposed to take up *seriatim* the questions as presented by counsel, and discuss them as elaborately and, perhaps, at as great length, as counsel have argued the same in their printed briefs. Under the circumstances, however, I do not deem it necessary to further incumber the record with my conclusions in the case beyond adding a little to what was said in denying the motion for a preliminary injunction.

Whether the bill of complaint herein is an original one in the nature of a bill of review attacking a former decree of the court, or is a bill of complaint in continuation of a former suit, or is an original bill to set aside a decree of foreclosure and sale and a sale thereunder, it seems to

me that, if the court was fully seised of jurisdiction in the suit in which the decree attacked was rendered, and the proofs under the present bill do not establish collusion and fraud in the proceedings to the injury of the present complainants, complainants' bill should fail.

1. As to jurisdiction of the court in the suit in which the decree of foreclosure and sale attacked was rendered: On the 11th day of February, 1885, Nelson S. Easton and James Rintoul, citizens and residents of the state of New York, claiming to be trustees under a certain deed of trust granted by the Houston & Texas Central Railway Company on the 1st day of July, 1866, covering the main line of the Houston & Texas Central Railway, filed their bill—No. 183 of the docket—in the circuit court for the eastern district of Texas against the Houston & Texas Central Railway Company to enforce and protect the trust property, wherein they prayed for an account, for an injunction, for a decree of sale of part of the trust property, and for a modified receivership. On the same day the same complainants filed in the same court another bill against the Houston & Texas Central Railway Company—No. 184 of the docket—to enforce and protect a trust provided and constituted by another deed of trust dated the 21st day of December, 1870, covering the Western Division of the Houston & Texas Central Railway, and all lands and real estate which then constituted, or might thereafter constitute, the said Western Division of the Houston & Texas Central Railway; and therein, on the facts alleged in the bill, prayed for an account, for an injunction, for a decree of sale of part of the trust property, and for a modified receivership. The records show that under these two bills service was had, the court took jurisdiction of the trust property, and made divers orders in relation to the management and disposition of the same. On the 16th of February, 1885, the Southern Development Company, a body corporate under the laws of the state of California, and a resident of that state, in its own behalf and on behalf of all other persons similarly situated, filed its bill of complaint—No. 185 of the docket—in the circuit court of the United States for the eastern district of Texas against the Houston & Texas Central Railway Company, therein averring, among other things, that it was a creditor of the said railway company for large sums of money advanced at various times for supplies, labor, repairs, operating and managing expenses, proper equipment for use and improvement, and other necessary expenses, in amount exceeding \$600,000; that the said indebtedness was contracted by the railway company in consideration of its promise to pay the same out of the earnings of its railway; that the said indebtedness was in equity and good conscience a charge upon the income and property of the said railway; that there had been a diversion of the income of the railway to pay interest on the bonded debt; that by said diversion a lien resulted in favor of the complainant, which complainant was entitled to have enforced in a court of equity. Said bill also set forth many other facts, particularly the absolutely insolvent condition of the railway company, tending to show the right to the relief prayed for, which was for an accounting, the appointment of receivers to take possession of

and operate the railway property, and for a decree for the payment of complainant's claims out of the earnings of the property. To this bill the Houston & Texas Central Railway Company appeared, and filed an answer, and thereafter, upon notice to the defendant, the court took full jurisdiction of the case, appointing receivers for all the property, real and personal, of the Houston & Texas Central Railway, and fully taking the same into the possession of the court.

Thereafter, on the 12th day of March, 1885, the Farmers' Loan & Trust Company, a corporation created by and under the laws of the state of New York, and a citizen of said state, brought its bill of complaint against the Houston & Texas Central Railway Company,—No. 188 of the docket,—therein alleging that complainant was trustee under several mortgages or deeds of trust as follows: A mortgage or deed of trust, dated June 16, 1873, covering the Waco & Northwestern Division, and also 6,000 acres of land per mile of completed road; a mortgage or deed of trust, dated October 1, 1872, covering the main line and the Western Division of the Houston & Texas Central Railway, and also 3,840 acres per mile of completed road; a mortgage or deed of trust, dated May 1, 1875, covering the Waco & Northwestern Division, and 6,000 acres of land per mile of completed road; a mortgage, dated May 7, 1887, to secure a series of bonds due May 1, 1887, covering all the lines of the said railway, and all its lands and land grants; a mortgage, dated April 1, 1881, covering all the lines of said railway and 10,240 acres of land per mile for each mile of completed road on all the lines of said railway company; also all of its town lots. The bill averred the violation on the part of the railway company of many of its agreements in relation to the trust property; the default of the company in the payment of interest; the insolvency of the company; the pendency of the preceding suits; the jeopardy of the trust property; and prayed for an accounting, a writ of injunction, a decree of sale of part of the trust property, and for a receiver of all and singular the rights, franchises, and property of every name and nature, including the rolling stock, goods, chattels, and things in action, including all lands, real estate, tenements, hereditaments, and all property of every sort and nature of the said defendant the Houston & Texas Central Railway Company, with power and full authority to operate said railroad and carry on all the business of said railway company under the protection of the court, with the usual powers of receivers and managers of railroads. In no one of the cases mentioned can there be any question as to the jurisdiction of the court, so far as the citizenship of the parties is concerned. Under these suits, the court was in full, complete possession, through its receivers, of all the property of the railway company.

In this state of the case, the same parties, Rintoul and Easton, trustees under the two several deeds of trust upon which suits Nos. 183 and 184 were based, then came into court January 21, 1886, and filed two other bills of complaint for the foreclosure and sale of all the railroad property covered by the said deeds of trust. To the bill for the foreclosure of the mortgage on the main line, complainants made the Hous-

ton & Texas Central Railway Company and one Benjamin A. Shepard, a resident of Texas, defendants; and they alleged, as to the Farmers' Loan & Trust Company, and as facts upon which the jurisdiction of the court was invoked, as follows:

"And your orators further allege that the Farmers' Loan & Trust Company, as trustees under the said mortgage or deeds of trust, hereinbefore described, will, as your orators believe, be benefited by, and it is to their advantage that the judgment and relief hereinafter prayed for, or some part thereof, should be granted to your orators. That said property covered by the said first mortgage on said main line, as well as all the other property, assets, and effects of said railway company, being now in the hands of this court by the receivership existing in respect of the same, and your orators thereby being required by law to institute this action in this court, and to come before this tribunal, in order to reach the property in its possession, and to obtain its rights concerning the same, and all the parties interested in the property covered by said mortgage on the main line as well as on all the other mortgages and property of said railway company being now before the court in said actions hereinbefore described as Nos. 183, 184, 185, and 188, and on the equity docket of this court, the said Farmers' Loan & Trust Company may and should be made a party defendant in this cause, irrespective of its citizenship; and said corporation should be brought in, as a defendant herein, by the order and direction of this court, and should be bound by the judgment and proceedings herein."

In the bill for the foreclosure of the mortgage covering the western division they made the same parties defendant, and the like averment as to the Farmers' Loan & Trust Company and the jurisdiction of the court. The facts alleged being true, and of record, the jurisdiction of the court to enter a decree of foreclosure and sale of the property covered by the mortgages described seems complete. In the case of *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. Rep. 61, which was in most respects affecting jurisdiction similar to the case under consideration, differing only in the minor matter of the names given to the pleadings, the supreme court, after a discussion of cross bills and their nature, and after deciding that in that case the bill filed by the Farmers' Loan & Trust Company was correctly styled a "cross bill," said:

"And whether this bill be regarded as a pure cross bill, as an original bill in the nature of a cross bill, or as an original bill, there is no error calling for the disturbance of the decree, because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject-matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

Citing *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Bank v. Calhoun*, 102 U. S. 256; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27.

2. The record and proofs do not show that the decree complained of was affected with collusion or fraud to the prejudice of the complainants. In the first place, the complainants, as stockholders, have not been injured by the decree and sale thereunder, but rather benefited. Before the decree, their interest as stockholders was subject to many millions

of bonded indebtedness, bearing a high rate of interest, and to the payment of a vast floating debt. The result of the sale and the reorganization thereunder is that, without increasing the amount, the interest upon the bonded debt has been largely reduced, long-time bonds substituted, and the amount of the floating indebtedness is not increased. Complainants contend that the decree complained of was a consent decree, obtained by collusion between the creditors of the company and the Southern Pacific Company, by which the defendant railroad company was precluded from making proper defenses to the suits for foreclosure. This contention is not borne out by the proofs. The answers of the railway company were not withdrawn. Testimony in the suit was taken; in fact, the record teemed with evidence in the nature of admissions by all the parties, tending to show the justice of the creditors' demands, and the fact that the railroad company had no meritorious defenses. The vast amount of floating indebtedness was not, and could not be, denied. The insolvency of the company, and its utter inability to pay its just debts, and maintain the property as a going concern, was admitted on all hands, and could not have been truthfully denied. The sale and reorganization of the property was considered essential in the interest of all concerned. The question of whether or not the principal of the bonds secured by the first main line and western division mortgage was or had become due because of the defaults of the company, and its general failure to comply with its agreements, was, it is true, an issuable fact; but at the same time it was a fact of minor importance, because a sale of the property was necessary on account of the defaults of the company in the payment of interest upon its other bonds secured by mortgages, upon which it was undoubted the principal had become due, and because of the large admitted floating debt pressing for payment. It was of little interest to the stockholders of the Houston & Texas Central Railway Company (who, so far as the record shows, never proposed to pay anything) whether the principal of the first main line and western division mortgages was declared due or not, when the interest thereon past due was in amount far beyond the ability of the company to meet, and for which a foreclosure was inevitable; and which, with the foreclosures under the subsequent mortgages for principal and interest conceded to be due, would have extinguished every interest the stockholders possessed. Nor do the proofs of the case at all satisfy me that there was any collusion. "Collusion" is an agreement between two or more persons unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." Bouv. Law Dict. "Collusion" is where two persons apparently in a hostile position, or having conflicting interests, by arrangement do some act in order to injure a third person, or deceive a court." Rap. & L. Law Dict. This case nowhere shows any agreement between any persons, either express or implied, to defraud any one, to deceive any court, or that any one has been defrauded, or any court deceived. Beyond this, the complainants have wholly failed to show that the complainants in the foreclosure suits were cognizant of any misconduct on the part of the defendant, its coun-

sel, or its directors, or that they insisted upon, or were parties to, any agreement by which the interests of the defendant company or its stockholders were really aggrieved.

It may be further noticed in this case that the proofs made do not show such diligence on the part of the complainants as gives them the right to attack, at this time, the decree of sale, the sale thereunder, and the organization agreement. In this connection, what was said by Mr. Justice PATTERSON of the New York supreme court, in his opinion in the *Gernsheim Case*, (Sup.) 7 N. Y. Supp. 878, on the identical facts, is very apropos:

"Manifestly, if the reconstruction were carried out in good faith, and the rights of the stockholders were protected and preserved, they would have been benefited by the cutting down of interest and fixed charges; and it is not at all a gratuitous assumption that all stockholders would have willingly acquiesced in the reconstruction agreement, provided it was carried out in good faith, and without any effort to destroy their interest in such stockholders. It seems to me that it is the result, and not the method, which has induced the assault upon the proceedings antedating the levying of the assessment on the stockholders. The reconstruction agreement was made on December 20, 1887. This suit [the *Gernsheim* suit] was not brought until September, 1889. It is nowhere explained in the moving papers why these plaintiffs remained quiescent for nearly two years without making any demonstration against the reconstruction agreement, or the proceedings in the United States court, which eventuated in the decree of foreclosure, (except as above stated;) and it is almost apparent that they were willing to take their chances under that agreement, and to acquiesce in all the proceedings that were had pursuant to it, until they ascertained that the heavy assessment of 73 per cent., of which they complained, was levied upon them to enable them to take stock in the new corporation."

It is hardly necessary to notice that the complainants do not offer to do equity, and pay into the court the amount of the debt of the defendant company which they concede to be due, or any of the expenses of foreclosure; nor that the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate of interest. In my opinion, the complainants' bill should be dismissed, with costs, and a decree to that effect will be entered.

BALLARD v. McCLUSKEY.

(Circuit Court, S. D. New York. July 26, 1892.)

DEPOSITIONS—AGREEMENT FOR TAKING—ABANDONMENT.

Where, under equity rule 67, counsel have agreed that the deposition of a witness may be taken down by a typewriter in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction, one of the counsel cannot abandon such examination without adequate cause shown to the court on a subsequent motion to compel the production of the witness before the examiner, and, if he does abandon it without such cause, the testimony of the witness will be closed.

In Equity. Bill by Charles W. Ballard against James J. McCluskey for infringement of a patent. On motion to compel production of a witness before the examiner. Proper practice stated.

W. D. Edmonds, for complainant.

A. B. Carrington, for defendant.

SHIPMAN, Circuit Judge. This is a motion to compel the complainant to produce Charles H. Treat, a witness, for further cross-examination. The action is a bill in equity for the infringement of a patent, and the testimony of the witness, so far as it had progressed, had been taken orally under rule 67, and had been by agreement taken down by a typewriter, at the office of one of the counsel, in the absence of the examiner, but under his constructive direction. Some differences of opinion having occurred between the counsel, the cross-examining counsel stated that the cross-examination was closed until the witness should be produced before the examiner for further examination, on the ground that the opposing counsel were "unable to agree as to the cross-examination, and defendant's counsel refuses to proceed in the absence of the examiner." The complainant insisted that the cross-examination should then proceed, or that the witness should sign his deposition, and his examination be considered as closed.

The record does not disclose an adequate cause for the refusal to continue the examination. The defendant's counsel did not proceed, the deposition was signed, and the witness dismissed. Since the new rule 67 was promulgated, the practice has been for counsel to agree that the depositions may be taken down by a typewriter, in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction. The question under this motion is as to the right of one counsel to refuse to continue the examination, and to demand the production of the witness before the examiner; in other words, to declare the agreement at an end.

When counsel have entered upon the taking of a deposition under such an agreement as I have stated, the examination cannot be abandoned until the witness is produced before the examiner, without adequate cause. If counsel abandon the agreement without adequate cause which shall be satisfactory to the court, the testimony of the witness under examination will be closed. Counsel are not at liberty to enter

upon the taking of testimony under a stipulation, and to abandon the examination for any reason. Such a course of procedure is not only irritating, but exceedingly expensive. On the other hand, they will be permitted to abandon, if, upon motion to compel the reproduction of the witness for examination, such abandonment is shown to have been required by the necessities of the occasion. In this case, I do not think that the defendant's counsel had adequate reason for his dissatisfaction; but this is the first question of the kind which has arisen under the new practice, and, as counsel acted under both lack of knowledge and impatience, I am not disposed to be rigorous, but, announcing what will be the course in the future, permit an additional cross-examination of the witness Treat, in accordance with the original agreement, especially as he is employed in New York city, and can manifestly be produced without trouble or much expense.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co.,
(SHAND *et al.*, Interveners.)

(Circuit Court, D. South Carolina. October 28, 1892.)

1. RAILROAD COMPANIES — FORECLOSURE OF MORTGAGE — PRIORITY OF LIENS — LEGAL SERVICES.

Legal services rendered to a railroad company in maintaining before the courts the validity of municipal aid bonds are not of a character to take precedence of the company's mortgage bonds, within the doctrine of *Foadick v. Schall*, 99 U. S. 235, and equity has no authority to give them such precedence, especially when the services were rendered two years before the appointment of the receiver.

2. SAME.

The fact that such services resulted in benefit to the bondholders will not justify displacing the latter's lien, when they were not parties to the contract of employment.

In Equity. Suit by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company to foreclose a mortgage. Heard on the separate intervening petitions of Robert W. Shand and the firm of Sheppard & Bro., asserting claims for legal services, and asking payment prior to the satisfaction of the mortgage bonds. Petitions dismissed.

For prior opinions delivered in the course of this litigation, see 45 Fed. Rep. 436, 48 Fed. Rep. 45, 188, and 49 Fed. Rep. 693.

Mitchell & Smith, for petitioners.

Samuel Lord and *A. T. Smythe*, for respondents.

SMYTHE, District Judge. These two petitions were heard together. Several townships in South Carolina had subscribed to the capital stock of the Charleston, Cincinnati & Chicago Railroad Company, the subscription payable in coupon township bonds. The townships were created corporations and given the power to subscribe in this way by the

act chartering the railroad company. This railroad company had contracted with the Massachusetts & Southern Construction Company to build and equip their road. The township bonds were to be used in paying for such construction. In 1888, in a cause entitled *Floyd v. Perin*, 30 S. C. 2, 8 S. E. Rep. 14, the supreme court of South Carolina pronounced invalid the provisions of a railroad charter similar to that of the Charleston, Cincinnati & Chicago Railroad Company, and declared township bonds issued thereunder invalid. This question being of grave importance both to the railroad company and to the construction company, R. A. Johnson, who was the general manager of both companies, engaged the professional services of these petitioners, who are both excellent lawyers, to devise and take such steps as would lead to the validation of the township bonds subscribed in aid of the railroad company. Although nothing clearly definite appears in the correspondence and conferences with Johnson, both of these gentlemen believed that they were retained by and for the railroad company and by the construction company. They rendered important, valuable, and successful service. The township bonds were validated by an act of the legislature, in the passage of which they were largely instrumental. The supreme court sustained the constitutionality of the act in a cause brought and argued by them. *State v. Neely*, 30 S. C. 598, 9 S. E. Rep. 664. The result is that the township bonds have been given value, and, as petitioners contend, have been largely used in the construction of the road. They now present their claim for services,—\$6,000, each,—and ask that it be allowed and paid in priority to the mortgage lien. The counsel for the the receiver and for the mortgage bondholders deny that these gentlemen were retained for the railroad company, or that their service benefited the railroad company. They insist that the retainer was for and on behalf of the construction company, to whom all these township bonds had been assigned. Be this as it may, and assuming, for the purposes of this case, that the facts are as stated by the petitioners, can we displace in their behalf the vested lien of the mortgage? *Fosdick v. Schall*, 99 U. S. 235, led the way to the displacement of the mortgage lien, permitting certain favored claims to be paid before the mortgage debt, either out of the income or out of the proceeds of sale. But the courts have carefully guarded themselves from extending these claims, which were for materials, supplies, and labor necessary for keeping the railroad a going concern, and have expressly refused to consider any claim originating more than six months before the appointment of the receiver. The services in this case were rendered nearly, if not quite, two years before the appointment of a receiver. Indeed, the supreme court of the United States, in *Kneeland v. Loan & T. Co.*, 136 U. S. 97, 10 Sup. Ct. Rep. 950, have felt the necessity of warning the profession against erroneous views as to the effect of *Fosdick v. Schall*:

“No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens.

It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

Counsel for the petitioners urge upon the court the consideration of the value of these services in securing the means for constructing the road. But the services rendered by the petitioners are not within that favored class protected in *Fosdick v. Schall*. Indeed, if they had obtained and supplied the money used in constructing the road, this would not have helped them. *Wood v. Trust, etc., Co.*, 128 U. S. 416, 9 Sup. Ct. Rep. 131; *Cowdrey v. Railroad Co.*, 93 U. S. 352; *Dunham v. Railway Co.*, 1 Wall. 267; *Railroad Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. Rep. 405.

Nor does it affect the question that their services incidentally benefited the mortgage creditors, and added to the value of the property covered by the mortgage. There were no contract relations with these creditors. In *Hand v. Railroad Co.*, 21 S. C. 162, the law is clearly stated:

"No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one flowing to him on account of services rendered to another by whom he may have been employed. Before a legal charge can be sustained, there must be a contract of employment, either expressly made or superinduced by the law or the facts."

See *Bound v. Railway Co.*, 51 Fed. Rep. 60.

The petitions are dismissed.

GOULD v. LITTLE ROCK, M. R. & T. RY. CO. *et al.*

(Circuit Court, E. D. Arkansas. October 28, 1892.)

No. 951.

1. CORPORATIONS—INSOLVENCY—PREFERENCE OF CREDITORS.

Under the decisions of Arkansas and at common law, an insolvent corporation may make preferences among its creditors in good faith, so long as its right to do so is not restrained by statute. *Ex parte Conway*, 4 Ark. 302, and *Ringo v. Bischoe*, 13 Ark. 563, followed. *Rouse v. Bank*, 22 N. E. Rep. 293, 46 Ohio St. 493, questioned.

2. SAME—LOANS BY DIRECTORS.

Advances made in good faith by certain directors of a railroad, and used for legitimate corporate purposes, their inducement being to protect and give value to their own large interests as creditors and stockholders, but all other stockholders and creditors being equally protected thereby, constitute a valid debt, enforceable by suit; and a deed of trust on certain lands thereafter executed by the direction of the stockholders and board of directors to secure it is as valid as if given to any other creditors.

3. SAME—DIRECTORS AS TRUSTEES.

Treating the directors as trustees, the payment of the debt is an essential prerequisite to the avoidance of the deed of trust given to secure it, whether the debt was a present or precedent one.

In Equity. Bill by Jay Gould against the Little Rock, Mississippi River & Texas Railway Company and Henry Wood, as trustees, to foreclose a deed of trust on certain lands. On her own motion, Sallie Leverett, as administratrix of the estate of J. M. Leverett, deceased, was made a defendant, and filed an answer and cross bill. Cross bill dismissed, and decree for complainant.

Statement by CALDWELL, Circuit Judge:

On the 25th day of April, 1884, the Little Rock, Mississippi River & Texas Railway Company, an Arkansas corporation, in pursuance of a resolution of its stockholders, and also of its board of directors, executed by its secretary, to Henry Wood, as trustee, a deed of trust in the nature of a mortgage on certain lands belonging to the company to secure the payment to Atkins, Winchester, Dexter, and Redfield the sum of about \$425,000. The money the deed of trust was given to secure was, from time to time, advanced by Atkins, Winchester, Dexter, and Redfield to the company for the construction and improvement of the railroad and the purchase of the necessary equipments, and to pay pressing debts, and was needed and used for these purposes. At the time the money was advanced and the deed of trust executed, Atkins was president of the company, and Dexter and Winchester were stockholders and directors in the company, and Redfield was a stockholder and a director part of the time, but was not a director when the deed was executed. They were all large holders of the stock and bonds of the company, and in control of the road and its affairs. There is nothing in the record to show what number of persons constituted the board of directors. The statute of the state regulating the organization of railroad companies provides that the board shall consist of not less than 5 nor more than 13, and counsel for interveners state in their brief that there were 8 directors. At the time the money was advanced the company owned its line of road and the rolling stock used in operating the same, and other property, but there were mortgages on this property, to secure bonds issued by the company, equal to or exceeding its value. The credit of the company was not good. It had no means of raising money to meet pressing demands and make necessary improvements, except by selling its mortgage bonds at a ruinous sacrifice. In this condition of affairs, the parties named loaned or advanced the money mentioned in the deed of trust to the company from time to time, as its necessities demanded, borrowing money themselves for this purpose. The company could not have obtained the money from any other source, and those who advanced it were impelled to do so to protect and preserve the large interests they already had in the property. As collateral security for the money advanced, the company pledged its first mortgage bonds to the amount in par value of \$297,000, its second mortgage bonds to the amount in par value of \$206,500, and 3,430 shares of the capital stock of the company. It was known this security was inadequate at the time it was taken, but it was all the company had to offer; and afterwards, when the state made a grant of lands to the company, the deed of trust in suit was executed thereon as additional security for these loans

or advances. At the date of the execution of the deed of trust the floating debt of the company was inconsiderable, and the company continued to be a going concern, and to own its road, until it was sold in 1887, under a decree foreclosing the mortgage given to secure its first mortgage bonds.

Some time before this sale of the road, the mortgagees mentioned in the deed, for the consideration of \$400,000, paid in cash, assigned and transferred the debt due them from the company and the deed of trust to secure the same, as well as the collateral securities which they held, to the present plaintiff. The purchase price of the road at the foreclosure sale was such that the holders of the first mortgage bonds received 56.52 cents on the dollar for the bonds, and the plaintiff received this percentage, amounting in the aggregate to \$167,864.40 on the first mortgage bonds which he held as collateral security for the debt secured by the deed of trust in suit, and this is all that has ever been paid thereon. The second mortgage bonds and stock were rendered worthless by the foreclosure of the first mortgage. This bill was filed by the plaintiff against the company and the trustee named in the deed, to foreclose the same. The company and the trustee appeared, and confessed the bill. Upon her own motion, Sallie Leverett, as administratrix of the estate of J. M. Leverett, deceased, was made a defendant, and thereupon filed an answer and cross bill, alleging that on the 28th day of March, 1885, she recovered a judgment against the defendant company for \$3,500 in the circuit court of Desha county, Ark., upon which executions were issued and levied upon the lands mentioned in plaintiff's deed of trust. She avers, among other things, that the deed is void, because, at the time of its execution, Atkins was president, and Winchester, Dexter, and Redfield, directors, of the company, and the principal holders of its stock and bonds, and the company insolvent. There was a replication to the answer, and an answer to the cross bill, which denied all its allegations.

Dodge & Johnson, for plaintiff.

Sol F. Clark, Dan W. Jones, Thomas B. Martin, and Ratcliffe & Fletcher, for defendant Leverett, contended that—

The deed of trust was void, because made to secure debts due to the directors of the company when it was insolvent, and cited *Lippincott v. Carriage Co.*, 25 Fed. Rep. 577, 586; *Howe, Brown & Co. v. Sanford Fork & Tool Co.*, 44 Fed. Rep. 231; *White, Potter & Paige Manuf'g Co. v. Henry B. Pettes Importing Co.*, 30 Fed. Rep. 864; *Adams v. Milling Co.*, 35 Fed. Rep. 433; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. Rep. 184; *Rouse v. Bank*, 46 Ohio St. 498, 22 N. E. Rep. 293; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7; *Gibson v. Furniture Co.*, (Ala.) 11 South. Rep. 365.

CALDWELL, Circuit Judge, (*after stating the facts*,) 1. It is the law of Arkansas, established by the decision of its supreme court 50 years ago, that a corporation of that state in failing circumstances may make preferences among its creditors by assigning all or a part of its property to preferred creditors, or to trustees for their benefit. Its right to prefer

one or more of its *bona fide* creditors to the exclusion of others, in the absence of a statute prohibiting it, is as unrestricted and absolute as is the common-law right of an individual debtor to make preferences among his creditors. *Ex parte Conway*, 4 Ark. 302, 348, 354; *Ringo v. Biscoe*, 13 Ark. 563. The established rule in that state is in harmony with the general, though not quite uniform, current of authorities in this country on the question. 2 Mor. Corp. § 802; *Allis v. Jones*, 45 Fed. Rep. 148; *Covert v. Rogers*, 38 Mich. 363; *Coats v. Donnell*, 94 N. Y. 168; *Dana v. Bank*, 5 Watts & S. 223; *Warner v. Mower*, 11 Vt. 390; *Whitwell v. Warner*, 20 Vt. 426; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. Rep. 514; *Duncomb v. Railroad Co.*, 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Buell v. Buckingham*, 16 Iowa, 284, (opinion by Judge DILLON;) *Hallam v. Hotel Co.*, 56 Iowa, 178, 9 N. W. Rep. 111; *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395; *Smith v. Skeary*, 47 Conn. 47; *Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. St. 314; *Sargent v. Webster*, 13 Metc. (Mass.) 497.

In some states, by statute, the property of an insolvent corporation must be devoted to the payment *pro rata* of all its creditors, and, after the insolvency of the corporation is known, the directors cannot divert its property from such use by giving preferences to some of its creditors; but where there is no such statute the great weight of authority is that the property of an insolvent corporation may be sold and used by its directors in the payment of some of its creditors to the exclusion of others. Its insolvency does not affect its right to make preferences any more than the right of an individual debtor to make preferences is affected by his insolvency. The cases which hold the contrary doctrine are bot-tomed on the erroneous theory that the insolvency of a corporation, in effect, dissolves it, and makes the directors mere trustees to distribute its assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no more than that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of any of its *bona fide* debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making preferences among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by statute or by judicial proceedings.

In *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. Rep. 338, Mr. Justice FIELD, in delivering the opinion of the court, calls attention to the fact that the property of a corporation is not a trust fund for creditors in any other sense than we have stated. He says:

"We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts,

but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability to be appropriated to pay that indebtedness. Such a doctrine has no existence. The cases of *Curran v. State*, 15 How. 304, 307, and *Wood v. Dummer*, 3 Mason, 308, give no countenance to anything of the kind."

The case of *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. Rep. 293, is cited in support of the proposition that the property of an insolvent corporation is a trust fund for its creditors in a sense that precludes the corporation from making preferences among its creditors, or otherwise using its property in the conduct of its corporate business. Referring to the doctrine of this case, the supreme court of the United States, speaking by Mr. Justice GRAY, says:

"That decision, it is true, proceeded in part upon the theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. Rep. 1081; *Richardson's Ex'r v. Green*, 133 U. S. 30, 44, 10 Sup. Ct. Rep. 280; *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. Rep. 338; *Peters v. Bain*, 133 U. S. 670, 691, 692, 10 Sup. Ct. Rep. 354." *Purifier Co. v. McGroarty*, 136 U. S. 237, 10 Sup. Ct. Rep. 1017.

A good many courts have from time to time inveighed against the rule of the common law which allows a debtor to make preferences among his creditors, but the rule is too firmly imbedded in our system of jurisprudence to be overthrown by judicial decision, and it can no more be overthrown by the courts in its application to corporations than to individuals. In *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. Rep. 514, the court said:

"Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors, although it is insolvent, unless such conduct is prohibited by law."

We think this is a correct statement of the rule, and that it can only be abrogated by legislation.

2. It is next contended that the deed of trust is void because it was executed to secure debts due to persons who were directors of the corporation, and large holders of its stock and mortgage bonds. The money was actually advanced by the directors in good faith for the benefit of the company, and was used by the company for legitimate corporate purposes. It was not loaned or advanced for the purpose of obtaining any advantage over the corporation or its other stockholders or creditors, but to conserve and protect the best interests of all persons interested in the property. It is obvious that the directors who made these advances did not do so from choice, or because they esteemed it a safe or profitable investment in itself. They made the advances because the corporation stood in pressing need of the money, and its failure to get it was

likely to result injuriously to all its creditors and stockholders. The inducement to make the loan was to protect and give value to their own large interests as creditors and stockholders of the corporation; but all other creditors and stockholders, in proportion to their interests, were equally protected and benefited by the loan. Upon these facts, the deed of trust executed by the direction of the stockholders and board of directors to secure the advances previously made by these four directors to the company is a valid security. The advances constituted a valid debt against the corporation, which it was legally liable to pay, and could have been compelled to pay by suit. Where a corporation is legally liable to pay a debt, it may undoubtedly give security for its payment. The use of its property to pay or secure a *bona fide* debt is not an unlawful use or diversion of its property, no matter what official relation the creditor sustains to the corporation. The corporation is under the same obligation to pay a *bona fide* debt due to one of its directors and stockholders that it is to pay a debt due to a stranger, and a security given for a debt due to a director and stockholder is as valid as a security given to any other creditor. The doctrine established by the best-considered cases and by the decisions of the supreme court of the United States is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a *bona fide* loan of money previously made to such corporation, and used by it in conducting its legitimate corporate business. Among the states maintaining this doctrine may be mentioned Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, Illinois, Minnesota, and Iowa. The rule is thus stated in a recent case by the supreme court of Iowa:

"We understand that he [a director] may become a creditor of the corporation, may advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor; and, if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim." *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395.

The previous cases in that court to the same effect are: *Buell v. Buckingham*, 16 Iowa, 284; *Bank v. Wasson*, 48 Iowa, 336; *Hallam v. Hotel Co.*, 56 Iowa, 178, 9 N. W. Rep. 111. In discussing the question, the supreme court of Connecticut say:

"These creditors had a perfect right to receive pay in money or goods, and the fact that they were stockholders and directors did not modify or abridge that right so long as there was no actual fraudulent intent. The fact, if it be a fact, that it operated to prefer these creditors is not sufficient at common law to stamp it as fraudulent, for the common law favored the vigilant, and a creditor might rightfully obtain a preference." *Smith v. Skeary*, 47 Conn. 47.

And to the same effect, see *Duncomb v. Railroad Co.*, 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J.

Eq. 635, 7 Atl. Rep. 514; *Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. St. 314; *Whitwell v. Warner*, 20 Vt. 425; *Gordon v. Preston*, 1 Watts, 386; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Kitchen v. Railway Co.*, 69 Mo. 224; *Oil Co. v. Marbury*, 91 U. S. 587.

An exhaustive and luminous discussion of this question is found in the opinion of the supreme court of Minnesota, delivered by Judge MITCHELL, in the case of *Hospes v. Car Co.*, 50 N. W. Rep. 1117. The reasoning of the learned judge who delivered the opinion of the court in that case makes it extremely clear that an insolvent corporation may prefer its creditors, whether they be officers of the corporation, or strangers; and that there is no foundation for the doctrine that the insolvency of a corporation has the effect to convert its assets into a "trust fund," in the technical sense of that term, and its officers into mere trustees charged with the duty of distributing its assets ratably among its creditors.

The question has been before the supreme court of the United States in several cases. In the case of *Hotel Co. v. Wade*, 97 U. S. 13, the court said:

"His [circuit judge's] finding is that the bonds and mortgages were not void upon the ground that the lenders of the money were also the directors of the company; that the terms of the contract were sanctioned by the stockholders; and that the money loaned was needed to complete the building, and that it was applied to effect the purpose for which it was borrowed. * * * Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the finding fails to support the proposition that the bonds and mortgage were invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred, and it has never been held that the arrangement was invalid where it appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence."

In the case of *Richardson's Ex'r v. Green*, 133 U. S. 30, 43, 10 Sup. Ct. Rep. 280, the court said:

"Undoubtedly his relation as a director and officer or as a stockholder of the company does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and, unless satisfied by proof that the transaction was entered into in good faith, with a view to the benefit of the company, as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

The attack upon the validity of the trust deed must fail upon another ground. Treating the directors as trustees, it is not open to the company or any of its creditors to avoid the security given in pursuance of the direction of the stockholders, as well as the directors, so long as the company retains the money which was loaned in good faith, and actually appropriated to legitimate corporate uses. The payment of the debt thus contracted is an essential prerequisite to the avoidance of the deed of trust given to secure its payment. "And," in the language of the court of appeals of New York, "this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be

regarded equally exists." *Duncomb v. Railroad Co., supra.* Let a decree be entered foreclosing the deed of trust for the amount due on the debt therein mentioned, and dismissing the cross bill of Sallie Leverett for want of equity.

MATTHEWS v. FIDELITY TITLE & TRUST CO. *et al.*

(Circuit Court, W. D. Pennsylvania. August 4, 1893.)

No. 27.

1. SUBROGATION—ASSIGNMENT FOR BENEFIT OF CREDITORS.

M., the owner of a mortgage, loaned it to a bank for temporary use, to sustain its credit when in a financial strait. The bank pledged the mortgage with a creditor as collateral security, and subsequently pledged with the same creditor commercial paper, owned by it, as collateral security for the same debt. Afterwards the bank made a general assignment for the benefit of creditors. The mortgagor then voluntarily paid the amount of the mortgage to the pledgee, who applied the money towards the debt of the bank. The pledgee collected the commercial paper, and, after full satisfaction, there remained a balance therefrom in the pledgee's hands. *Held*, that by right of subrogation M. was entitled to this balance as against the voluntary assignee.

2. SAME—ESTOPPEL.

M. had proved as a general creditor against the assigned estate, and received a *pro rata* dividend on the full amount of his claim. *Held*, that he was not thereby estopped from asserting his right by subrogation to the whole of the special fund remaining in the hands of the pledgee, as that fund and his dividend together did not satisfy his claim in full.

In Equity. Bill by John Matthews against the Fidelity Title & Trust Company and others to enforce an alleged right of subrogation. Decree for complainant.

On October 31, 1889, and prior to that time, the complainant, John Matthews, was the owner of a mortgage for \$50,000, made by the Moorhead-McCleane Company, and dated February 1, 1887, payable 10 years after date. On the date first above mentioned the Lawrence Bank was financially embarrassed, and its condition was known both to Matthews and to its president, Young, and on that day Matthews assigned the mortgage to Young for the use of the bank, and received in return a certificate of deposit, bearing interest, for the sum of \$50,000. Subsequently the mortgage was assigned by Young to the president of the Union National Bank to secure overdrafts made and to be made upon it by the Lawrence Bank. The overdrafts having at length somewhat exceeded the amount of the mortgage, the Lawrence Bank, as additional security, pledged with the Union Bank a large amount of commercial paper. Shortly afterwards, on November 25, 1889, the Lawrence Bank made a voluntary assignment for the benefit of creditors to the defendant the Fidelity Title & Trust Company. On December 2d following, the Moorhead-McCleane Company paid the amount of the mortgage and accumulated interest to the Union Bank, which applied the same to the extinguishment of the overdrafts. Subsequently it collected large amounts

of the commercial paper held in pledge, and, after satisfying its whole claim against the Lawrence Bank, had left a surplus of \$21,000. The complainant, Matthews, claims this fund by right of subrogation, on the theory that he had only assigned his mortgage for use in sustaining the credit of the bank, and was to receive it back when this purpose was accomplished. It appeared, however, that Matthews had filed his certificate of deposit with the assignee of the Lawrence Bank, and had received his *pro rata* share of a dividend paid to the creditors thereof.

Lyon, McKee & Sanderson, for complainant.

Wm. M. McGill and *David Q. Ewing*, for Fidelity Title & Trust Company—

Contended that subrogation "will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party, who, on some sort of compulsion, discharges the payment against a common debtor;" citing *Cottrell's Appeal*, 23 Pa. St. 294; *Webster & Goldsmith's Appeal*, 86 Pa. St. 409; *Hoover v. Epler*, 52 Pa. St. 522; *Mosier's Appeal*, 56 Pa. St. 80; *Wallace's Estate*, 59 Pa. St. 401; *Bleakley's Appeal*, 66 Pa. St. 187; *Wandell's Estate*, 18 Wkly. Notes Cas. 143; *Sheld. Subr. § 1*; *Shinn v. Budd*, 14 N. J. Eq. 234; *Bank v. Winston's Ex'rs*, 2 Brock. 254; *Gadsden v. Brown*, 1 Speer, Eq. 41; *Sandford v. McLean*, 3 Paige, 122.

Before *ACHESON*, Circuit Judge, and *BUFFINGTON*, District Judge.

ACHESON, Circuit Judge. Taking the proofs as a whole, the transaction of October 31, 1889, between the plaintiff, Matthews, and the Lawrence Bank, cannot fairly be regarded as a purchase by the bank from the plaintiff of the Moorhead-McCleane Company mortgage. Neither of the parties understood or intended the transfer of the mortgage to be a sale thereof. As well the officers of the bank as the plaintiff himself believed that the financial embarrassment of the bank would be overcome, and we think it was in the contemplation of them all that the mortgage would be returned to the plaintiff after its temporary use to sustain the credit of the bank. Certainly it was the plaintiff's expectation—well warranted by what the officers of the bank told him—that the mortgage would be retransferred to him shortly. It is, indeed, true that a certificate of deposit for the sum of \$50,000, the principal (without the accrued interest) of the mortgage, was issued by the bank and delivered to the plaintiff; but it is quite clear from the evidence that this certificate was intended as a mere security to the plaintiff. As already intimated, the substantial nature of the transaction was a loan of the mortgage to aid temporarily the bank in its financial strait.

Turning now to the dealings between the Lawrence Bank and the Union National Bank, we find from the evidence that the latter was the clearing-house agent of the former bank, and that, for the purpose of securing any existing or future overdrafts by the Lawrence Bank of its clearing-house account with the Union Bank, the Lawrence Bank, by its president, on November 4, 1889, assigned the mortgage to the president of the Union Bank, in trust for that institution. While this assignment, upon its face, was unconditional, it is indisputable under the proofs

that the transfer by the Lawrence Bank to the Union Bank was not a sale or absolute assignment of the mortgage, but a mere pledge, for the purpose just stated. At the time of this transfer the Lawrence Bank had overdrawn its clearing-house account to the amount of \$14,915.39, and on November 8, 1889, its overdrafts in all amounted to \$57,108.38. On the last-mentioned date the Lawrence Bank assigned and delivered commercial paper owned by it, amounting to \$25,769.49, to the Union Bank, as security for all its liabilities incurred or to be incurred to the Union Bank. Such was the condition of affairs when the Lawrence Bank, on November 25, 1889, made its deed of voluntary assignment for the benefit of its creditors. Then, on December 2, 1889, before the maturity of the mortgage, the Moorhead-McCleane Company, the mortgagor, voluntarily paid the principal thereof, with accrued interest, amounting to \$52,350, to the Union Bank, and this money was credited by the Union Bank to the Lawrence Bank. Afterwards the Union Bank collected the commercial paper pledged with it by the Lawrence Bank, and, after applying so much of the proceeds as fully discharged all the remaining indebtedness of the Lawrence Bank, there was left in its hands a balance from these securities, amounting to about \$21,000. This balance is claimed by the plaintiff, Matthews, by right of subrogation, and to enforce such right is the purpose of this bill.

Now, it is well settled that subrogation is not founded on contract, nor does it depend on strict suretyship, but it results from the natural justice of placing the burden where it ought to rest. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it, and relieve him whom none but the creditor could ask to pay. 2 White & T. Lead. Cas. 282; *McCormick v. Irwin*, 35 Pa. St. 111. The facts above narrated, we think, clearly bring this case within the operation of the rule, for, as between the Lawrence Bank and the plaintiff, the former was bound to pay the indebtedness to the Union Bank, and, as the plaintiff's mortgage, pledged by the Lawrence Bank for its debt, has been applied to the discharge thereof, the plaintiff has, as against the Lawrence Bank, an equitable right to the surplus in the hands of the creditor arising from the other securities owned and pledged by the Lawrence Bank for the same debt. Nor can the Fidelity Title & Trust Company, the trustee under the deed of voluntary assignment for the benefit of creditors, successfully contest the plaintiff's claim, for that company is clothed merely with the rights of the Lawrence Bank. *Morris' Appeal*, 88 Pa. St. 368. The cases cited by the defendant's counsel to show that one who, without compulsion, obligation, or duty pays the debt of another, is not entitled to subrogation, have no application here, for the plaintiff was not a volunteer in the sense of those authorities. He was no more a volunteer than is any surety who, of his own free will, binds himself for the acts or debt of another.

But it is contended that, if the plaintiff ever had a right to subrogation, he lost it by claiming and receiving out of the general assets of the Lawrence Bank in the hands of the trustee a dividend amount-

ing to \$8,737.15, upon his certificate of deposit. But we cannot adopt that view. True, the plaintiff, on January 9, 1891, appeared as a claimant before the auditor appointed to distribute among the creditors of the Lawrence Bank the balance in the hands of the trustee under the deed of assignment upon its first and partial account, and as the foundation of his claim presented the certificate of deposit for \$50,000, heretofore referred to. But at the same time he submitted to the auditor evidence similar to that now before us, explanatory of the whole transaction. All the facts were disclosed, and the allowance to him by the auditor of the dividend awarded was an adjudication of his right thereto upon all the evidence. Herein we perceive no ground of estoppel against Matthews. It is clear to us that he was at liberty to prove as a general creditor against the assigned estate in the hands of the trustee without prejudicing his rights in the specific fund in the hands of the Union Bank. He had a valid claim against the Lawrence Bank for \$50,000 and upwards, which originated prior to the voluntary assignment. His proof before the auditor was by no means an abandonment of his right to subrogation. The case did not involve an election, for the two claims were not inconsistent. If it appeared that the plaintiff had received a larger dividend than he was entitled to, we could so mold our decree as to do equity; but we do not see that he was allowed more than his proper share. He had, we think, a right to a *pro rata* dividend upon the full face of his claim, upon the principle that a creditor may so use his collaterals as to secure his whole debt. 1 Story, Eq. Jur. (12th Ed.) § 564b; *Kittera's Estate*, 17 Pa. St. 416. Let a decree be drawn in favor of the plaintiff in accordance with the views expressed in this opinion.

BUFFINGTON, District Judge, concurs.

PATAPSCO GUANO CO. v. BOARD OF AGRICULTURE OF NORTH CAROLINA.

(Circuit Court, E. D. North Carolina. September 24, 1892.)

1. CONSTITUTIONAL LAW—STATE INSPECTION LAWS.

In the absence of any constitutional prohibition, a state has the right, under the general powers reserved from the grant of other powers to the federal government, and in the regulation of its internal commerce, and to protect its citizens from fraud, to say that certain articles shall not be sold within its limits without inspection, and also to charge the cost of such inspection upon those offering such articles for sale.

2. SAME—INSPECTION TAX—POWERS OF FEDERAL COURTS.

A state tonnage tax upon fertilizers to defray inspection expenses will not be declared unconstitutional, simply upon the ground of alleged excess, when such excess does not manifest a purpose to evade constitutional inhibitions; and a federal court will not go into the examination of the question, except for the purpose of deciding whether the tax is only colorably or ostensibly an inspection charge, or a charge of a kindred nature.

3. SAME—EXCESSIVE TAX.

The tax of 25 cents per ton imposed upon fertilizers by Pub. Laws N. C. 1891, c. 9, (amending Code, § 2190,) to defray the expenses of inspection, is not in itself so unreasonable or excessive as to show a purpose to evade the inhibition of the federal constitution against the taxation of imports by the states.

4. SAME—REPEAL OF STATUTE—REVIVAL OF PRIOR STATUTE.

Acts N. C. 1885, c. 308, § 4, provided that the board of agriculture should apply to the maintenance of an industrial school such parts of its funds as were not needed for the regular work of the department, not to exceed \$5,000 annually. Pub. Laws 1887, c. 410, § 6, (amending and re-enacting Code, § 2190,) imposed a privilege tax of \$500 on each separate brand of fertilizer sold in the state, and, as a substitute for the act of 1885, provided that all the surplus arising from this tax should be turned over to such industrial school. In 1890 the act of 1887 was declared unconstitutional as imposing a burden on interstate commerce. 43 Fed. Rep. 609. Thereafter its objectionable features were repealed, and superseded by Pub. Laws 1891, c. 9, which imposes a charge of 25 cents per ton on fertilizers, "for the purpose of defraying the expenses connected with the inspection" thereof. *Held*, that the repeal of the act of 1887 did not revive the act of 1885, so as to appropriate \$5,000 of the fertilizer tax to the support of such school, and thus show an intent by the legislature to raise money for that purpose, rather than for the declared purpose of defraying the expenses of inspection.

In Equity. Bill by the Patapsco Guano Company against the board of agriculture of North Carolina to perpetually enjoin the latter from enforcing against it the state inspection tax on fertilizers. Heard on motion to dissolve injunction. Motion granted, and bill dismissed.

Thos. N. Hill and J. W. Hinsdale, for complainant.

Busbee & Busbee and Battle & Mordecai, for defendant.

SEYMOUR, District Judge. This court, in the case of *American Fertilizing Co. v. Board of Agriculture*, reported in 43 Fed. Rep. 609, decided so much of section 2190 of the Code of North Carolina as imposed a privilege tax of \$500 per annum on every manufacturer or other person importing any commercial fertilizer into the state, for each separate brand or quality, to be unconstitutional. The ensuing legislature repealed the section, and modified the entire legislation upon the subject of commercial fertilizers. This legislation is to be found in chapters 9 and 348, Pub. Laws 1891. Chapter 9, quoted in part, reads as follows:

"Section 1. That section 2190 of the Code shall be substituted by the following: 'For the purpose of, defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this state, there shall be a charge of twenty-five cents per ton on such fertilizers and fertilizing material for each fiscal year, which shall be paid before delivery to agents, dealers, or consumers in this state. * * * Each barrel, bag, or other package * * * shall have attached thereto a tag stating that all charges specified in this section have been paid. * * * Any person, corporation, or company who shall sell or offer for sale any such fertilizers contrary to the provisions above set forth shall be guilty of a misdemeanor. * * *'

"Sec. 2. Section 2191 of the Code shall be substituted by the following: 'Every bag, barrel, or other package of such fertilizers, * * * offered for sale in this state, shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the commissioner of agriculture, together with a true and faithful sample of the fertilizer * * * which it is proposed to sell, at or before the delivery to agents, dealers, or consumers in this state. * * * Also, the chemical composition of the contents of each package, * * * together with the date of its analysis, and that the requirements of the law have been complied with. * * *'

"Sec. 4. Section 2193 of the Code shall be substituted by the following: 'Any merchant, etc., who shall sell or offer for sale any commercial fertilizer without such labels, etc., * * * shall be liable to a fine of ten dollars.

* * * Any agent of any railroad * * * who shall deliver any fertilizers in violation of this section shall be guilty of a misdemeanor.' "

Chapter 348, Pub. Laws 1891, amends the previous legislation of the state in regard to the establishment and maintenance of an industrial school.

By the act of 1885, (chapter 308, § 4,) it was enacted that the board of agriculture should apply to the establishment and maintenance of an industrial school such part of their funds as was not required to conduct the regular work of the department, not to exceed \$5,000 annually. Chapter 410, Pub. Laws 1887, § 6, provided that the board of agriculture should turn over to such industrial school annually the whole residue of their funds from licenses on fertilizers remaining over, and not required to conduct the regular work of the department. By chapter 348, Pub. Laws 1891, the provision of section 6, c. 410, Pub. Laws 1887, above cited, is stricken out, and the following provision is substituted in lieu thereof:

"The said board of trustees [referring to the trustees of the North Carolina college of agriculture and mechanic arts, which takes the place of the industrial school created by the act of 1885] shall have power to accept, on behalf of the state, donations of property, real or personal, and any appropriations made by congress * * * for the benefit of agricultural experiment stations, or agricultural and mechanical colleges."

Section 5 of this act appropriates \$10,000 annually for the years 1891 and 1892 to such college of agriculture and mechanic arts. The act of 1891 leaves in force section 2196 of the Code, which provides that the chemist of the agricultural department shall be paid out of the funds of the department of agriculture, section 2198 of the Code, which imposes certain duties upon the state geologist, and authorizes the state board of agriculture to pay for the expenses of the same, and section 2206 of the Code, which appropriates \$500 annually of the money received from the tax on fertilizers to the North Carolina Industrial Association, to be expended under the direction of the board of agriculture. By section 2208 of the Code it is provided that all moneys arising from the tax on licenses, and from various other sources specified, shall be paid into the state treasury, and shall be kept in a separate account by the treasurer as a fund for the department of agriculture. The ordinary repealing clause are annexed to the two acts hereinabove cited from the Laws of 1891. Although, as has been said, chapter 348, Laws 1891, does not repeal section 2206 of the Code, the section appropriating \$500 annually of the money received from the tax on fertilizers, yet a later act refers to the subject of an appropriation to said association. This is chapter 426, Laws 1891, which provides that an appropriation of \$500 be made to the treasurer of said association, to be paid by the state treasurer. This act refers to no particular fund as the source from which such payment shall be derived.

The constitutional objection to this legislation is that it is, it is claimed,

a regulation of commerce. The answer of the state's counsel in sustaining the tax is that it is an inspection law. The reply made to this answer by counsel for plaintiff is, first, that it appears from the whole scope of the legislation that the imposition in question is not intended in good faith to be a compensation to the state for the cost of inspecting commercial fertilizers; that this appears from the alleged fact that the amount is in excess of what would be necessary to pay such cost; and the court is asked, if it be in doubt as to whether this be true, to direct an investigation of the question of what would be the necessary cost of the inspection of commercial fertilizers under the act of 1891, and whether the imposition of a charge of 25 cents per ton be not in excess of what is absolutely necessary to the enforcement of the law. Counsel further contend that the law cannot be an inspection law because it is directed to the subject of articles not the products of the state enacting the regulation; and, further, if not technically an inspection law, that it cannot be upheld on the analogous ground of being a police regulation in the nature of an inspection law, because the police power of the state is confined to the protection of the public health, the public morals, or the public safety. I will consider these contentions in the order above given.

1. I concur with counsel for plaintiff that if the imposition of 25 cents on each ton of commercial fertilizer be not either an inspection impost, or cannot be supported on some analogous ground, it must fail, as being a tax on interstate commerce. The general taxing power of a state extends only to property within its geographical limits, or owned as the personality of its residents. A reading of the law now under discussion may leave it questionable whether, as far as it affects or intends to affect fertilizers manufactured outside of North Carolina by citizens and residents of other states, the imposition considered as a tax is not payable before the property taxed comes within the jurisdiction of the state. Under any construction of the statute it is chargeable upon the merchandise before it becomes mingled with the general mass of personality of the state. Possibly, in the view taken of the subject in the *New Orleans Coal Case*, (*Brown v. Houston*), 114 U. S. 622, 5 Sup. Ct. Rep. 1091, this might not be fatal were the imposition a part of a law taxing at equal rates all taxables; but it is too clear, it would seem, to require any citation of authority that, considered as a specific burden upon a particular article imported from another state, the fertilizers cannot be subjects of state taxation until they are mingled with the general mass of the goods within the state's limits. By section 1 of the first-cited act of 1891 it is provided that the tax shall be paid before delivery to agents, dealers, or consumers in the state, and in various parts of the act it is made penal for any one, including a common carrier, to deliver any fertilizer not bearing upon it, in the shape of a tag, evidence that the tax is paid.

2. The opinion of the court being that the imposition cannot be sustained as a tax on merchandise, I pass to the question of whether it can

be supported as an inspection law, or, on any other ground, as a law regulating the internal commerce of the state.

"Inspection laws are not, strictly speaking," says Chancellor Kent, "regulations of commerce. Their object is to improve the quality of articles produced by the labor of the country, and to fit them for exportation or for domestic use. These laws act upon the subject before it becomes an article of commerce. Inspection laws, quarantine laws, and health laws, as well as laws regulating the internal commerce of a state, are component parts of the immense mass of residuary state legislation over which congress has no direct power, though it may be controlled when it directly interferes with their acknowledged powers." 1 Kent, Comm. *439.

The act imposing a tax of \$500 per annum for each separate brand of fertilizer (Code, § 2190) is imposed as a privilege tax. Amended section 2190, Laws 1891, c. 9, in terms imposes not a tax, but "a charge," of 25 cents per ton on fertilizers, "for the purpose of defraying the expenses connected with the inspection of fertilizers." It is thus expressly imposed as an inspection tax. The strong presumption is that the declared purpose of the drafter of the statute is its real purpose, and no court will lightly assume the contrary. In fact a doubt is expressed by high authority, of the power of the United States courts to pass upon the subject of whether such an imposition is too large for the necessary expenses of inspection. In *Neilson v. Garza*, 2 Woods, 287, Mr. Justice BRADLEY says that it may be doubtful whether it is not exclusively the province of congress, and not at all that of a court, to decide whether a charge or duty under an inspection law is or is not excessive. Mr. Justice BLATCHFORD, in citing *Neilson v. Garza*, adds that there was nothing in the record from which it could be inferred that the state of Maryland intended to make its tobacco inspection laws a mere cover for laying revenue on exports. *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. Rep. 44. A distinction is to be readily deduced, from authority on the subject of inspection and kindred laws, between the question of whether the courts of the United States will pass upon the alleged excessive charge imposed by the law, and that of the consideration of whether a state legislature, or perhaps, as it were better or more correct to say, the framer of a state statute, has intended, under the guise of a pretended charge for the expenses of inspection, to impose a tax on imports or exports, or commerce between the states, or any subjects not properly liable to state taxation. I think that in cases of this character the court is not required to go into an examination of the question of whether the imposition is excessive, unless for the purpose of deciding whether the tax is only colorably an inspection charge, or a charge of a kindred nature. The case in the supreme court of *Packet Co. v. Aiken*, 121 U. S. 444, 7 Sup. Ct. Rep. 907, illustrates the subject. The syllabus is:

"A municipal tax which authorizes the collection of a wharfage rate, to be measured by tonnage, estimated to be sufficient to light the wharves, keep them in repair, and construct new wharves as required, and which may realize a profit over expenses, does not violate the constitution, as being a duty or burden upon commerce."

The supreme court, expressing its opinion by BRADLEY, J., says:

"We see nothing in the purposes for which the lessees were required to expend or pay money at all foreign to the general object of keeping up and maintaining proper wharves, and providing for the security of those that use them. * * * In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the state, nor sit in judgment on the charges imposed for the services rendered under state authority. It is for congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. * * * If in any case of this character the courts of the United States can interfere in advance of congressional legislation, it is where there is a manifest purpose by roundabout means to invade the domain of federal authority."

Turner v. Maryland, *supra*, is a case of the former class; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213, and *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, are cases where the United States courts interfered with state statutes on the ground of manifest purpose to invade the domain of federal authority.

It remains to be considered whether the tonnage tax of 25 cents on commercial fertilizers manifests an evident intent, under the guise of an inspection law, to impose taxation on interstate commerce. The fact, were it true, that the amount of the tax might upon investigation turn out to exceed the sum required to reimburse the state for the cost of inspection, would not, in the view the court takes of the principles of law involved, be at all decisive. The question would perhaps be somewhat analogous to the inadequacy in the consideration in a contract of sale, which might be evidence of fraud, but not conclusive of it, unless sufficiently great to at once "shock the conscience." The verified answer of the board states that the amount collected in 1891 under the existing law was \$32,894; that \$24,000 is all that has been or can be collected during the year 1892. It further states that the number of brands to be analyzed is 350. If such be the case the amount of the tax under the old law, as it existed before 1891, on fertilizers, at the rate of \$500 per brand, would have been \$175,000. Doubtless the reduction in the amount of the tax has been the cause of the introduction into the state of some brands of fertilizer that would not have paid the tax of 1890. Of course, it would have been impossible, in advance of actual results, to have determined the precise imposition which would have covered the cost of inspection. The case has been heard upon bill and answer and certain proofs.

The tax of 25 cents per ton on fertilizers resulted in 1891 in producing about \$33,000. The estimate, which seems a reasonable one to me, for 1892, is that it will pay \$24,000. It is, in the account produced, mingled with other receipts of the department of agriculture. There is no provision in the North Carolina statutes for keeping separate accounts of the cost of the work done under the fertilizer law, and under other branches of the duties of the department of agriculture. The entire expenses—actual, \$14,022.47; estimated about \$3,300—of the depart-

ment of agriculture for the six months (December 1, 1891, to May 31, 1892) are \$17,352.47. These charges include:

Board and committee meetings,	\$1,452 60
Inspector's expenses,	2,398 18
Gas and water,	1 75
Paper, printing bulletins, and other office work,	1,435 53
Salaries and wages,	2,175 00
Attorneys' fees,	534 00
Subscription to periodicals,	39 03
Analytical,	5,000 00
Postage, express, freights, etc.,	985 00
ESTIMATED.	
Gas and water,	40 00
Paper, printing, etc.,	90 00
Attorneys' fees,	200 00
Analytical,	3,000 00
Total,	\$17,352 00

Some of these charges cannot properly be, as a whole, charged to the inspection of fertilizers; how many of them can, it is impossible to say. I should suppose that on the whole the tax on the fertilizer will produce enough to pay the inspection charges, with a considerable margin. It is upon such a supposition that I pronounce my opinion. If I were to hold that the charge upon fertilizers would be unconstitutional, if it could be shown to produce more than enough to pay the inspection charges, I would be compelled either to decide against the state at this stage of the case, or to direct an inquiry with a view to ascertaining the exact amount produced by the tax, and the exact amount of the cost of the department properly chargeable to inspection. Upon the coming in of the report some such questions as these would arise: Does the charge of \$8,000 for analysis in whole or in part belong to inspection? It is averred by the answer that it does. What part of the general expenses of the board of agriculture ought the board to charge for inspection? In fact, the court would be compelled to supervise the entire subject of the expenditures of the board. This would be, for many reasons, inconvenient, and, as I think, could produce no good result. The amount of the inspection tax appears a reasonable one; not excessive, of itself, so as to make it probable that it would check importation. Putting the case, as I do, upon the position that the imposition could not be decided unconstitutional by the circuit court, simply upon the ground of alleged excess, if the excess does not show a purpose to evade an inhibition of the constitution, I have come to the conclusion that I cannot say that such intention appears in the amount of the tax.

I will proceed to give the facts of a case which sustains fully the principle on which this decision is based. It is the leading one in the reports of the United States on the subject of inspection laws; that of *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. Rep. 44, which involved the constitutionality of the Maryland inspection laws. The act of the

legislature of Maryland of 1864 provided for the appointment of five tobacco inspectors, and a number of clerks, whose salaries were to be paid from the receipts of their respective offices. These inspectors were to cause each hogshead of tobacco to be numbered, and to enter the number, time of receipt, etc., the name of owner or consignee, etc., in a book to be kept by each of them. It was further provided that the tobacco in each hogshead should be inspected; that each hogshead, with the tobacco it contained, should be separately weighed; and that each hogshead should be branded with the weight of the tobacco and of the hogshead. Provision was made for taking samples from each hogshead; for sealing and delivering to owners certificates of inspection of all merchantable tobacco; and for repacking and reweighing unmerchantable tobacco. It was made unlawful to take out of the state any uninspected tobacco in hogsheads. An amendatory act was passed in 1870, which allowed any grower or purchaser of tobacco to pack the same in counties where grown without having it opened for inspection. However, by the amendatory act it was provided that such tobacco, whether or not opened for inspection, could only be packed in casks of a specified size, and should be liable to the full charge for outage and storage. By an act of 1872, such charge was fixed at \$2 for a hogshead of 1,100 pounds. No inspection of the quality of the tobacco was required, but it was the duty of the grower or packer to have his tobacco delivered, packed by him, at some one of the state's tobacco warehouses, that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it had been packed in the neighborhood, and where it was grown, and marked as required by statute; and for this service, and no other, the owner of such tobacco was required to pay a charge of two dollars for every hogshead. No further duty was required of a tobacco inspector than to keep a record of the facts of each case, and to weigh the tobacco, and brand the weight on each hogshead. A question passed upon by the supreme court in this case was the validity of the law as an inspection law, in view of the fact that the plaintiff contended that the amount of the charge for such inspection was excessive. The decision of the court was in favor of the constitutionality of the law.

What I have already said disposes of the contention of plaintiff that contingently there ought to be a further inquiry in this case. But it is contended by the plaintiff that the law under consideration in this case shows upon its face, by various provisions made for the expenditure of the money collected under the law, that the intention of the legislature was to collect a sum more than sufficient to pay the expense of inspection. An ingenious argument was made by Mr. Hill, the purpose of which was to show that certain provisions of law which had the effect of repealing appropriations made from the funds derived from the original fertilizer tax had the effect of reviving certain previous appropriations of money derived from the proceeds of such fertilizer tax. I am not disposed to deny the truth of the general proposition that the repeal of a repealing law does, in the absence of any special circumstances,

revive the law repealed. This proposition is laid down in Dwar. St. p. 676. In *Brinkley v. Swicegood*, 65 N. C. 628, PEARSON, C. J., says:

"The act of 1870-1871 repeals the Code of Civil Procedure in regard to costs, and makes no provisions for costs in the matter now under consideration; so the effect is to restore the Revised Code in that particular."

But the question is one of the intention of the legislature. In the case before the court the legislature of North Carolina had, by the law of 1885, made an appropriation to the industrial school of \$5,000 annually. By an act of assembly, passed in 1887, which must be construed to be substituted for the act of 1885, and therefore to be a repealing law, the legislature of North Carolina appropriated to such school all the surplus arising from the proceeds of the tax on fertilizers. In 1891, an act of the legislature was passed, the effect of which, it is conceded, was to repeal the appropriation made to the state industrial school by the act of 1887. It is contended by Mr. Hill, for the plaintiff, that the repeal in 1891 of the act of 1887 revived the act of 1885, and that it results from this revival that \$5,000 of the fund arising from the present tax on fertilizers is now appropriated to the state industrial school. The same argument is used to show that by existing legislation \$500 of the proceeds of the tonnage tax on fertilizers is annually appropriated to the North Carolina Industrial Association, which is, as the court is informed, a negro agricultural fair. The argument drawn from this contention is that the state to-day appropriates at least \$5,500, annually, of the money derived from the tonnage tax to purposes other than the cost of inspection of fertilizers, and that this fact proves that the amount of the tonnage tax was intentionally made larger than was necessary. The court is of the opinion that such was not the intention of the legislature. This court had at its June term, 1890, (43 Fed. Rep. 609,) decided that the then existing tax upon commercial fertilizers was unconstitutional, and had given as a reason for one of its positions, to wit, that the then existing tax on fertilizers could not be supported on the ground of its being an inspection tax, the fact that a large portion of the proceeds of such tax was appropriated for other than inspection purposes. At the ensuing session of the legislature of North Carolina in January, 1891, an act was passed which has been hereinbefore recited, and which in express terms repeals all laws conflicting with itself. By the first section of this act, which imposes a tax of 25 cents per ton on all commercial fertilizers, the legislature declares the purpose of the tax to be for inspection only. The previous law had imposed a tax of \$500 per brand upon every brand and description of fertilizer, and declared the same to be a privilege tax.

The tonnage tax of 25 cents is declared by the first section of the act of 1891 to be substituted for the \$500 privilege tax. This court will not infer, simply for the purpose of enforcing an ancient rule of law having for its basis only the presumed intention of legislatures, that the purpose declared in the act of 1891 is falsely declared, and by an implication which contradicts the declared will of the legislature, that the repeal of sections of the Code which had been de-

clared unconstitutional should have only the effect of reviving earlier laws equally objectionable with those that were attempted to be repealed. The court is of the opinion that, under existing legislation, there is no appropriation of the proceeds of the tonnage tax directly to the support of the industrial school, now called the "State Agricultural and Mechanical College," or the "North Carolina Industrial Association." If it should be otherwise, however, it was not intended, and therefore does not affect the case. Certain appropriations are made, in unrepealed sections of the Code of North Carolina, from the funds of the state board of agriculture, for various purposes,—such as that, under section 2196, for the salary of an analyst; under section 2198, to a geological museum; and, under some other sections, to various other purposes. But these appropriations are to be paid out of the general funds of the state board of agriculture, which are derived from other sources, as well as from the tonnage tax on fertilizers, and are not directly appropriated out of the tonnage tax. In lieu of the appropriation of the surplus funds derived from the tax on fertilizers, given by the act of 1887 to the state agricultural college, an annual sum of \$10,000 is directed to be paid out of the treasury of the state to such college; and in lieu of the \$500 directed to be paid out of the fertilizer tax to the North Carolina Industrial Association, an annual appropriation of \$500 from the public treasury is made to the same. Chapter 338, Laws 1891, makes a provision for the oyster industries of the state from other sources than the fertilizer tax. Chapter 417, Laws 1891, makes an appropriation of \$10,000 direct from the treasury to the state geological survey, so that it is evident that the legislature of 1891 repealed all laws making any substantial diversion of the money to be derived from the tonnage tax on fertilizers to any other purpose than to such as are directly or indirectly connected with the expense of inspection, leaving the real question for the court only whether the tax of 25 cents per ton appears in itself so excessive as to indicate a purpose other than that declared on the face of the law. Upon this question the court has already declared its opinion.

3. But one question remains to be discussed. In the collation of inspection laws given in the note to the case of *Turner v. Maryland*, no statute is mentioned which, under the guise of an inspection law, imposes an inspection tax upon things not grown in or produced in the state enacting the inspection law, and there is as yet no decision of the supreme court approving of the validity of any law imposing a charge for the inspection of articles grown or produced outside of the state. In the very recent case of *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. Rep. 855, BRADLEY, J., in rendering the opinion of the court, says:

"The question is still open as to the mode and extent in which state inspection laws can constitutionally be applied to personal property imported from abroad or from another state."

This question was not decided in *Voight v. Wright*, which was a case arising under the Virginia act of 1867, providing for the inspection of flour brought into the state, and offered for sale therein, and which went off on the ground that the Virginia law in question discriminated

in favor of Virginia-made flour, and against flour manufactured in other states. The point must necessarily be passed upon in the decision of this case. I do not think it necessary to expressly state that this law is technically an inspection law, though I see no reason why it should not be so called. Whatever called, it seems to me to be a law that the state of North Carolina has the power to enact under the general powers reserved from the grant of other powers to the United States.

It is not worth while to discuss the question of whether it is one of the police powers of the state. It is, in effect, a law to provide for the security of purchasers in buying an article whose contents and qualities cannot be determined by ordinary inspection, but only by analysis and the use of the knowledge of experts. It would seem that there can be no reason why, in the absence of any constitutional objection, a state should not have the power, in the regulation of its internal commerce, to say that articles of this description shall not be sold within its limits without inspection. It is a law enacted to protect the citizens of the state from fraud. Neither do I know of any reason why the state should not be permitted to charge the cost of the inspection upon those offering such articles for sale.

The judgment of the court is that the injunction heretofore granted be dissolved, the bill dismissed, and that the defendant have judgment for costs against the plaintiff and its surety on the prosecution bond.

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1892.)

No. 141.

1. CONTRACTS OF SALE—RIGHT TO RESCIND—TIME THE ESSENCE.

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities, a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.

2. CONTRACTS FOR WORK—TIME, WHEN THE ESSENCE—DAMAGES FOR BREACH.

But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence; and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation.

3. SAME.

A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale.

4. SAME.

A contract by a lithographing company to make and furnish, "in the course of the year," designs of certain buildings of a manufacturing company, with sketches

of its trade-marks; to execute engravings, and to embody same on large amounts of stationery; to engrave a vignette of one of the firm's plants; to furnish a certain number of hangers, on fine chromo plate, etc.,—is not a contract for the sale and delivery, or for the manufacture and sale, of marketable commodities or personal property, but is one for work and labor requiring artistic skill; and the stipulation as to time is not of the essence of the contract so as to justify a repudiation thereof because of a delay in delivery of six or eight days after the expiration of the year.

In Error to the Circuit Court of the United States for the District of Colorado. Reversed.

Statement by SANBORN, Circuit Judge:

This was an action by the plaintiff in error to recover the contract price of certain stationery and advertising matter furnished the defendant. It was tried on the merits, and at the close of the evidence the court instructed the jury to return a verdict for the defendant, and this instruction is assigned as error. The plaintiff was a corporation of Wisconsin, engaged in lithographing and printing, and its principal place of business was at Milwaukee, in that state. The defendant was a corporation of Colorado, engaged in the business of milling, and its principal place of business was at Denver, in that state. In June, 1889, the plaintiff agreed to make new designs of certain buildings of defendant, with sketches of its trade-marks; to execute engravings thereof in a strictly first-class style; to embody these on the stationery described below; to submit to defendant for approval proofs thereof; to submit designs and proofs of hangers, on fine chromo plate, for advertising defendant's business, by the following fall; to engrave a strictly first-class vignette of one of defendant's plants; to submit a sketch and proof thereof to defendant; to furnish defendant with 10,000 business cards and 5,000 checks in August, 1889; to furnish, in the course of the year, letter heads, note-heads, billheads, statements, bills, envelopes, and cards to the defendant to the number of 331,100, and 5,000 hangers; and to furnish the vignette and 5,000 hangers more after the approval of the proofs thereof by the defendant. The defendant agreed to take and pay for this stationery, this vignette, and these hangers at certain agreed prices, which amounted in the aggregate to about \$6,000. The plaintiff furnished the 10,000 cards and 5,000 checks required under the contract in August, 1889, and the defendant received and paid for them. The plaintiff introduced testimony to the effect that it strictly complied with and fully performed these contracts in every respect, except that it shipped the articles contracted for (which were not delivered in August) by rail from Milwaukee to the defendant, at Denver, in December, 1889, in five boxes, four of which did not arrive at Denver until 9:42 A. M., January 1, 1890, and the fifth did not arrive there until January 4, 1890; that before January 8, 1890, all of these articles were tendered to the defendant, and it refused to examine or receive them; that the sketches and proofs of the designs, trade-marks, and hangers had been submitted to and approved by the defendant during the summer and fall of 1889, before these articles were manufactured, and that the last proof was approved November 16, 1889; that on December 16, 1889, the defendant wrote the plaintiff to forward by express 2,000 statements and 3,000 envelopes "as per

proofs submitted;" that the state of the art and process of lithographing is such that, after the general idea of a piece of work is conceived, it is customary to make first a pencil design, and, when this is found satisfactory, to prepare a colored sketch where colored work is required; that after the sketch is colored it is lithographed; that is, transferred to a stone; that each color requires a separate stone; and in these hangers there were nine colors; that it requires from two to three months to reproduce on stone a colored sketch like that used for the hangers; that the artists' work and the reproduction on stone were the most expensive parts of this work contracted for; and that the expense of the materials and printing was but a small part of the entire expense of the work.

F. W. v. Cotzhausen, for plaintiff in error.

V. D. Markham, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, (after stating the facts.) The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. *Norington v. Wright*, 115 U. S. 188-203, 6 Sup. Ct. Rep. 12. This application of the general principle commends itself as just and reasonable,

on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. *Taylor v. Sandiford*, 7 Wheat. 13, 17. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. Rep. 12; *Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 7 Sup. Ct. Rep. 882. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. *Taylor v. Sandiford*, 7 Wheat. 13, 17; *Hambly v. Railroad Co.*, 21 Fed. Rep. 541, 544, 554, 557.

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are

derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale. *Engraving Co. v. Moore*, 75 Wis. 170, 172, 43 N. W. Rep. 1124; *Goddard v. Binney*, 115 Mass. 450; *Hinds v. Kellogg*, (Com. Pl. N. Y.) 13 N. Y. Supp. 922; *Turner v. Mason*, (Mich.) 32 N. W. Rep. 846. Thus in *Engraving Co. v. Moore*, *supra*, where the lithographing company had contracted to manufacture a large quantity of engravings and lithographs for a theatrical manager, with special features, useful to him only during a certain season, and they were completed and set aside in the rooms of the lithographer, and there burned before delivery to the manager, the court held that the contract was not one for the sale of personal property, but one for work, skill, and materials, because it was not the materials, but the lithographer's work of skill, that gave the value to the finished advertisements, and was the actual subject-matter of the contract, and because that work and skill, while it added the chief value to the finished articles for the especial use of the defendant, made both the articles and the materials worthless for all other purposes.

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employees of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and to collect the contract price therefor. These contracts required the names of defendant's mills and its trademarks to be so impressed upon all these articles that when they were completed they were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper. The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about \$6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire \$6,000. The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material; indeed, they strongly indicate the contrary. They provide that a certain portion of the articles shall be furnished in two months, that the remainder of the stationery and 5,000 hangers shall be furnished in the course of the year, and that 5,000 hangers more and the vignette shall be furnished within a reasonable time after the proofs are approved by the defendant; there is no stipulation for the payment

of any damages or the avoidance of the contracts on account of a failure to perform within any of the times stipulated in the contracts, and the parties themselves proceeded so leisurely thereunder that the first and only admitted request by the defendant for the delivery of any of the articles not delivered in August was on December 16, 1889. In *Taylor v. Sandiford*, *supra*, the court refused to permit the owner to retain the \$1,000 which the house builder had expressly agreed to pay if he failed to complete the house within the time fixed in the contract. In the absence of any such stipulation, or any clearly-expressed intent that time should be material even, it would be clearly unjustified by the law and inequitable to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract. This conclusion disposes of the case, and it is unnecessary to notice other errors assigned. The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

POWER v. MUNGER.

Circuit Court of Appeals, Eighth Circuit. September 20, 1892.)

No. 98.

LIMITATION OF ACTIONS—RUNNING OF STATUTE.

Defendants contracted to haul the steamer Butte, owned by plaintiff, out of a river, on marine ways operated by them, and made a similar contract with the owners of the steamer McLeod. By reason of defendants' negligence in improperly blocking the ways, the Butte slipped back into the river, and collided with the McLeod, which sank. The owners of the McLeod libeled the Butte, and recovered damages. Held, that the right of plaintiff to sue defendants for indemnity for the money which he was compelled to pay did not accrue, nor did the statute of limitations begin to run, until the payment was made.

In Error to the Circuit Court of the United States for the District of Minnesota.

At Law. Action by Thomas C. Power against Roger S. Munger. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

Henry L. Williams, for plaintiff in error.

W. P. Warner and C. G. Lawrence, (Warner, Richardson & Lawrence on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. In November, 1879, Roger S. Munger and Charles S. Weaver, partners under the firm name of C. S. Weaver & Co., were engaged in the business of repairing steamboats, at Bismarck, Dak. On the 17th of November, 1879, they entered into a written contract with the owners of the steamer Butte, whereby they agreed to haul the steamer out of the Missouri river upon the marine ways operated by them, and to replace the boat in the river in the following spring. At the same time they made an oral agreement of the same tenor with the owners of the steamer McLeod. In carrying out these contracts, the steamer Butte was hauled upon the ways by C. S. Weaver & Co., and the McLeod was placed at the foot of the ways, preparatory to being hauled thereon. Through the alleged negligence of C. S. Weaver & Co. in not properly blocking the Butte upon the ways, this steamer slid back into the river, and, coming into collision with the McLeod, injured that vessel to such an extent that it sank, and became a total loss. The owners of the McLeod thereupon filed in the United States district court for Minnesota a libel in admiralty against the owners of the steamer Butte to recover the damages caused them by the destruction of the McLeod, and upon appeal to the United States circuit court, on the 15th of October, 1883, a decree and judgment in favor of libellants was entered, awarding them one half the damages, being the sum of \$9,572.82. Of the pendency of these proceedings due notice was given to C. S. Weaver & Co. by the owners of the Butte, with the request that they disprove the charge of negligence in the handling of the Butte when placed upon the ways as above stated. Upon appeal to the supreme court of the United States, the decree awarding damages against the owners of the Butte was affirmed (127 U. S. 789)² on the 1st day of June, 1888, and on the 29th day of that month, Thomas C. Power, one of the owners of said steamer Butte, and a respondent in the proceedings in admiralty, was compelled to pay, and did pay, upon said judgment therein, the sum of \$8,574.74. On the 8th of January, 1892, he brought the present action at law in the United States circuit court for the district of Minnesota against Roger S. Munger and Charles S. Weaver to recover the damages thus caused him, service of notice being had upon Munger only. Among other defenses, it was pleaded by said Munger that the cause of action did not accrue after November 17, 1879; that more than 10 years had elapsed, during all of which time said defendant had resided in the state of Minnesota, and therefore the action was barred under the provisions of the statute of the state of Minnesota. The case was heard before the court and jury, and after the close of the testimony the court directed the jury to re-

¹See 14 Fed. Rep. 483.

²Mem. decision. No opinion.

turn a verdict for the defendant, on the ground that the action was barred by the statute of limitations. Judgment for the defendant having been entered upon the verdict rendered in obedience to the instructions of the court, the plaintiff, Thomas C. Power, brings the case to this court upon writ of error, the sole question at issue being that presented by the ruling made in the court below upon the plea of the statute of limitations.

This ruling of the trial court was based upon the assumption that the suit was for a breach of the written contract between C. S. Weaver & Co. and the owners of the steamer Butte; that the contract created an implied obligation on part of Weaver & Co. to properly handle the Butte; that the injury to the McLeod resulted from a breach of this implied obligation; that a cause of action for breach of this implied obligation arose in favor of the owner of the Butte at the time of the injury to the McLeod, and therefore the period of limitation must be dated from that time.

In the petition herein filed the facts already stated are set forth in their proper order, and, as we construe the petition, it does not declare upon a breach of the contract between Weaver & Co. and the owners of the Butte, but it sets forth all the facts, and bases the right of recovery thereon. Thus it is therein stated that the plaintiff was compelled to pay a given sum of money by reason of a judgment rendered against him and others, as the owners of the steamer Butte, as compensation for one half the damages caused to the owners of the steamer McLeod by a collision occurring between the two steamers, it being further expressly averred "that the collision and damage aforesaid occurred solely by reason of the carelessness, negligence, and unskillfulness of the defendants in propping up said steamboat Butte, and placing said steamboat McLeod at the foot of the said marine ways while the steamboat Butte was so improperly stayed;" thus charging negligence against Weaver & Co. in the handling of the McLeod as well as of the Butte.

The fact of the execution of the written contract between C. S. Weaver & Co. and the owners of the Butte, and the general tenor of this contract, as well as of the oral contract with the owners of the McLeod, are set forth in the petition, but it is not averred that by the terms thereof C. S. Weaver & Co. had bound themselves to the owners of the Butte not to cause injury to the McLeod. The contract does declare the character of the liability assumed by Weaver & Co. touching the Butte, and, if this action was to recover for damages caused to the Butte, then this contract would be the measure of the parties' rights, and would be the basis of the action. The suit, however, is not to recover for injuries caused to the property of the owners of the Butte through the failure of C. S. Weaver & Co. to properly perform their contract obligations, nor is it for the protection or maintenance of any personal or property right of the plaintiff, but, in effect, is based upon the allegations that, through the negligence of Weaver & Co. in handling the steamer Butte when intrusted to their care, injury was caused to the McLeod; that for the damages to the McLeod a judgment was obtained in the admiralty proceedings

against the plaintiff and other owners of the Butte, which the plaintiff was compelled to pay. The recital of the contracts in the declaration is in accord with the code system of pleading in force in Minnesota, under which it is the practice to set forth in some detail the facts constituting the history of the given case. The allegations in the declaration are entirely consistent with the view that the plaintiff bases the action on the charge of negligence. The setting forth the two contracts under which C. S. Weaver & Co. had charge of the steamers is matter of inducement, and the question at issue is not other nor different from what it would have been had it been simply stated that C. S. Weaver & Co. had possession of and control over the steamers at the time of the accident. In other words, the question when the statute of limitations began to run is not dependent upon the mere form of the petition, but arises upon the entire facts that were presented at the close of the evidence, and at the time when the trial court ruled that the statute was a bar to the suit. If, under the facts then in evidence, it appeared that the plaintiff could not recover except upon proof of the execution of the written contract between C. S. Weaver & Co. and the owners of the Butte, and a breach of its terms, then it might well be that the statute began to run at the date of a breach; but, in fact, plaintiff's right of action is not based upon a breach of this contract. It is based upon the allegations that Weaver & Co., having in their possession and control the steamer Butte, so negligently handled the same as to cause injury to the steamer McLeod; and that the plaintiff, as one of the owners of the Butte, has been compelled to pay the damages awarded to the owners of the McLeod; and the query is whether the statute began to run at the time of the injury to the McLeod or at the date when plaintiff was compelled to pay the judgment in favor of the owners of the McLeod.

It is said that a right to recover nominal damages accrued to plaintiff at the date of the collision; and therefore the statute then began to run. We must be careful to distinguish between a right of action for damages caused to the property of the owners of the Butte and that caused by injury to the McLeod. In the former case, the right of action would accrue at the time of the collision, although all the damages resulting therefrom might not then be apparent. In all cases wherein there is an actual violation of a legal right, or an invasion of the right to property, the right to an action accrues, even though no substantial damage may have been caused. The violation of a legal right is a technical injury, for which nominal damages are recoverable. At the time of the collision a right of action then accrued in favor of the owners of the Butte for all damages caused to their property through the fault of C. S. Weaver & Co., whether such fault was counted on as a breach of contract or as negligence in the nature of a tort, but for damages resulting from such fault, which are not the consequence of injury to the property of the owners of the Butte, but only arise because the owners of the Butte were held liable for the injury to the McLeod, then the right of action for such consequential damages did not arise until the plaintiff was compelled to pay the damages awarded the owners of the McLeod. If the

statute began to run when the collision occurred, then the plaintiff could have maintained an action at that time against C. S. Weaver & Co. for at least nominal damages; yet it would not have been possible to frame a declaration based on the facts then existing that would have been good against a demurrer. If the plaintiff had counted on the written contract between Weaver & Co. and the owners of the Butte, it would have appeared that the contract did not deal with the question of injury to property of third parties. There is nothing in the contract which binds Weaver & Co. not to cause injury to the property of others, or by which they agree to be responsible therefor, or to repay any sums which the owners of the Butte might be compelled to pay to third parties. Any duty which Weaver & Co. owed to third parties, or to the owners of the Butte in regard to the property of such third parties, does not grow out of anything found in the written contract, but out of the fact that Weaver & Co. had the possession and control of the steamer when upon their ways, and were therefore subject to the usual obligation imposed by law, to use due care in handling property in their charge, so as not to negligently cause injury to others.

The duty and obligation resting on C. S. Weaver & Co. to so handle the Butte as not to cause injury to the McLeod did not grow out of the execution of the contract with the owners of the Butte, or out of anything therein contained, but out of the fact that Weaver & Co. placed the Butte upon the ways; and the law imposed upon them, with regard to third parties, the duty of exercising due care in the performance of such work.

On the other hand, if the owners of the Butte had brought an action on the ground of negligence against C. S. Weaver & Co., the facts would not have sustained a right of recovery. Negligence alone does not create a right of action. There must be negligence and consequent damage. *Railroad Co. v. Standen*, 22 Neb. 343, 35 N. W. Rep. 183; *Wabash Co. v. Pearson*, (Ind. Sup.) 22 N. E. Rep. 134. When the Butte collided with the McLeod, the sinking of the latter did not cause injury to the property or property rights of the owners of the Butte. No ground then existed for awarding damages, substantial or nominal, to the owners of the Butte, as against Weaver & Co., for the sinking of the McLeod. Whether the sinking of the McLeod would ever be a cause of damage to the owners of the Butte depended upon a contingency; that is, upon another event, to wit, whether they would be called upon to make good the damages caused to the McLeod. If they were not so called upon, then the alleged negligence of Weaver & Co., which produced the collision, and destruction of the McLeod, would not cause damage to the owners of the Butte; but, if they were compelled to make good the loss caused by the sinking of the McLeod, then, and not till then, could it be said that the negligence of Weaver & Co. in causing the destruction of the McLeod had resulted in damage to the owners of the Butte. As the collision between the steamers took place on the water within the admiralty jurisdiction, it gave the right to the owners of the McLeod to look primarily to the colliding vessel, or the owners thereof, for the damages

caused, regardless of the fact that the latter was under the actual control of Weaver & Co. at the time of the accident. If, however, the owners of the Butte, by reason of their ownership of the colliding vessel, were compelled to make good the damages caused to the McLeod, and resulting from the negligence of C. S. Weaver & Co., then a cause of action in their behalf against Weaver & Co. arose when they were compelled to make good the damages thus caused. The rule applicable to such cases is stated in Wood, Lim. Act. § 179, as follows:

"But where a person or corporation is primarily liable for the negligence or misfeasance or malfeasance of another, the statute does not begin to run upon the remedy of such person or corporation against the person guilty of such negligence or breach of duty until the liability of such person or corporation has been finally fixed and ascertained, because, in the latter case, the gist of the action is the damage, while in the former, it is the negligence or breach of duty."

The distinction existing between cases based upon a breach of contract or a violation of a legal right and those for the recovery of consequential damages resulting from negligence is clearly pointed out in *Wilcox v. Plummer*, 4 Pet. 172,—a case greatly relied on to support the ruling made by the trial court. It was an action of *assumpsit* to recover the loss caused by the negligence of an attorney in failing to sue an indorser upon a promissory note placed in his hands for collection. The question considered by the supreme court was as to the date when the statute of limitations began to run, it being said:

"It is not a case of consequential damages, in the technical acceptation of those terms, such as is the case of *Gillon v. Boddington*, 1 Car. & P. 541, in which the digging near the plaintiff's foundation was the cause of the injury, for, in that instance, no right or contract was violated, and by possibility the act might have proved harmless, as it would have been had the wall never fallen. Nor is it analogous to the case of a nuisance. * * * The ground of action here is a contract to act diligently and skillfully, and both the contract and the breach of it admit of a definite assignment of date. When might the action have been instituted? is the question, for from that time the statute must run. When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

This decision gives us the test that is determinative of questions of the character of that under consideration. If the action is based upon a breach of contract, or for an invasion of some right belonging to the plaintiff, then the cause of action accrues when the act is done which constitutes the breach of contract, or the invasion of the legal right of the plaintiff; and, of course, the statutory limitation begins to run at the date when the right of action accrues, regardless of the question of the amount of damages that may then be recoverable. If, however, the action is not based upon a breach of contract, or upon some act which, when done, is an invasion of some legal right of the plaintiff, but is for

the recovery of consequential damages, resulting from the negligence of the defendant, then the right of action does not accrue until actual damage has resulted from the negligence complained of.

In the case at bar, the sinking and destruction of the McLeod was not an invasion of any legal right of the plaintiff. The contract between Weaver & Co. and the owners of the Butte does not deal with the duty of Weaver & Co. towards third parties or their property. The action is not based upon the claim that, through the failure of Weaver & Co. to properly perform their contract obligations, injury was caused to the Butte or any other property or property rights of the owners thereof. Recovery is sought because, through the alleged negligence of Weaver & Co., injury was caused to the owners of the McLeod, for which injury the plaintiff, as one of the owners of the Butte, has been compelled to respond. Reimbursement is sought, not for any injury to the property or property rights of the plaintiff, nor for the breach of any contract with him, but for money he has been compelled to pay to the owners of the McLeod for damages resulting to them from the negligence of Weaver & Co. The right to sue for indemnity for the money which the plaintiff was compelled to pay did not accrue until payment had been made, and, necessarily, the statute of limitations did not begin to run until the right to sue therefor had accrued. It was therefore error to hold that the statute began to run at the date of the collision causing the destruction of the McLeod, and the judgment must therefore be reversed.

Other questions are discussed in the briefs of counsel which we have not considered, this opinion being strictly limited to the one point of the time when the statute began to run against the right of plaintiff to sue for the money he was compelled to pay to the owners of the McLeod. The judgment below is reversed, at cost of defendant in error, and the case is remanded to the circuit court, with instructions to grant a new trial.

CHICAGO, ST. P., M. & O. RY. CO. v. GILBERT *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 117.

1. RAILROAD COMPANIES—FIRES—EVIDENCE.

In an action against a railroad company for the negligent burning of buildings situated near its tracks, where the only issue was as to the origin of the fire, evidence that, on different occasions within some weeks prior to the loss, fire had escaped from engines of the company in the immediate vicinity of the property, was admissible as tending to prove the possibility, and the consequent probability, that some engine caused the fire. *Railway Co. v. Richardson*, 91 U. S. 454, followed.

2. SAME—INSTRUCTIONS—CHARGE TAKEN AS A WHOLE.

In such case it was not error for the court to charge that it is the duty of a railroad company to keep its right of way entirely free from combustible materials, where the instruction as a whole directed the jury to determine whether inflammable materials had been spread over the right of way by employees of the company,

and, if so, that such fact was not conclusive evidence of negligence, but only a circumstance to be considered as tending to show a careless mode of carrying on the business.

8. SAME—PAROL EVIDENCE—TITLE TO LAND.

In such case testimony of one of the plaintiffs that the buildings belonged to himself and his coplaintiff was admissible to show a *prima facie* right of ownership in the property destroyed. No issue having been made as to plaintiff's title, it was not necessary to prove the same by the best evidence.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Joseph W. Gilbert and another against the Chicago, St. Paul, Minneapolis & Omaha Railway Company for the negligent burning of plaintiffs' buildings. Verdict and judgment for plaintiffs. Defendant brings error. Affirmed.

S. L. Perrin, (*J. H. Howe*, on brief,) for plaintiff in error.

T. J. Knox and *John A. Lovely*, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. On the 23d of May, 1889, a steam flouring mill and barn, with their contents, the property of the defendants in error, situated in the village of Adrian, in the state of Minnesota, in immediate proximity to a line of railway owned and operated by the plaintiff in error, were destroyed by fire. The owners of the burned property brought this action against the railway company for the purpose of recovering the damages caused by the destruction of their property, alleging that the company had negligently placed and suffered to accumulate, upon the right of way and land of the company adjoining the property of the defendants in error, combustible material composed of dry grass, weeds, rubbish, and the like, and that on said 23d day of May, 1889, the company ran a locomotive by said property which was not properly equipped nor properly handled to prevent the escape of fire, and as a consequence thereof fire was communicated to the combustible material upon the right of way, whence it spread to the mill and barn adjoining, causing their destruction. The company in its answer denied the several acts of negligence alleged against it, and averred that the fire and consequent destruction of the property were due to the negligent and careless manner in which the mill was managed, claiming that the fire escaped from the mill, and not from the locomotive of the company. Upon these issues the case was tried before the court and jury, the trial resulting in a verdict and judgment in favor of the plaintiffs below, the damages being assessed at \$15,878.33. To reverse the judgment the railway company brings the case to this court by a writ of error.

It is stated in the brief of counsel for the plaintiff in error that "the important question in this case raised by the first ten assignments of error is whether the case disclosed by the record can be properly and fairly distinguished from the case of *Railway Co. v. Richardson*, 91 U. S. 454." The assignments of error thus referred to are based upon the admission,

over the objection of the company, of the testimony of several witnesses that on different occasions within some weeks prior to May 23, 1891, fire had escaped from the engines of the company in the immediate vicinity of the property subsequently destroyed. In the case just cited the supreme court held such evidence to be admissible, "as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."

We do not think counsel for plaintiff in error have successfully distinguished the facts of the two cases. Counsel cite and comment at length on the cases of *Gibbons v. Railroad Co.*, 58 Wis. 335, 17 N. W. Rep. 132; *Railroad Co. v. Stranahan*, 79 Pa. St. 405; *Allard v. Railroad Co.*, (Wis.) 40 N. W. Rep. 685; *Ireland v. Railroad Co.*, (Mich.) 44 N. W. Rep. 426; and *Coale v. Railroad Co.*, 60 Mo. 227,—as authorities establishing the distinction that evidence showing the scattering of fire by the engines of the company at other times and places is only admissible when the identity of the particular engine supposed to have set the fire in the case on trial is unknown. We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the company that the fire was caused by sparks escaping from a particular engine, in which event the query would be as to the condition of that particular engine and the mode in which it was handled. On the contrary, the parties were at issue as to the origin of the fire, the plaintiffs claiming that it was due to fire escaping from some one of the engines of the company, and the defendant that it was due to fire escaping from the mill itself. Upon this issue it would certainly be open to the defendant to prove that the mill was so run and managed by the plaintiffs that the fire frequently escaped therefrom, and caused the burning of combustible matter in the vicinity of the mills, because such evidence would tend to support the claim of the defendant that the fire was started by sparks or live coals coming from the mill. In like manner it was, upon this issue of the origin of the fire, open to plaintiffs to prove that the engines of the company did permit the escape of sparks, causing other fires, as a fact tending to show that this particular fire thus originated.

This action was brought under the provisions of section 60, c. 34, Gen. St. Minn., which enacts that:

"All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damage caused by fire being scattered or thrown from said cars or engines, without the owner or owners of the property so damaged being required to show defect in their engines, or negligence on the part of their employes; but the fact of such fire being scattered or thrown shall be construed by all courts having jurisdiction as *prima facie* evidence of such negligence or defect. * * *

Under the provisions of this section, to obtain the benefit of the *prima facie* case therein provided for, it is necessary for the plaintiffs to prove that the conflagration complained of resulted from fire scattered or thrown

from the cars of the railway company, and, when the company denies that the given fire so originated, then, upon this issue of the origin of the fire, it is competent to prove generally that the engines used by the defendant company do scatter or throw out fire, because, in the language of the supreme court in the *Richardson Case*, *supra*, such evidence tends to prove "the possibility, and consequent probability, that some locomotive caused the fire." See, also, *Sheldon v. Railway Co.*, 14 N. Y. 218; *Ross v. Railroad Co.*, 6 Allen, 87; *Longabaugh v. Railroad Co.*, 9 Nev. 271.

Furthermore, the fact that fire did escape from time to time from the engines used upon the company's railway, in the vicinity of the property which was destroyed, was a fact proper for the consideration of the jury in determining whether the company was or not negligent in allowing combustible material to accumulate on the right of way, which was one of the issues in the case. If fire did in fact from time to time escape from the engines of the company, then the act of placing or allowing the accumulation of combustible matter upon the right of way would have to be considered, in connection with the probability of the escape of fire, in determining the issue of negligence in this particular. It would not be negligence to allow the accumulation of combustible material, unless there was danger of fire being communicated thereto, and it was competent to prove this danger by showing that in fact fire did from time to time escape from the engines used upon the company's road. Not only so, but evidence of the setting out of other fires in this vicinity from sparks or coals coming from the locomotive engines would tend to show knowledge on part of the railway company of the need that existed for preventing the accumulation of inflammable materials, and would thus directly bear upon the question whether the company had exercised all the vigilance and foresight which the circumstances demanded of it. We conclude, therefore, that the evidence objected to was competent under the issues in this cause, and it was not error to admit the same.

The next contention of counsel for the company is that "the court, in effect, told the jury that the right of way of the railway must be kept clear from all material that would facilitate the spread of fire, in case a fire should start; the jury were, in effect, instructed, as a matter of law, that under all circumstances and conditions, and at all times, it was the imperative and absolute duty of the railway company to keep its right of way entirely free from combustible material of every kind and nature,"—and that in so ruling the court erred. The difficulty with this contention of counsel is that it has no sufficient support in the record. It is true that the court did say "the right of way of a railway company ought to be kept clear from all materials that would facilitate the spread of fire, in case the fire should start," but this sentence must be read in connection with its context in determining its true meaning. It is not permissible to take out a single sentence from the charge as a ground of error, and to maintain that it incorrectly states the law because it does not contain all the limitations or qualifications necessary for the accu-

rate statement of the particular proposition to which it relates. It will be borne in mind that one of the charges of negligence against the company was that its employes had placed upon the right of way, in close proximity to the property of plaintiffs, a quantity of chaff, straw, and other refuse from the yards of the company, and it was in regard to this issue that the sentence excepted to was used.

The charge of the court on this branch of the case was as follows:

"It is well known, and several railroad men have testified to it, that, using even the best appliances, coals or sparks will escape from an engine, and do damage to property adjacent to the right of way. And such being the case, the railroad company should keep its right of way free from all combustible material that might facilitate the spread of fire, and it is proper evidence for you to take into consideration if you are satisfied that the plaintiffs, by their witnesses, have proved that these inflammable materials were spread over this right of way, in determining whether such act shows negligence on the part of the defendant company. Of course it is not conclusive, but it is to be taken into consideration by the jury as tending to show a careless mode of conduct in carrying on its business. If you are satisfied the fire was communicated from this engine, (which, as I said before, is the vital point,) then it is to be taken into consideration by you if this material was put over there, in determining whether or not it was an act of negligence on the part of the defendant. This case is peculiarly one presenting questions of fact. The law in regard to it is quite simple and settled with regard to the duty of both parties. It is charged by plaintiffs that the defendant was negligent, and, on the other hand, the defendant charges the plaintiffs with being negligent themselves; that is, guilty of contributory negligence. The test is: What would an ordinarily prudent person have done under similar circumstances? No better test can be applied, for all that either of these parties was required to exercise was ordinary care with regard to the management of its business."

Clearly the court did not charge, as a matter of law, that it was, under all circumstances, the duty of the railway company to keep its right of way entirely free from combustible material. The jury were instructed to determine from the evidence whether the inflammable materials had been spread over the right of way by the employes of the company, and, if they so found, that such fact would be proper evidence to be considered in determining whether such act constituted negligence on part of the company, it being further stated that, if the jury found that the company, through its employes, had covered the right of way with inflammable material, the fact would not be conclusive evidence of negligence, but was only a circumstance to be considered by the jury as tending to show a careless mode of carrying on the business of the railway. Certainly, the company had no just ground for exception to this part of the charge, for it was as favorable to it as it could possibly expect.

The last assignment of error discussed in the brief of counsel for plaintiff in error is to the effect that the court should not have permitted one of the defendants in error to testify that the mill belonged to himself and his coplaintiff. It is said that "it is elementary law that title to real property cannot be proved by parol. Title to such property can only be obtained or passed in certain prescribed ways, and in accord-

ance with positive rules of statutory law." Where an action is brought for the direct purpose of establishing title to realty, and where the question of ownership of the title is the issue in the case, and the judgment rendered in the cause will become record evidence of the title, then it may well be that the best evidence of title should be adduced. What this best evidence may be depends upon the facts of each case. In some cases it may consist of long adverse possession, provable only by parol. The rules of evidence applicable to issues framed to settle and adjudicate the title to realty are not necessarily applicable to cases of the kind now under consideration. Under the issues actually presented to the court and jury in this cause, all that was necessary for the plaintiffs to show was a *prima facie* right of ownership of the property destroyed, and this could be done by parol testimony. If the company or any other person had made the issue that the plaintiffs below were not the owners of the property, and were not therefore entitled to recover damages for its destruction, and had introduced evidence tending to show title in some other party, it might then have become necessary for the plaintiffs to have submitted other evidence in support of their right. Until this was done, they could rest upon the *prima facie* evidence of title afforded by proof of possession of the property at the time of its destruction. It was certainly proper to accompany the evidence, showing possession of the property in the plaintiffs, with testimony showing that plaintiffs claimed to be the owners of the property, because such testimony would show that the possession was held under claim of title, thus making out a clear *prima facie* case upon this question, and this was the effect of the testimony excepted to. Finding no error in the record, it follows that the judgment must be and is affirmed, at cost of plaintiff in error.

WINSOR COAL CO. v. CHICAGO & A. R. CO.

(Circuit Court, W. D. Missouri, W. D. November 7, 1892.)

1. RAILROAD COMPANIES—STATE REGULATION—UNREASONABLE RATES—RAILROAD COMMISSIONERS.

Sections 1, 10, and 11 of the act of the legislature, (Laws Mo. 1887, p. 15, Ex. Sess.,) standing alone, would seem to entitle the shipper to recover triple damages from the common carrier for exacting unreasonable and unjust freight charges, whenever a jury might deem the rate unreasonable or unjust; but looking at the whole act, in connection with antecedent legislation, *in pari materia*, it is held that the triple liability does not arise where the carrier has not charged a rate in excess of the maximum rate established by the railroad commissioners, or the maximum rate permitted by the statute in the absence of any action thereon by the commissioners.

2. SAME—COMMON-LAW RIGHTS.

The right of action existing at common law in favor of the shipper for extortionate charges was superseded by the remedies provided by the statute.

3. SAME—CONSTRUCTION OF STATUTE.

The act of 1887 declares that "it shall be the duty of the railroad commissioners to see that all schedules of rates adopted by common carriers are reasonable and just, and they may, upon complaint of any person, or upon their own motion without complaint, make inquiry from time to time, and determine whether the sched-

ule of rates prepared and adopted by any common carrier is reasonable and just." *Held*, that the word "may" should be construed as "shall," for the statute is evidently intended to be mandatory.

4. SAME—LIMITATIONS OF ACTIONS—DEMURRER.

Under the statute, causes of action which arose more than three years before the institution of the suit are barred, and where this fact appears on the face of the petition it may be taken advantage of on demurrer. *Henoch v. Chaney*, 61 Mo. 129, and *Bliss v. Pritchard*, 67 Mo. 181, followed.

At Law. Action by the Winsor Coal Company against the Chicago & Alton Railroad Company to recover triple damages for charging an alleged unreasonable rate on certain freight. Heard on demurrer to the petition. Demurrer sustained.

Alexander Graves, for plaintiff.

Wash. Adams, for defendant.

PHILIPS, District Judge. There are various counts in the petition. The substantive charge in each is that the defendant, a common carrier, charged the plaintiff unreasonable and unjust rates on car loads of coal shipped from Higginsville to Kansas City, Mo.; that 45 cents per ton was the just and reasonable rate for such service, whereas defendant exacted more than 65 cents per ton. Judgment is prayed for three times the amount of the excess, as by statute in such case made and provided. To this petition defendant interposes a demurrer. It demurs to the first 48 counts for the reason that the causes of action are barred by the statute of limitations, and to all of the counts on the ground that they do not state facts sufficient to constitute a cause of action.

The question broadly raised and argued by both counsel is whether or not a railroad company which has not exacted a charge in excess of the maximum rate fixed by the state is nevertheless liable to an action for triple damages, as for extortion, as prescribed in the act of the legislature adopted by the extra session of 1887, p. 15. The plaintiff contends that this statute gives to the shipper a right of action for an unreasonable charge made by the carrier, whether or not the sum charged be more or less than the maximum prescribed by the railroad commissioners; while the defendant contends that no charge made by it can be unlawful, subject to the statutory pains and penalties, when the charge made is within the limits prescribed by the state's authority. By the first section of this act all railways in the state are declared to be public highways and common carriers; and all charges made for services in the transportation of freight shall be reasonable and just; "and all unreasonable and unjust charges for such services are prohibited, and declared unlawful." By sections 10 and 11 a right of action is given against such carrier for doing an act or thing in said act prohibited, or declared to be unlawful, or omitting to do anything enjoined thereby, and giving to the person injured three times the amount of damages sustained, by suit in any circuit court of any county or city where the road is operated. But these are not all the provisions of this statute, and we must look to the enactment as an entirety to discover its real purport and proper construction. As is said in *In re Bomino's Estate*, 83 Mo. 441:

"Among the recognized canons of interpretation of statutes are the following: The intention of the legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view, are to be considered. When the expression in the statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the law-giver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity, (1 Kent, Comm. 461, 462;) and when it is doubtful whether a certain thing falls within the terms used in an act, it is proper to resort to other statutes to ascertain the intention of the legislature in the enactment of the general statute."

By the expressed declaration of the statute in the concluding paragraph, "this act is not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

Under the then existing statutes of the state the legislature had undertaken the task of regulating freight rates of railroads. It had prescribed a maximum charge for the class of property in question, and made various provisions against extortionate charges, unjust discriminations, and combinations. It had created the office of railroad commissioners, and invested them with various powers of supervision over the railroads of the state. The general policy of the statute was and is to prevent extortionate charges, unjust discriminations, combinations, and favoritism. The railroad commissioners were empowered to reduce the rates of railroads, either in general or special classes, whenever, in their judgment, it could be equitably done, and the railroad companies were bound by the decision of the commissioners; "and every violation by any company charging a greater or higher rate" was declared a misdemeanor, and, on conviction, should pay a fine of not less than \$20 nor more than \$200 for each and every offense; and the injured party should have a right of action against the carrier before any court of competent jurisdiction for the recovery of three times the amount taken or demanded in excess of the rates prescribed. Rev. St. Mo. 1889, §§ 2675, 2676, 2679, 2682, 2684, 2686. By the act of 1887 the legislature simply sought, by additional powers conferred on the railroad commissioners, and restrictions, obligations, and liabilities imposed upon the common carrier, to still further accomplish the policy of the state in regulating the rate of freight charges. The first section opens with the declaration of what was already an existing common-law axiom, and reaffirmed in section 14, art. 12, of the state constitution, that such roads are public highways and common carriers; and therefore they are subject to the legislative power to interdict unjust and unreasonable charges for the performance of their duty to the public.

Among its salient and more important provisions are the following: Such common carrier shall neither directly nor indirectly, by any special rate, rebate, drawback, or any device, take from one citizen less than from another for a like service rendered; nor charge more for transport-

ing a car of freight then it charges at the same time for several cars of like class, etc.; nor give advantages to any person or corporation in the transportation of goods over any other person or corporation. It shall not receive a greater compensation in the aggregate for transportation of property, etc., over a shorter than a longer distance. It is prohibited from pooling of freights. It is required to establish and publish its schedule of rates, which shall be "reasonable and just, and shall not in any case exceed the maximum rates which are or may hereafter be established by law." Copies of such schedules shall be filed with the railroad commissioners, and thenceforth such schedules, not being in excess of the statutory maximum rates, shall be deemed the established rates, until the same are changed as in this act provided. It shall give 10 days' notice of any proposed change, except when the rates are to be reduced, in which latter event notice shall be publicly posted, etc. "When any such common carrier shall have established and published its rates in compliance with the provision of this act, the same, not being in excess of any statutory maximum rates now or that may be hereafter in force, it shall be unlawful for any such common carrier to charge, collect, or receive a greater or less compensation, etc., than is specified in such published schedule. * * * It shall be the duty of the railroad commissioners to see that all schedules of rates adopted by common carriers are reasonable and just; and they may, upon complaint of any person, or upon their own motion without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just." The word "may" in the last clause of the above quotation should be construed to mean "shall," on the settled rule of the construction of statutes that, where rights of third persons are involved, or the public good requires it, such term is to be regarded as mandatory. *Leavenworth & D. M. R. Co. v. Platte Co.*, 42 Mo. 171; *Steines v. Franklin Co.*, 48 Mo. 167. Other sections of the act make this still clearer. By section 8 it is provided that, if any such common carrier shall neglect or refuse for 30 days to file a published schedule of rates, it shall be the duty of the railroad commissioners to make and print "a schedule of reasonable rates for such common carrier, and deliver copies of same to such carrier. * * * A copy of such schedules so made by said board, certified by the secretary of such board, shall, in proceedings wherein is involved the reasonableness and justness of the charges and rates of such commissioners be *prima facie* evidence that rates therein fixed are reasonable and just." And again, section 13 makes it the duty of the railroad commissioners "to see that the provisions of this act are enforced," and any person having an interest may make complaint to such commissioners that the rates established by the carrier are unreasonable, or that any of the provisions of the act are being violated. Thereupon the commissioners are to investigate the facts, and, if found against the carrier, the commissioners shall order a correction of the abuse; and they may make an award of damages to the injured party. These orders may be enforced by the attorney general or proper county attorney,

through the courts, and in such trials the finding of the commissioners shall be *prima facie* evidence, etc. Section 16 provides in detail for the hearing of complaints about unreasonable rates established or practiced by the carrier; and, if the commissioners are of the opinion that the rates should be changed or modified, they shall fix "and determine what would be reasonable and just charges or rates," and deliver a copy of its finding to both complainant and carrier. "The rates of charges so found and ascertained by said order, * * * certified," etc., "shall, in any and all proceedings wherein is involved the reasonableness and justness of the rates and charges by such common carrier, be *prima facie* evidence that the same are reasonable and just." Further provisions are made for application to the court for mandatory injunctions to compel the due performance of the duties imposed by the act upon such common carriers, and to enforce obedience to the orders of the railroad commissioners.

Throughout the entire act it is clear that it was the legislative mind to impose upon the chosen agents of the state—the railroad commissioners—the duty of supervising and regulating the rates charged by such carriers, and to ascertain and declare, from time to time, as the changing conditions of trade and commerce might suggest, what, as between shipper and carrier, is a reasonable and just rate of compensation. In the absence of any affirmative action by the commissioners, the legislature declares a maximum rate, and the carrier is to make and keep public a schedule within this maximum. The railroad commissioners may revise it, if deemed right and just to do so; and the rates thus fixed are to be observed by the carrier until changed conformably to the statute. The statute expressly declares it to be unlawful for the carrier to exact a greater or less rate than that so scheduled. In the absence of any affirmative action by the commissioners, the intendment of law arising from the legal presumption that public officers perform their duties should be that no complaint had arisen of unjust charges, or that the commissioners, who are presumed to be in possession of the schedule adopted by the carrier, deemed the maximum fixed by the carrier and the legislature to be reasonable and just.

Does it stand to reason that, after the legislature had provided all these agencies and instrumentalities for regulating the freight rates, and ascertaining and determining, *pro bono publico*, what is just and reasonable, and making that ascertainment *prima facie* evidence of its correctness in judicial controversies between shipper and carrier, it was contemplated that any shipper could thereafter be at liberty to disregard this lawfully established rate, and have its reasonableness and justness submitted to the arbitrament of a jury of the country? Can it be possible that, after the legislature has thus provided in detail a scheme for the establishment of reasonable rates, which shall be uniform to all the people, it intended by the general terms of sections 1, 10, and 11 to authorize any malcontent to go to a jury to fix for him another rate? What in the judgment of one jury in one locality would be an unreasonable charge might in the opinion of another jury in another locality be

quite reasonable. With the known capriciousness of jury verdicts, influenced often by individual peculiarities, mental habits, the quantum and quality of the evidence in the particular case, how would it be possible to carry out the legislative intent to establish and maintain a uniform rate of charges? Would not the diversity of conclusions reached by different juries between different litigants in and of itself bring about discriminations and inequality? Under such a construction of this statute as contended for by plaintiff it is not apparent how any railroad company could safely do business in the state. Its agents could never know when they were safe in any charge by them made. After a schedule of rates has been approved and published, the statute makes it unlawful for the carrier to charge less than the scheduled rate, under the pains and penalties prescribed in the act; and yet, under plaintiff's theory, the common carrier might be liable for the penalty of triple damages because it did not charge a lesser rate.

Notwithstanding the phraseology of this statute may be, in some respects, inapt or ambiguous, yet it is the duty of the court to so construe the whole statute as to avoid, if possible, conflicts between different parts, and, by keeping in view the intention and design of the lawmaking power, to escape absurdities, and reconcile contradictions more apparent than real. It is the common carrier against which this legislation is directed. It is its acts, its delinquencies, which are sought to be guarded against and corrected. As against it, in any judicial controversy between it and the shipper, or between it and the state, respecting its freight charges, the schedule of rates limited by the state or declared by the commissioners shall, in favor of the shipper or the public, be taken as *prima facie* just and accurate; and the railroad company must assume the laboring oar to overcome this presumption. The statute simply reserves the right to the carrier to go to the courts under this disadvantage to have the findings of the commissioners reviewed. To the shipper the act gives every reasonable privilege and advantage. He can go to the board of commissioners with his complaint, and, without cost to himself, have an investigation by them of his grievances, with the means of enforcing the conclusions of the commissioners; or he may go, as has this plaintiff, directly to the courts, and have a trial "in due and ancient form," and show, if he can, that the rate charged him is in excess of the limit fixed by the statute and the commissioners. When he does this, he stands in court with a *prima facie* case of unreasonable exaction made by the carrier.

Statutes of this character are not peculiar to this state. Similar legislation is to be found in other states, such as Nebraska, Iowa, Illinois, Georgia, and perhaps others. While these statutes may differ somewhat in phraseology and detail, the general trend, scheme, and policy are the same. The courts of those states, in construing their statutes in the particular under discussion, hold that the carrier may charge the maximum rate fixed by the statute, and a liability to the penal action never arises until the carrier passes in his charges this dead line. This for the reason, which stands upon a granite foundation of public justice and

common sense, that no act of the citizen can be unlawful which the law permits. A statute which would attempt to declare a different rule would not only be a legal solecism, but would commit an act of *felo de se*. See *Railroad Co. v. Dey*, (Iowa,) 48 N. W. Rep. 98; *Railway Co. v. Dey*, 35 Fed. Rep. 873-876; *State v. Fremont, etc., R. Co.*, (Neb.) 35 N. W. Rep. 118, and 36 N. W. Rep. 305; *Sorrell v. Railroad Co.*, 75 Ga. 509; *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443.

A right of action in favor of the shipper, it may be conceded, existed at common law for extortionate charges, but the statute has superseded the common-law remedy. *Young v. Railroad Co.*, *infra*; Ror. R. R. 1373, and notes. The plaintiff having no ground of action for an unreasonable and unjust charge against the carrier, except where the carrier has transcended the limit prescribed by the state's agents, the petition should allege the facts necessary to bring the case within the operation of the statute. *Kennayde v. Railroad Co.*, 45 Mo. 258; *King v. Dickenson*, 1 Saund. 135; *Bayard v. Smith*, 17 Wend. 88. This is not done, and the demurrer is sustained.

It appears on the face of the petition that as to the first 45 counts the causes of action arose more than three years next before the institution of the suit. Under the statute these causes of action are barred. This may be taken advantage of by demurrer. *Henoch v. Chaney*, 61 Mo. 129; *Bliss v. Prichard*, 67 Mo. 181; section 3231, Rev. St. Mo. 1879; *Young v. Railroad Co.*, 33 Mo. App. 509.

MACKEY v. HOLMES.

(Circuit Court, W. D. Missouri, W. D. November 7, 1892.)

1. RETROSPECTIVE LAWS—USURY—PENALTIES.

Laws Mo. 1891, p. 170, § 2, provides that when the validity of any pledge or mortgage of personal property to secure indebtedness is drawn in question proof that the party holding the lien has received or exacted usury shall render such lien invalid. *Held*, that this merely prescribed an additional penalty for an act which was before unlawful, and therefore it invalidated a chattel mortgage, made before it went into effect, when usury was received on the indebtedness afterwards, and that such a construction was not giving the statute a retroactive operation.

2. USURY—CHATTEL MORTGAGES—REPLEVIN.

In an action of replevin to recover personal property held under a mortgage, which has been invalidated under said act by the exaction of usury, the plaintiff can only recover the specific chattel, or its equivalent in money, where he is in a position to so elect; and no judgment in *assumpsit* or for the mortgage debt can be rendered therein, nor can any affirmative relief be granted to defendant. *Hamilton v. Clark*, 25 Mo. App. 428, followed.

At Law. Action of replevin, brought by Cornelia Mackey against Moses M. Holmes to recover personal property held under a chattel mortgage. On motions to strike out the two counts of the answer. Denied as to the first count, and sustained as to the second.

Scarrit & Scarrit, for plaintiff.

Brumback & Brumback and *A. F. Evans*, for defendant.

PHILIPS, District Judge. 1. Section 1 of the act of the Missouri legislature adopted April 21, 1891, (Laws Mo. 1891, p. 170,) declares that—

“Usury may be pleaded as a defense in civil actions in the courts of this state, and, upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by debtor, whether paid as commissions, or brokerage, or as payment upon the principal, or as interest on said indebtedness.”

Section 2 declares that—

“In actions for the enforcement of liens upon personal property pledged or mortgaged to secure indebtedness, or to maintain or secure possession of property so pledged or mortgaged, or in any other case when the validity of such lien is drawn in question, proof upon the trial that the party holding or claiming to hold any such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property, or any lien whatsoever thereon, given to secure such indebtedness, invalid and illegal.”

This act went into effect on the 22d day of June 1891.

The first count in the answer, while it discloses the fact that the chattel mortgage under which the plaintiff claims the right of possession to the property in question was executed prior to the said 22d day of June, 1891, distinctly alleges that the notes executed by the defendant for usurious interest were paid by defendant, and the money was received by plaintiff, after the 22d day of June 1891. We recognize the fact that the organic law of the state (section 15, art. 2, Const. 1875) prohibits any law retrospective in its operation; and we recognize the further rule of law that all such legislative acts are presumed to be prospective in their operation. But the plaintiff never had any lawful right or claim to this usurious interest thus exacted. It was interdicted at the time the contract was made, and any defendant could plead such usury in defense to any action predicated of such contract. Rev. St. 1879, § 2727, and Rev. St. 1889, § 5976. The difference consists merely in the penalty prescribed for the misdeed. Therefore, the plaintiff never had any vested right in this usury. It was unlawful, and contrary to the policy of the state. And while the legislature could by no *ex post facto* or retrospective law touch or affect the antecedent contract, it was perfectly competent for it to declare, as it did in said section 2 of the act of April 21, 1891, that, if any usurer, after this law shall take effect, shall exact usurious interest for a debt secured by a chattel mortgage, he shall lose the benefit and protection of such mortgage. It is but a new penalty attaching to an act declared beforehand to be unlawful, and for repeating the offense after the new enactment. If it should be held that the act of 1891 does not apply to this transaction and the unlawful interest exacted after its passage, it would result that no penalty whatever could attach to the usurious contract, and that all defense whatsoever was lost to the defendant when such contract should be drawn in ques-

tion; for by the last section of the act of 1891 said section 5976 of the General Statutes of 1889 is expressly repealed. Except when the language of the legislature is such as to admit of no two meanings as to its import, it is the duty of the courts to be constrained by the interpretation which will plainly effectuate the legislative intent, and preserve the known public policy of the state. The motion to strike out the first count of the answer is therefore overruled.

2. The second count of the answer, it seems to me, is quite unnecessary. It pleads matters evidently based on the first section of said act of 1891. I take it that this section applies only to the instance where suit is brought to recover on the note or contract vitiated by usury. The action here is replevin, to recover the possession of the personal property mentioned in the mortgage given to secure a debt affected by usury. The plaintiff in this action can only recover the specific chattel, or its equivalent in money, where the plaintiff is in position to so elect. No judgment in *assumpsit* or for the mortgage debt can be rendered therein. *Hamilton v. Clark*, 25 Mo. App. 428. So, if the defense interposed by the defendant in the first count of the answer be sustained by the proofs, it will put an end to this action. Neither the statute in question, nor any known rule of procedure, entitles the defendant to any relief over against the actor in such event. The motion to strike out the second count of the answer is sustained.

HARKINS v. PULLMAN PALACE CAR Co.

(Circuit Court, D. Delaware. November 14, 1892.)

1. DEATH BY WRONGFUL ACT—EXCESSIVE DAMAGES.

In an action against a railroad company to recover damages for the death of plaintiff's husband, an ordinary laborer, 30 years of age, earning about \$400 a year, a verdict of \$7,000 is not so excessive and exorbitant as to induce the belief that the jury were influenced by partiality or prejudice, and a new trial should be refused.

2. SAME—RULE OF DAMAGES.

In an action by a wife for causing the death of her husband, a day laborer, the maximum recovery is not necessarily limited to a sum which would produce an annual income equal to one half his annual earnings.

At Law. Action by Maggie Harkins against the Pullman Palace Car Company to recover damages for the death of her husband. Verdict for plaintiff for \$7,000. On motion for new trial. Refused.

George H. Bates, for the motion.

Levi C. Bird, opposed.

WALES, District Judge. This was an action to recover damages for the death of plaintiff's husband, caused, it was alleged, by the negligence of the defendant. A trial was had at the present term, and the

jury returned a verdict for the plaintiff for \$7,000. A motion is now made, on part of the defendant, for a new trial on the ground of excessive damages.

It is conceded that in cases of this character the principle on which damages are to be assessed is that of pecuniary injury, and that no compensation can be given for the loss of comfort or companionship; and it is claimed, in support of the motion, that Mrs. Harkins, on the most liberal estimate, would be fully compensated for the loss she has sustained by the payment to her of a sum of money which would yield an annual interest equal to the one half of her husband's yearly income at the time of his death. The deceased husband was an ordinary laborer, 30 years of age at the time of his death, and had been earning \$1.35 per day, or at the rate of \$400 a year. A person of his age, all other conditions being favorable, could purchase an annuity of \$200 by the payment of the principal sum of \$2,630, which latter sum, it is contended by defendant's counsel, should be the maximum damages to be allowed to the plaintiff. This basis of calculation is, however, much too narrow. The question for the jury was, what was the life of her husband worth to the plaintiff in a pecuniary point of view? And in answering that the jury were not necessarily confined to a calculation of the husband's wage-earning capacity only. The life of an honest, industrious, and kind-hearted husband and father, exclusive of mere affection and sentiment, has for his wife a money value in addition to what he may be earning by his personal labor or business. We do not know on what principle the jury proceeded in making up their verdict. It is not charged that they were actuated by improper motives, the only reason urged for the motion being that the damages are excessive, whatever may have been the basis of calculation. Where this is the sole objection, the court must be clearly convinced that the sum awarded is grossly disproportioned to the loss sustained before granting a new trial; and, although, in our opinion, a smaller sum would have been a sufficient allowance, we are not able to say that this verdict is so excessive and exorbitant as to justify us in setting it aside. The verdict does not give the plaintiff so much more than she is fairly entitled to, and in the like proportion inflict a wrong and hardship on the defendant, as to offend the sense of justice of every reasonable person who may be familiar with all the facts of the case. The case was given to the jury with special instructions on the computation of damages, and we are not disposed to interfere with their verdict because they have made a somewhat higher award than we should have done. It is impossible to lay down any exact rule of assessment in actions of tort. The jury are the judges of the facts, and the court will not usurp their duty or nullify their judgment except in an extreme case. A verdict is the expression of the sense of the jury on the questions of fact intrusted to their judgment for decision, and it is only where they have exceeded all just and reasonable limits in giving damages that a court will interfere; and the excess must be glaring and flagrant to demand such interference. This verdict is not so large as to induce the belief that the jury were influenced by partial-

ity or prejudice, nor so clearly wrong and unjustifiable as to require a new trial. We feel constrained, therefore, to refuse the motion, and it is so ordered.

DALLAS, Circuit Judge, concurs.

ROBISON *v.* McCracken *et al.*

(Circuit Court, S. D. New York. August 23, 1892.)

1. RAILROAD COMPANIES—CONSTRUCTION CONTRACT—VALIDITY—INTEREST OF DIRECTORS.

A railroad company, a corporation in form only, by its president entered into a construction contract, whereby defendants agreed to complete the superstructure of the road, furnish materials, and equip it by a certain date, and in payment therefor certificates for \$1,800,000 of its full-paid stock and \$1,800,000 of first mortgage bonds, comprising the entire capital stock and bonds, were to be delivered to defendants. On the day of the contract, and contemporaneously therewith, defendants agreed with plaintiff, acting on behalf of certain directors who were the actual stockholders, that if the contract was complied with on the part of the company they would pay to him one half of the net profits realized from the contract out of the stocks and bonds. The road was completed. One hundred and fifty thousand dollars was determined, without formal accounting, as the proportion of net profits due plaintiff, \$50,000 of which was paid. *Held*, that though the contract was voidable, yet being an executed one, and no stockholders or creditors objecting, defendants could not retain the balance of the amount which they agreed to pay complainant.

2. SAME—FALSE REPRESENTATIONS.

The alleged fact that defendants were induced to enter into the agreement as to amount of profits by false representations as to the amounts remaining due for right of way, and as to the amount of work done, could not entirely release defendants from liability, but could only go in reduction of the recovery.

3. SAME—NEW TRIAL—COMPROMISE VERDICT.

In an action for the remaining \$100,000 due plaintiff under the contract, after a trial occupying 10 days, a verdict was returned for plaintiff for the full amount, less \$7,500, which sum represented one half of the amount paid by defendants for the assignment of a judgment against the road. *Held* that, this part of the verdict being a compromise, the same would not be set aside because defendants were not credited with the whole amount of the judgment.

At Law. Action by Willard F. Robison against William V. McCracken & Co. On motion by defendants for a new trial. Denied.

Wager Swayne, for plaintiff.

Milton L. Southard, for defendants.

SHIPMAN, Circuit Judge. This is a motion by the defendants for a new trial of an action at law, wherein a verdict was rendered for the plaintiff.

In February, 1886, David Robison, Jr., James M. Ashley, John Cummings, William Baker, all of Toledo, Ohio; L. G. Mason, Edward Middleton, and A. W. Wright, all of the state of Michigan,—formed a corporation by the name of the Toledo, Saginaw & Muskegon Railroad Company, to build a railroad of 96 miles in length from Muskegon, Mich., to a point near Ashley, in that state, where it would intersect

with the Toledo, Ann Arbor & North Michigan Railroad. At the time the said corporation was formed, Messrs. Robison, Ashley, Cummings, and Baker each subscribed for 500 shares of stock, Mason and Wright each subscribed for 50 shares, and Middleton subscribed for 1 share. Wright's and Middleton's subscriptions were merely formal, to enable the corporation to comply with the laws of the state of Michigan, and have a sufficient number of Michigan directors, and the plaintiff claims that Mason's subscription was of the same character. Checks for 5 per cent. of the amount of the subscription were delivered to the treasurer, which were not intended to be collected or paid, and which were subsequently returned to the makers. Articles of association were signed, the seven subscribers were chosen directors of the company, Mr. Robison was chosen president, and the corporation, having thus formally complied with the statutes of Michigan, was deemed to have a legal existence. Stock certificates were issued for the purpose of enabling the directors to qualify, but no more stock was issued until it became necessary to perform the contract with the defendants, which will be hereafter stated, and then it was all issued in the name of and delivered to them. Assessments were neither made nor paid upon the original 2,101 shares, nor were calls made in the ordinary way upon stockholders, but, when money was needed, Robison would request each of the other Toledo promoters of the enterprise to pay one quarter of the required and designated sum, which was done.

It is manifest that outside of local aid, by way of gifts or deeds for the benefit of the road, they furnished the material financial strength which was requisite for the development of the enterprise, and they claim that they were the only persons who were financially responsible for its success or failure, and who were and continued to be the *bona fide* stockholders in the corporation. Mr. Mason insists that he was a stockholder, and that it was by the others understood that he was to have 20 per cent. of whatever profits might arise to the stockholders or directors, after the construction of the road. Whether he was or was not an actual stockholder, and whether or not it was understood that he was to participate with the other four in the profits of the enterprise in case of success, or bear the losses in case of failure, could not be decided in this case. If he was a stockholder, he found and now finds no fault with contracts for the building of the road by which stockholders or directors were to have profits. So far from seeking to set aside contracts which his associates made, he craves to participate in their benefits. The road was built or procured to be built in the name and under the form of a corporation, but the enterprise was conducted by and for the exclusive benefit of all the actual stockholders, viz., the four Ohio gentlemen and Mr. Mason, if he was acting in conjunction with them, or without him, if his interest was, like that of the other Michigan stockholders, merely nominal, and not actual. The contract for the division of profits was not made to shut out Mason if he was a stockholder, but was made upon the theory that he did not want to be a stockholder.

On October 2, 1886, the railroad company, by its president, entered

into a contract with the defendants, W. V. McCracken & Co., by which it agreed to cause a line of railroad from Muskegon, Mich., to a point near Ashley, in that state, to be surveyed and located, and to procure the rights of way and lands for that purpose, and to procure the road-bed to be graded, and adequate supply of cross-ties to be delivered along the line of the railroad, and to have the same completed and in readiness for the laying of the cross-ties by August 1, 1887. McCracken & Co. agreed to furnish materials for and construct all culverts, trestle work, and bridges, to lay the cross-ties, and to construct and complete the superstructure of said road and to equip it by January 1, 1888. The railroad company was to deliver to McCracken & Co., in payment of the materials and work, certificates for \$1,600,000 of its full-paid stock and \$1,600,000 of its first mortgage bonds, which were all its stock and all its bonds, until the extension of its road beyond the easterly terminus thereof. Thus the entire capital stock and the entire issue of bonds were to be delivered to McCracken & Co.

On the same day, and contemporaneously with the contract just named, McCracken & Co. agreed with the plaintiff, Willard F. Robison, who is declared by him to have been acting in behalf of his father, David Robison, Jr., and Messrs. Ashley, Cummings, and Baker, that, if the conditions of the foregoing contract were complied with by the railroad company, they will pay to him one half of the net profits realized by the contractors from the performance of the contract out of the proceeds of the stock and bonds. As the entire capital stock and bonds of the company were to be delivered by the railroad company to McCracken & Co., it is manifest that the substructure was to be paid for in some other way or some other funds, either by said corporation or by the persons for whom the plaintiff was acting; and as the plaintiff was to receive no part of the profits unless the conditions of the building contract were performed by the corporation, they obviously were under a very strong inducement to see to it that the contract was performed. The railroad corporation proceeded with its part of the contract, the contractors entered upon the work of constructing the superstructure, and on April 5, 1888, work thereon was nearly completed. It had been in running order, and was running for traffic during the winter of 1887-88. On April 5, 1888, McCracken & Co. were engaged in negotiations with the Grand Trunk Railroad Company to purchase the entire stock and bonds of the railroad, which negotiations were known and approved by David Robison, the president of the new company. He was desirous that the amount of net profits which he and his associates were to receive should be forthwith determined, and a verbal agreement was reached that McCracken & Co. should pay, without a formal accounting, the sum of \$150,000, as the proportion of net profits which were to be paid under the contract of 1886. The agreement was reduced to writing, and was expressed in the following manner. McCracken's proposition was:

"That in lieu of the profits therein provided for, that is, provided for in the contract of October 2, 1886, we shall pay to you the gross sum of \$150,000,

to be paid as follows: Our promissory note for \$20,000 of this date, payable six months after date; our promissory note of this date for \$30,000, payable nine months after date, and \$100,000 to be paid by us two years from May 1, 1888, or as soon before that time,"—and so on.

The letter of acceptance is as follows:

"I am willing to make the modification you suggest, and hereby accept the proposition and offer you make in your letter of to-day, above referred to, in lieu of said contract, and all conditions and obligations of the former contract are hereby canceled, and your proposition of to-day is accepted in lieu thereof."

The defendants paid the plaintiff \$50,000 as the two notes therefor respectively matured, but refused to pay the \$100,000 when it became due; whereupon the plaintiff brought this action of *assumpsit* upon the second contract to recover that sum. As a defense upon matters of fact, the defendants alleged that David Robison had induced them to enter into the contract of 1888 by misrepresentations in regard to the amount due for unpaid rights of way and in regard to the amount of unperformed work. The jury found for the plaintiff to recover \$100,000, less \$7,503.75, one half the amount paid by the defendants for the assignment of a judgment in favor of one Glann against the railroad company. The defense, as matter of law, was the invalidity of the contracts of 1886 and 1888, because by the original contracts four directors had secretly provided for one half of the profits which should arise out of the construction of the road, and it was claimed there could be no recovery, because, the contract being void, no action could be maintained upon it or upon its successor. The defendants invoke the aid of the principle which denounces the action of directors of a corporation who, professing to be its agents, and to be contracting in its behalf, secretly agree for a private and personal benefit to themselves, or agree to sell their official influence for personal gain, and assert the just doctrine that "no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law." *Armstrong v. Toler*, 11 Wheat. 258. The decisions of the courts of the United States have been most strenuous in demanding that the directors of corporations shall act disinterestedly in contracts which they make in behalf of the corporation for which they act, and in setting aside tainted contracts which the corporation refused to abide by, or in setting aside contracts between a director or an agent and a third person for the sale of official influence. *Wardell v. Railroad Co.*, 103 U. S. 651; *Thomas v. Railroad Co.*, 109 U. S. 522, 3 Sup. Ct. Rep. 315; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. Rep. 402; *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. Rep. 838; *Providence Tool Co. v. Norris*, 2 Wall. 45.

It is manifest that the facts in this case are of a different character from those which have ordinarily marked contracts which are the subject of just rebuke by courts. The corporation which entered into the construction contract was one in form only, and the agreement for construction and division of the profits was, in fact, made by all the

stockholders, if Mason was not a stockholder. But, assuming the existence of Mason's character as a stockholder, and that an exorbitant contract of the entire body of stockholders for their own pecuniary benefit can be seasonably attached by existing creditors, it is well settled that, as a general rule, contracts of a corporation, which were made by directors who obtained a personal pecuniary benefit thereby, are not, on that account alone, void, but are voidable at the election of the parties who are affected by the fraud. This is clearly announced in *Barnes v. Brown*, 80 N. Y. 527; *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. Rep. 145; *Oil Co. v. Marbury*, 91 U. S. 587; and *Thomas v. Railroad Co.*, 109 U. S. 522; 3 Sup. Ct. Rep. 315. In the latter case it is said, in substance, that those for whom the agent was acting have the option to avoid such a contract, but until they exercise their option, and seasonably show that it is their purpose not to submit to the act of the agent, the contract is in existence, and is not a nullity.

In this case, Mason, the remaining stockholder at the time, has not dissented, but desires to enjoy the contract. The corporation has never dissented. *McCracken & Co.*, to whom the whole stock was issued, made both contracts, paid \$50,000 upon the contract of 1888, the last payment being nine months after its date. Neither creditors nor the present stockholders have ever dissented. The case clearly falls within the general rule which has been cited. It contains no circumstances which create an exception, and make the contract one which is absolutely void. The condition of the defendants is this: They made a voidable contract with the plaintiff, which has not been avoided. The contract is an executed one, the defendants received and sold the entire stock and bonds of the company, and have the fruits of the contract, a part of which they have paid, and the residue of which they refuse to pay upon the ground that the contract was illegal in its relations to the corporation. Cases may arise where a court will have nothing to do with the controversies in regard to the proceeds of a business of an inherently corrupt and wicked character, but this is not one of them. The weakness of the defendants' position is clearly disclosed in *McBlair v. Gibbes*, 17 How. 232; *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483; and *Railroad Co. v. Durant*, 95 U. S. 579. In the latter case the court said: "The appellee cannot claim adversely to those for whom he acquired and holds the property. The rights of others, if such rights exist, do not concern him. He cannot vicariously assert them."

The defendants' next point is that the court should have charged that, if the jury found that the defendants entered into the contract of 1888 by means of fraudulent misrepresentations, the plaintiff could recover nothing. The contract had not been rescinded. The defendants did not disaffirm, but set up the misrepresentations in defense, to reduce the plaintiff's demand to the extent of \$60,000. They could disaffirm the contract, or seek to recoup the damages arising out of the fraud. "By proving the fraud and damage, the vendee may reduce the demand, where his injury is less than the price paid, and where it is equal or

greater he may defeat the action altogether." *Whitney v. Allaire*, 4 Denio, 554. In this case, the damages, as claimed, did not equal \$100,000.

The defendants' remaining point is that a new trial should be granted because the jury allowed one half of the amount paid for the Glann judgment, whereas, if they found for the defendants upon that item, the whole should have been allowed. The jury were instructed, if they found that any sums were to be deducted from the \$100,000, on the ground of misrepresentation, to state separately the amount which they found upon the three items which were claimed by the defendants, viz.,—amounts paid by them for grading, right of way, and the Glann judgment. The jury returned a verdict for \$100,000, with interest, less \$7,503.75, with interest, and were inquired of what that amount was for. The reply of the foreman did not show, to my mind, that the jury found for the defendants upon the subject of misrepresentations, but were of opinion that there were equities in favor of the defendants upon the Glann judgment, which should be worked out by allowing them one half of the amount which has been paid. That part of the verdict was a compromise. Upon a motion for a new trial of an action, in a case involving \$100,000 and which occupied 10 days, I am not disposed to set aside the verdict because the jury were illogical in respect to \$7,500, especially as the plaintiff had an equal right to say that he is the sufferer by the compromise. The motion for a new trial is denied.

STEINER FIRE EXTINGUISHER CO. v. CITY OF ADRIAN.

(Circuit Court, E. D. Michigan. December 14, 1891.)

1. PATENTS FOR INVENTIONS — ANTICIPATION — APPLICATION OF OLD DEVICE TO NEW USE—CHEMICAL FIRE EXTINGUISHERS.

Letters patent No. 147,422, issued February 10, 1874, to John H. Steiner, cover in claim 4 a chemical fire engine, consisting of a wheeled frame, provided with a generator or extinguisher, and with a hollow-journaled reel, the latter having its journal connected permanently to the generator by a pipe, and being provided with a hose coupled to it, so that the fluid may be forced through the hose while wound on the reel, and the reel may be unwound to any desired length without kinking. *Held*, that this claim is void because of anticipation by patent No. 142,488, issued September 2, 1873, to O. R. Mason, for an apparatus for thawing ice from water and gas pipes; and by British patent No. 100, granted January 12, 1865, to William Russ, for "an improved apparatus for distributing liquid manure;" and British patent No. 2,510, granted August 12, 1868, to Edward P. G. Headley, for an apparatus for watering streets, etc., and extinguishing fires,—since all these patents show the leading idea of a hollow-journaled reel, and hose connected thereto, and there was no invention in applying the same to a chemical fire extinguisher by making the necessary connections with the other well-known elements of such a machine.

2. SAME—NEW RESULT.

The Steiner patent cannot be sustained on the ground that the journaled reel, the hose coiled thereon, and its connections, in the combination, promote the perfect neutralization of the carbonic acid by the alkali, and diminish the liability to discharge any free acid which may have escaped from the generator; for the patentee did not invent the instrumentality by which this result is achieved, and his specifications contain no hint that he either sought or expected such a result.

In Equity. Bill by the Steiner Fire Extinguisher Company against the city of Adrian, Mich., for infringement of a patent. Bill dismissed.

Parker & Burton, for complainant.
John G. Elliott, for defendant.

SWAN, District Judge. This is a suit in equity, founded on the alleged infringement by defendant of the fourth claim of letters patent No. 147,422, granted to John H. Steiner, for an "improvement in chemical fire extinguishers." The patent bears date February 10, 1874, and the application was filed January 5, 1874. The fourth claim of the patent is in these words:

"(4) A chemical fire engine, consisting of a wheeled frame, provided with a generator or extinguisher, and with a hollow-journaled reel, N, the latter having its journal connected permanently to the generator by a pipe, M, and provided with a hose, O, coupled to it, as shown and described."

The patentee precedes the statements of the claims which he makes by the disclaimer:

"I am aware that a hollow-journaled reel such as used by me in this engine is not new, and therefore I lay no claim thereto, except in connection with the generator and the connecting pipe, as shown."

The defense denies the originality of Steiner's improvement and the infringement charged, and sets up twenty-six American patents of prior date to Steiner's as anticipations of the latter's patent, of which only three or four are insisted upon as material to the defense; and two British patents, neither of which is urged as embodying the improvement covered by Steiner's patent. The American prior patents mainly relied upon by the defense are No. 102,431, to C. F. Pinkham, dated April 26, 1870, for a fire annihilator; No. 131,414, to Stillson and Kley, for improvement in chemical fire engines, dated September 17, 1872; No. 142,488, to O. R. Mason, for thawing ice from water or gas pipes, patented September 2, 1873; No. 142,637, for improvement in fire extinguishers, to F. Latte, patented September 9, 1873, on application filed January 6, 1873; and No. 146,386, to John Dillon, for improvement in fire extinguishers, issued on January 13, 1874, on application filed December 1, 1873. Upon the hearing there were offered in evidence, as showing the state of the art, British letters patent No. 100, granted to William Russ, dated January 12, 1865, "for an improved apparatus for distributing liquid manure," and No. 2,510, granted to Edward P. G. Headley, August 12, 1868, for "an improved hydraulic apparatus for watering streets, roads, gardens, and other places, extinguishing fires, attaching to fire engines, and other similar or analogous purposes."

The first apparatus for the use of carbonic acid gas in the extinguishment of fires by a mingled stream of water and carbonic acid gas was the invention of William A. Graham, who filed his application December 27, 1851, upon which, July 9, 1878, letters patent No. 205,942, to his administrator, were issued. This had for its object "the extinguishing of fires in a more expeditious and effectual manner than has been attained by means heretofore used," which it effected by the delivery of one stream, impregnated with and projected by carbonic acid

gas, generated substantially in the manner now in use, either from a fountain or generator mounted on wheels similar to those of common fire engines, or from a stationary tank, through fixed pipes or tubes, arranged through a building. All subsequent machines using the combination of carbonic acid gas and water for the extinguishment of fires are simply improvements, real or supposed, of Graham's invention. As this agency can only be used beneficially in the extinguishment of incipient fires, the *desideratum* in all apparatus of this kind is celerity and certainty, or, as put by Graham in his specifications: "In extinguishing fires, time is money; time is life."

Every later effort towards the improvement of Graham's invention has aimed to meet this need, and secure the prompt and efficient discharge of the mixed fluid as the perfection of its use for the end designed. Steiner's improvement is in that direction, and is professedly a combination of old elements, though the defense denies it even this merit, insisting that it is a mere aggregation of well-known contrivances. Its patentability is further assailed on the ground that all its co-operating parts, even if it be held a combination of old elements, have been employed for like uses; and their adaptation to the fire extinguisher is not invention, but required only ordinary mechanical skill. While it is elementary that a new and useful combination of old elements entitles its originator to the protection of the patent law equally as if all the elements of his device were entirely new, yet the doctrine is qualified by the indispensable condition that the combination must be the result of invention, which requires the conception and development into practical working form of a new means or device for performing a useful function or functions. The conjunction of parts or mechanism for the production of the effect must be of the inventor's own devising. He must conceive its construction as an original creation, not merely perceive the fitness of an existing contrivance to the required end. It must be the product of the constructive, not merely of the perceptive, faculties of the mind. This is simply stating in another form the settled rule of law that the application of a device to a new use is not invention. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not. The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 494, 4 Sup. Ct. Rep. 220; *Roberts v. Ryer*, 91 U. S. 150.

There can be no doubt upon this record that the combination employed by Steiner insured greater celerity, certainty, and efficiency in the application of the fluid upon the fire by the pipe connection and coupling between the generator and the hollow-journalled reel, and thence into the hose wound upon the reel and permanently connected thereto, and necessarily, therefore, with the generator; and from the fact that the hose thus placed and connected permits the flow of the fluid

simultaneously therewith, and can be readily unreeled to any required length, without liability to kinking, and thus, by the turning of the waycock, the contents of the generator can be immediately discharged upon the fire at the will of the pipeman. A striking proof of the utility of the combination is found in the fact that its main features have been largely adopted since its introduction in the Steiner machine. The Adrian machine clearly uses the same means to the same ends as those employed in complainant's. The apparent differences produced by the position of the reel, its generators, and the coupling and pipe connections, and the absence of a reel case or covering, are formal, not substantial. If, therefore, Steiner's improvement is a patentable device, and has not been anticipated by prior inventions, the case made by the pleadings and proofs entitles complainant to the relief prayed. We come now to that inquiry, and the examination of the American prior patents. There is nothing anticipatory of Steiner in the Pinkham patent. Its scope is limited to a duplication of the generators, and the use of an issue or discharge pipe common to both, and connected to the generators by branch pipes furnished with stopcocks, by the use of which one generator can be refilled while the other is in use. The reel or spool is used merely to carry the hose "when not required for use." In the Stillson and Kley machine the hose is wound upon a solid-journaled reel, and is permanently attached to the discharge pipe leading to the generators. The discharge pipe communicates with both tanks or generators through cocks so arranged that when one is open the other may be closed, thus permitting the successive use of the generators. As compared with Steiner's, the striking defect of the machine lies in the necessity of unreeling all the hose as a prerequisite to the discharge of the fluid. While this difficulty is in part obviated by winding the hose on the reel simultaneously from each end, the machine is not capable of such facile and expeditious use as is Steiner's. Indeed, the function of the reel in the Stillson and Kley engine seems to be only the carriage of the hose, not in any way to facilitate its manipulation by the pipemen, or to adjust its length to the exigencies of the occasion. The chief, if not the only, feature common to this and complainant's improvement, is the permanent attachment of the hose to the discharge pipe. This machine does not suggest the advantage of Steiner's.

In Latta's machine the cylinder of the tank or generator is arranged and used "as a drum or spool upon which the leading hose that proceeds from the extinguisher is reeled or wound." The objection to this device is the liability of the opening from the generator into the discharge pipe to be left, by the unreeling of the hose, above the water line of the contents of the generator, the effect of which would be to permit the escape of the gas alone, instead of using it as a force by which the fluid must be ejected. In its present form it is regarded as unreliable, and inferior to later devices, including Steiner's. Dillon's fire extinguisher is stationary, and consists of a partially tubular shaft, hung in half bearings, and revolved by a crank. To the tubular end of the shaft is connected an ingress pipe, which, in its turn, is attached to the

water supply in a dwelling or other building. The hose is wire-lined, permitting the flow of water while coiled on the shaft, which is used as a reel. The evidence in this record carries back the date of Steiner's invention to September, 1873, and therefore he was not anticipated by Dillon. This renders unnecessary comparison of the latter's device with complainant's. The Pinkham, Stillson and Kley, Latta, and Dillon machines being thus eliminated from the inquiry, the effect of the Mason patent and those of Russ and Headley remains to be considered. Mason applied for his patent May 10, 1873,—four months before the earliest date which can be assigned to Steiner's alleged invention. His is a device for thawing ice from water or gas pipes, and in form and appearance is not unlike the reel and connections which Steiner employs. Examination of its parts reveals a still closer resemblance. His idea and mechanism were directed to thawing ice from water and gas pipes by means of a jet or stream of heated fluid injected against the frozen contents of the pipe. "To this end," his specifications say, "the invention consists in combining a flexible pipe with a revolving reel or drum, the pipe being coiled upon the drum, the construction of parts being such that the heated fluid can be forced through said drum and any desired length of pipe." The shaft of the reel, like Steiner's, is hollow part of its length, and to this part one end of the flexible pipe coiled on the reel is connected, while the open end of the reel shaft is connected by a pipe to a force pump, which is used to force a hot stream through the pipe coiled on the reel, one end of which pipe is thrust into the frozen water or gas pipe. "As the thawing out progresses, the stream of hot water can be made to follow up closely by unwinding the pipe from the drum; thus the heat can be applied just where the work is to be done." The specifications further state: "It is evident that a reservoir of steam might be connected with the open end of the shaft, and carried into the water or gas pipe in the same manner as I introduce water through the pipe." The claim of that patent is: "The combination of the flexible pipe with the reel or drum having the hollow shaft and coupling, through which the fluid is delivered to the pipe."

It is admitted that this patent shows two elements of Steiner's improvement, viz., the hollow-journaled reel, and the pipe permanently connecting with it. It is also admitted that "the wheeled frame provided with a generator or extinguisher, * * * and provided with a hose," are old, and had been combined before the issue of the Steiner patent; and that the nozzle, with valve, was an old and well-known device, understood as an essential part of a hose when used for fire-extinguishing purposes. The combination claimed as the patentable merit of Steiner's extinguisher is that of the hollow-journaled reel, with its connections to the generator, and the connection of the hose to the outlet to the hollow journal, and that thereby, "in an organized machine of that class of fire extinguishers, he secured by such organism useful results never before attained." While Steiner's device facilitates the manipulation of the hose, and the certain and speedy discharge of the

fluid, it is plain that the combination which produces these effects has its antitype in Mason's machine, which itself is at least of questionable originality, and that Steiner has merely found a new use for the very mechanism of Mason. The latter's suggestion that "a reservoir of steam might be connected with the open end of the reel shaft," is, indeed, superfluous to prompt that idea. Equally patent is the attachment of the combination to the fire extinguisher. The use of the hose reel, the hose, nozzle, and connecting pipe in combination being old, and "the fact that water will flow through a hose wound on a reel if the diameter of the reel is large enough, and the curves or angles are not abrupt, being a matter of common knowledge, which no one can appropriate to his own use to the exclusion of the public," as is said in *Preston v. Manard*, 116 U. S. 664, 6 Sup. Ct. Rep. 695, and, *a fortiori*, the known fact that water can be forced through a hose coiled on such a reel by the expulsive power of carbonic acid gas, left, in my judgment, no merit in Steiner's device but the application of the elements of this combination to the fire extinguisher. The results he obtained by its use are the same in character as those obtained by Mason and the British patentees Russ and Headley. The case strongly resembles those of *Roller-Mill Co. v. Walker*, 138 U. S. 124, 132, 11 Sup. Ct. Rep. 292; *Electric Co. v. La Rue*, 139 U. S. 606, 11 Sup. Ct. Rep. 670; *Blake v. San Francisco*, 113 U. S. 679, 5 Sup. Ct. Rep. 692. See, also, *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220, and cases there cited.

The argument is pressed that one effect of the hollow-journaled reel, the hose coiled thereon, and its connections, in combination, is to promote the perfect neutralization of the carbonic acid by the alkali, and diminish, if it does not fully prevent, the liability of the discharge of free acid which may have escaped from the generator; that by the agitation of the fluid by the reel, and the retardation of its passage to the nozzle, occasioned by the coiled hose, the acid and alkali are more thoroughly mingled. While this may be true, the fact remains that Steiner did not invent the instrumentality by which that result is effected; nor does he seem to have forecast, or even suspected, the effect. His specifications are barren alike of statement and intimation from which it can be inferred that he either sought or expected that advantage from the combination. Both on the ground, therefore, that this function of his device is not patentable, because the means used to produce it are old, and for the reason that the claim of the inventor cannot be expanded to include more than his application warrants, this argument cannot avail.

But, if wrong in the conclusion that there is practical identity in the Mason and Steiner devices, the state of the art, as shown by the apparatus covered by British letters patent to Russ in 1865, and to Headley in 1868, seems to be conclusive that the very arrangement of parts for which Steiner claims was embodied in those machines; Headley's especially. He says in his specification, for "hydraulic apparatus for watering streets, etc., extinguishing fires, attaching to fire engines, and other similar and analogous purposes." "Upon a suitable locomotive

frame, to be propelled by hand or otherwise, I mount a windlass or drum, the axis of which I make hollow. Upon this drum I wind any required length of flexible tube or pipe, one end of which I connect with the hollow axis of the drum upon which it is wound, and the free end of which tube or pipe I fit with suitable connections for attaching it to hydrants or standards supplying water under pressure. To the end or ends of the hollow axis or drum I attach suitable distributing media. The axis is fitted with a handle for winding the pipe, which runs off as the frame is moved, and on again when required." The mode of using the apparatus is as follows: "The end of the flexible pipe being connected to the hydrant or standard, the frame, windlass, and coil of pipe are moved, as required, to a greater or less distance, and distribute the water as the apparatus travels; no locomotive tank or other water container being necessary." Russ' improved apparatus for distributing liquid manure is much like Headley's, except in particulars necessary to apply it to the special use for which it is designed. Both these machines seem to me to anticipate all that is embodied in both Steiner's and Mason's, and clearly to deprive both of any vestige of originality. These patents do not appear to have been called to the attention of Judge MORRIS, as appears from the transcript of the record in the case of *Extinguisher Co. v. Holloway*, 43 Fed. Rep. 306. The bill must be dismissed, with costs.

BRICKILL *et al.* v. THE CITY OF BALTIMORE.

(Circuit Court, D. Maryland. November 11, 1892.)

PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—STATE STATUTES OF LIMITATION.

The weight of judicial opinion being that state statutes of limitation are not applicable to actions in federal courts for infringements of patents, a circuit court of the United States, although of the contrary opinion, in the absence of any authoritative decision of the question by any appellate court, will sustain a demurrer to a plea of such statute in an action on the case for infringement of a patent, where part of plaintiff's claim is within the saving clause of Act Cong. June 18, 1874, repealing the previous limitation of such actions, and where there must be a trial in any event, and the question may be considered on appeal.

At Law. Action by William A. Brickill and others against the city of Baltimore for infringement of letters patent No. 81,132, issued to plaintiff Brickill, August 8, 1868, for an improvement in "feed-water heaters for steam fire engines." A demurrer to the declaration, on the ground that the patent was void on its face for uncertainty, was overruled. 50 Fed. Rep. 274. The cause is now heard on a demurrer to defendant's plea of the state statute of limitations. Demurrer sustained.

Raphael J. Moses, Jr., A. C. Trippe, and Arthur Stewart, for plaintiffs.
Albert Ritchie, for defendant.

MORRIS, District Judge. This is an action on the case for infringement of a patent for improvement in feed-water heaters for steam fire engines. 52 Fed. no. 8—47

gines. The patent was issued August 18, 1868, and expired August 18, 1885. This suit was entered August 15, 1891, 3 days less than 6 years after the expiration of the patent, and the declaration alleges infringement by the defendant during the entire period of 17 years, from 1868 to 1885, covered by the existence of the patent. The defendant has pleaded the Maryland statute of limitations of three years, applicable to actions on the case, and to this plea the plaintiffs have demurred. Since the enactment of the United States patent laws, the only statute enacted by congress limiting actions for infringement of patents was the act of July 8, 1870, which was repealed by the act of congress, June 18, 1874, adopting the Revised Statutes, so that, except in respect to those matters which come within the saving clause of that repeal, the law was then left and remains as it had been prior to the enactment by congress of any act of limitation. The contention of the plaintiffs is that there is now no statute of limitations applicable to actions for infringement of patents, and the contention of the defendant is that the statute of the state in which the federal court is held is applicable by virtue of section 721 of the Revised Statutes, which provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." The plaintiffs contend that an action for infringement of a patent is a case to which the above-quoted section 721 does not apply, because such actions arise out of rights created by an act of congress, as to which congress has given the federal courts exclusive jurisdiction, and that the section is only applicable to cases where the state and federal courts have concurrent jurisdiction over the subject-matter.

This question of the applicability of the statute of limitations of the several states to actions for infringement of patents has been frequently raised in the circuit court of the United States, and has been variously decided. There has as yet been no authoritative decision by any appellate court. In the present condition of the adjudications on this question, eminent judges and careful text writers have declared that the weight of judicial opinion is that the state statutes are not applicable, and it has been so held in the circuit court of the United States for the district of Connecticut, in a case now pending there, for infringement of this same patent, between these plaintiffs and the city of Hartford. 49 Fed. Rep. 372.¹ The question has been fully argued before me, and I have been assisted by the briefs of counsel, and particularly by the unusually able and exhaustive brief filed by the counsel who then represented the city of Baltimore; but, in view of the fact that the question has been already so often passed upon and discussed by the circuit courts, it would be useless to enter into a discussion of the authorities. The settlement of the question must wait for its authoritative decision by an appellate tribunal. I am free to say, however, that I find myself unable to concur in the reasoning by which the decisions adverse to the applicability of

¹See, also, *Brickill v. City of Buffalo*, 49 Fed. Rep. 371, for a like ruling.

the state statutes are sustained. There are, it is quite true, many reasons why congress should enact a statute of limitations expressly applicable to this peculiar character of property; but this, of itself, is no reason why, in the absence of such legislation, suits arising out of patents should not be governed by the same rules as govern similar actions. I am not aware of any common-law action, growing out of private rights, even though granted by the United States, to which, in the absence of any federal statute, the state statute of limitations are not held applicable. *McCluny v. Silliman*, 3 Pet. 270; *Bank v. Dalton*, 9 How. 522; *Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690; *Leffingwell v. Warren*, 2 Black, 599; *Amy v. Dubuque*, 98 U. S. 470.

I do not appreciate the supposed force of the argument that because congress, in order to secure uniformity of decisions as to the construction of the patent laws and the validity of patents, has given to the federal courts the exclusive jurisdiction of questions of infringements, that, therefore, this class of cases should be the sole exception to the prevailing rule, which makes the state acts of limitations just as binding upon the federal courts as they are upon the state courts; more especially as the supreme court has held that section 721, so far as it makes the state laws rules of decision as to the competency of witnesses, is applicable to this very class of actions for infringement of patents. *Vance v. Campbell*, 1 Black, 427; *Haussknecht v. Claypool*, Id. 431. If there be merely a doubt as to whether or not section 721 is applicable, the fact that not to hold it applicable would leave actions for infringement of patents the only private actions not affected by any statute of limitations should, in my judgment, favor the construction which would make the statute applicable. *McCluny v. Silliman*, 3 Pet. 270; *Hayden v. Oriental Mills*, 15 Fed. Rep. 605; *Copp v. Railway Co.*, 50 Fed. Rep. 164.

Such is my opinion, notwithstanding the weight of authority which is claimed to be against it, and if there were no appeal, or if the whole of complainants' case were cut off by the statute pleaded, I should feel called upon to overrule the demurrer; but in view of the doubt in which the question rests, and of the fact that part of complainants' claim is within the savings of the repeal of the statute of 1870, and that there must be a trial in any event, and that the question will probably, in any event, be carried up to an appellate court, I think it best that I should yield my own judgment, and let the whole case go to the jury. The repeal of the statute of 1876 saved to suitors the right to bring suit for any infringement occurring before its repeal, within six years from the expiration of the patent; therefore any infringement by the defendant prior to June 18, 1874, is within the provisions of the federal statute. If at the trial of this case the verdict should be in favor of the plaintiff, it will be proper that the jury shall find separately the amount of damages prior to June 18, 1874, and the amount of damages subsequent to that date, so that, however the question of limitations may be ultimately settled, there may be no difficulty in entering a proper judgment without a second trial. For the purposes of this case I shall sustain the demurrer.

CELLULOID MANUF'G CO. v. ARLINGTON MANUF'G CO. *et al.*

(Circuit Court of Appeals, Third Circuit. November 15, 1892.)

PATENTS FOR INVENTIONS—LIMITATION OF CLAIM.

Letters patent No. 199,908, issued February 5, 1878, to the Celluloid Manufacturing Company, for an "improvement in the manufacture of sheets of celluloid and other plastic compositions," while covering an invention of a primary character, and therefore entitled to a liberal construction, are restricted by the terms of the claims and specifications to the use of a slab of celluloid fastened for the purpose of planing into thin sheets to a grooved or channeled plate through the agency of heat, pressure, and the contractile energy of the material in cooling, and are therefore not infringed by a device made under patent No. 387,947, issued August 14, 1888, to Francis Curtis, wherein the celluloid slab is held on a perfectly smooth plate by atmospheric pressure and adhesion only. 44 Fed. Rep. 81, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Bill by the Celluloid Manufacturing Company against the Arlington Manufacturing Company and others for infringement of a patent. The circuit court dismissed the bill, (44 Fed. Rep. 81,) and complainant appeals. Affirmed.

Rowland Cox and Frederic H. Betts, for appellant.

John R. Bennett, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. This is an appeal from the decree of the circuit court of the United States for the district of New Jersey in a suit in equity brought by the Celluloid Manufacturing Company, the appellant here, against the Arlington Manufacturing Company and others, for the alleged infringement of letters patent No. 199,908, dated February 5, 1878, for an "improvement in the manufacture of sheets of celluloid and other plastic compositions," granted to the first-named company, as assignee of John W. Hyatt, the inventor. The case, as presented to us, involves the single question of infringement, and the determination of that question depends upon the construction to be given to certain of the claims of the patent. The invention (the specification of the patent declares) "relates to an improved apparatus and process for the manufacture of sheets of plastic composition, and, in the present instance, is applied to the article known as 'celluloid.'" At the opening of the specification the following explanatory statements occur:

"Heretofore the great obstacle to successfully planing or reducing plastic or pliable material to sheets by securing it upon a surface and then feeding it to a fixed cutting edge has been that the material was apt to rise from the surface supporting it, and ride up the knife; thus cutting the material irregularly, or arresting the operation. Hence, to hold the slab of material firmly upon the surface sustaining it pending the operation of shaving or planing it into strips has been esteemed a great *desideratum*, and is one of the objects effected by the mechanism and process hereinafter set forth."

"The objects of the invention are accomplished by causing the union in a single slab of a number of sheets or pieces of celluloid, this being effected by

means of pressure and heat, which contemporaneously amalgamate the sheets into a slab, and also force portions of the under side thereof into channels or inclined grooves in the surface upon which the slab rests, which grooves are so arranged that upon the hardening and shrinking of the material the portions thereof in the grooves operate as a series of hooks or clutches to retain the slab in place, after which the plate supporting the slab is placed upon a machine for planing, whereby the material is shaved or planed off in sheets or pieces of any desired thickness, according to the capacity of the machine, the sheets being subsequently dried in open frames, whereby they acquire and retain formation."

It is further stated that unseasoned celluloid, when heated above 150° Fahrenheit, becomes plastic, and can be easily manipulated so long as it is warm, but, becoming cool, it hardens, and while losing its caloric has a slight tendency to shrink. The specification proceeds to set forth an apparatus whereby the objects of the invention are accomplished, and describes the base or bed plate, upon which the slab of celluloid is to be mounted, as having in the central portion of its upper surface a slightly raised boss, the entire upper surface of which is covered by grooves and intermediate ridges or elevations; these grooves, on either side of the vertical longitudinal center of the boss, inclining inward and downward towards the vertical central longitudinal plane of the plate. The purpose of this construction, it is stated, may be effected, though not so satisfactorily, by means of apertures of any desired form which have an inclination downward towards the said plane; the apertures, or some of them, on opposite sides of the said center of the plate, having similar inclinations towards the said central plane. The described operation of forming the slab and fixing it securely upon the plate is briefly this: A number of rough sheets of crude celluloid are superposed, one above the other, upon the bed plate in a chase or mold, and by the application of hydraulic pressure and of heat the celluloid is softened and solidified, the lower part of the plastic mass being forced into and completely filling the grooves on the face of the boss. Then, after the application of water or other cooling agent, whereby the celluloid is chilled and hardened in place, the chases, or sides of the press, are removed, "and the material is found in a homogeneous slab secured upon the boss." The specification here states:

"Being exposed to the air, the celluloid shrinks somewhat, which causes the portion thereof which has been forced into the inclined grooves to operate as clutches or hooks, grasping the metal with immense power, and holding the slab firmly by a tension towards the center against any movement or force, either lateral or upward. Thus is the prime object of the invention accomplished."

We do not deem it necessary to set forth with particularity the other two steps of the Hyatt process, namely, the cutting and drying of the sheets, and hence we pass over so much of the specification as relates to the same and to the devices employed therein. Near the close of the specification we find the following paragraphs relating to the first step of the process:

"It is obvious that, after one of the slabs has been shaved off, leaving only a thin film of celluloid upon the plate, a second slab may be secured thereon

by means of collodion, cement, or other suitable solvents, that will cause the slab to unite homogeneously with the film remaining upon the plate, when the slab thus attached may be manipulated the same as though secured upon the plate in the manner first above detailed."

"The plate, A, may be grooved laterally or otherwise, and bars of wood secured in the grooves so as to be flush with, or slightly above, the surface of the plate, and the slab formed upon this formation."

Then follows this pregnant statement:

"The purpose of retaining the slab in position may be effected also by vertical apertures in the plate, or, in fact, apertures or elevations of any order in or upon or about which the plastic composition can be forced, and there permitted to harden; the essence of this element of the invention being to affix a plate (slab) of plastic composition upon a plate immovably by combined heat and pressure and subsequent cooling."

The patent has 31 claims, but infringement by the defendants of the 28th, 30th, and 31st claims only is affirmed. Those claims are as follows:

"(28) The within-described process of making sheets of plastic composition, which consists—*First*, in forming and causing the adhesion of a slab of the composition to a plate; *second*, subjecting such slab to the operation of a plane to reduce it to sheets; and, *third*, drying the sheets thus produced in a frame, substantially as set forth."

"(30) A slab of plastic composition, fixed upon a bed or plate by the means substantially as herein specified, for the purpose of enabling the division or planing of the slab, substantially as set forth."

"(31) A plate carrying a slab of plastic composition affixed thereon by means of heat and pressure, substantially as set forth, and for the purposes specified."

The court below was of the opinion that the letters patent in suit are limited to an apparatus and process whereby the slab of celluloid is affixed to a supporting surface during the operation of planing it into sheets by the employment of the contractile power of the material developed in the cooling of the heated mass, and therefore adjudged that the defendants did not infringe any of the claims of the patent by the use of an all-metal plate, having a perfectly smooth surface, to which the block of celluloid is held by atmospheric pressure and adhesion only, agreeably to the method described in and covered by letters patent No. 387,947, dated August 14, 1888, issued to Francis Curtis, assignor to the Arlington Manufacturing Company, one of the appellees. The construction which the court below thus gave to the patent in suit is the same it received in the case of *Celluloid Manuf'g Co. v. American Zylonite Co.*, 31 Fed. Rep. 904, a suit on this patent in the circuit court of the United States for the district of Massachusetts, Mr. Justice GRAY there delivering the opinion of the court. If the court below was right in its views as to the scope of the Hyatt patent, its conclusion upon the question of infringement was indisputably correct, for clearly, in the practice of the defendants' method of securing the slab of celluloid to a smooth metal plate, the contractile force of the material is not utilized. This the appellant's expert, Mr. Brevoort, concedes. He testifies that in the defendants' method "there is no holding due to the shrinking of the material

as it cools;" and he admits that if the claims are limited to a block fixed to the plate "by the power it exerts in shrinking, then the defendants do not infringe."

We are therefore brought to the consideration of the controlling question, what is the true construction of the patent in suit, with particular reference to the three claims alleged to be infringed by the defendants? Now, we agree with the appellant that the patent describes and claims a process. But what is the nature of that process? The specification gives no uncertain answer. From first to last—as our above quotations demonstrate—it lays special stress upon the shrinking quality of the celluloid in cooling, and its consequent exercise of a contractile agency in holding the slab to the plate in a fixed position, while it is subjected to the strain of the plane. Thus, at the outset, it is stated that, upon the hardening and shrinking of the material, the portions thereof in the grooves operate as a series of hooks or clutches to retain the slab in place. Then, after describing the operation of forming the slab by heat and pressure, it is stated that upon exposure to the air the celluloid shrinks somewhat, which causes the portions which have been forced into the inclined grooves to act as clutches or hooks, grasping the metal with immense power, and holding the slab firmly by a tension towards the center against any movement or force, either lateral or upward. Then follows the significant declaration, "Thus is the prime object of the invention accomplished." In the face of this announcement, how can it be said that the utilization of the contractile energy of the slab is not a necessary feature of the patented process? But this is not all. The specification proceeds to state that the purpose of retaining the slab in position may be effected by vertical apertures, or by apertures or elevations of any order, in or upon or about which the plastic composition can be forced, and there permitted to harden; "the essence" of this step of the invention being to affix the slab upon a plate immovably "by combined heat and pressure and subsequent cooling." The subsequent cooling is thus declared to be of the substance of the invention. It will be perceived that Hyatt's real discovery was not that celluloid, in cooling, would shrink, but that the contractile energy thereby developed could be turned to the achievement of that which had been "esteemed a great *desideratum*," namely, the affixing of a slab of the material upon the sustaining surface immovably; and the conception is well expressed in the first claim of the patent:

"A slab of material secured upon a surface through the operation of the power it exerts in shrinking acting upon two or more elevations or depressions on or in the surface on which the slab is placed."

The specification throughout contemplates the interlocking of the slab with the plate by its own action—its contractile power—under heat, pressure, and subsequent cooling. This is the underlying principle of the invention disclosed by the patent. No other agency for accomplishing the desired result is suggested, nor is any other fairly deducible from anything set forth in the specification. The method, briefly referred to, of uniting homogeneously a second block with the film of celluloid left

on the plate, obviously is a mere modification of the first-described operation, and introduces no different principle. Nor does the suggested form of plate, with bars of wood secured in the grooves, so as to be flush with or slightly above the surface of the plate, indicate any departure from the interlocking and clinching action. In his original deposition, Mr. Brevoort, upon this point, testified:

"This method, like the first one, contemplates an interlocking of the slab with the plate; the wood presenting, by reason of its structure, spaces within which portions of the block could penetrate and harden."

This, we think, is the natural and correct view, and it is confirmed by the testimony of Mr. Hyatt, who states:

"Before I made use of either of these particular forms of apertures, I caused the block of celluloid to adhere to a piece of coarse-grained wood, by means of solvents of the celluloid, and also by heat and pressure, which caused the celluloid to enter the pores or interstices of the wood, and which held the blocks while being cut into sheets."

But, as we have seen, the defendants not only dispense with all grooves, apertures, and elevations and their equivalents,—using a perfectly smooth surface all metal plate,—but they employ a force to retain the slab of celluloid in place entirely different from that of the Hyatt invention, and operating in a different way. In a word, the two processes differ in principle.

Now, undoubtedly, where an invention is meritorious, and of a primary character, as seems to be the case here, the patent should be liberally interpreted, so as to secure to the patentee his real invention as he has disclosed it to the public by his specification; and, if it be for a process, he should be protected from the unauthorized practice of it by others, by whatsoever modes or forms of apparatus they may apply the process. *Tilghman v. Proctor*, 102 U. S. 707; *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299; *Bene v. Jeantet*, 129 U. S. 683, 9 Sup. Ct. Rep. 428. The appellant's pretensions, however, far transcend the limits of these settled and just rules. Virtually the appellant claims all means, however differing in mode of action and principle from the process described in the patent, whereby a slab of celluloid is caused to adhere to a plate for the purpose of planing it into sheets. But a construction which would so expand the appellant's exclusive rights is altogether inadmissible under the terms here chosen to express the invention. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76.

As was said with reference to a patent for a process in *Tilghman v. Proctor*, 102 U. S. 729, 730, so is it to be said here, that the true meaning of the claims is to be sought by comparing them with the context of the specification; the description therein contained giving to the claims the proper construction and qualification. Moreover, claim 28 is expressly for "the within-described process," and each of the three claims here in question has the clause, "substantially as set forth," which connects the claim with the specification, and thus limits it. *The Cornplanter Patent*, 23 Wall. 218.

In this connection we deem it worthy of notice that claim 30, as originally formulated, read: "A slab of plastic composition fixed upon a bed or plate by mechanical or adhesive action," etc.; but, pending the proceedings in the patent office, the applicant, by his own voluntary act, it would seem, amended the claim by striking out the words, "mechanical or adhesive action," and substituting the clause, "by the means substantially as herein specified,"—a change which appears to us to indicate an intention on his part entirely inconsistent with the position upon which the appellant now insists.

Upon the most careful consideration of the whole case, we cannot avoid the conclusion that the court below rightly construed the specification and claims of the patent; and accordingly the decree must be affirmed.

HUNT v. MOLINE PLOW Co.

(Circuit Court, N. D. Illinois, S. D. October 31, 1892.)

PATENTS FOR INVENTIONS—LICENSE—ROYALTY—RESCISSION OF CONTRACT.

Before the issue of a patent the patentee agreed to grant an exclusive license to manufacture under it, in consideration of the licensee's agreement to pay a certain royalty, the agreement providing that, if the licensee should decide at any time not to continue making the patented device, then the license and the agreement should be surrendered without damage to either party. The licensee, having found that the patent, when issued, did not include all the claims he supposed it did, notified the patentee that he could not go on with the contract, paid him royalty on all the machines made up to that time, and proceeded to make others under a different patent, embodying substantial changes in the machine. *Held*, that the patentee was not entitled to royalty after he received said notice.

In Equity. Suit by Homer H. Hunt against the Moline Plow Company for an accounting for royalties for the use of a patent. Bill dismissed.

John G. Manahan, for complainant.

Bond, Adams & Rickard, for defendant.

BLODGETT, District Judge. The bill in this case seeks an accounting from the defendant to the complainant for the use of a patent, of which the complainant is assignee, granted to George W. Hunt, September 25, 1883, for a "wheel plow." The facts as they appear from the proof are substantially these: The patent in question was applied for by George W. Hunt on the 14th of December, 1882, and in the spring of 1883, some time in April, he brought to the shop of the defendant in Moline, Ill., a plow, which he represented was constructed in accordance with his patent. Some of the officers and managers of the defendant examined the plow, and from that inspection concluded that it would be a useful and profitable plow for the defendant to manufacture; and after some negotiation the parties entered into an agreement, which is called "Exhibit D" in the proofs, in the following words:

"This agreement, made and entered into by and between George W. Hunt, of Muscatine, Iowa, and Moline Plow Co., of Moline, Ill., witnesseth, that whereas, said Geo. W. Hunt is the inventor of a sulky or wheel plow, an application for patent on which was officially allowed on March 2nd, 1883, and whereas, said Moline Plow Co. are desirous of manufacturing said wheel plow, it is hereby agreed that when the above-mentioned patent is issued to said Geo. W. Hunt he shall immediately issue to said Moline Plow Co. a license for the exclusive manufacture of said wheel plows under said patent in all parts of the United States; also for Manitoba and Northwest Territory, if patent is issued in Canada. In consideration of the granting of said license, and the exclusive right to manufacture said wheel plow in territory above described, for the full term of life of said patents, the said Moline Plow Co. agree to manufacture a sufficient number of said wheel plows to supply the demand for them in said territory, so far as they are able; and they further agree to pay to said Geo. W. Hunt a royalty of one dollar (\$1.00) on each wheel plow manufactured and sold until one thousand of said wheel plows shall be sold, and a royalty of fifty cents (50 cts.) each on any number of said wheel plows that may be made and sold by said Moline Plow Company during the lifetime of said patent in addition to the above-mentioned one thousand wheel plows. The royalty herein provided for shall be due and payable on Jan'y first and July first of each year, at which times the royalty for the total number of wheel plows manufactured under said patent and sold by the Moline Plow Co. during the previous six (6) months shall become due. It is further agreed that the Moline Plow Co. shall have a reasonable and sufficient time in which to test the value and desirability of said wheel plow as an implement to manufacture and sell, and, if they shall decide at any time that they do not wish to continue the manufacture and sale of said wheel plow, then this contract, or any lease or license issued under it, shall be surrendered to said Geo. W. Hunt, without damage to either party. And it is further agreed that the said Geo. W. Hunt shall defend any suit or suits that may be commenced or entered on account of the manufacture or sale of said wheel plow in the territory above mentioned, because of any claim that it may be an infringement of any other patent or patents. Witness our hands this twenty-first (21st) day of April, A. D. 1883.

"G. W. HUNT.

"MOLINE PLOW CO.

"C. A. BAKER, Secy. & Treas."

Soon after this instrument was executed the defendant commenced the manufacture of plows in accordance with the sample plow which had been brought to defendant's shops as aforesaid, and made about 100 plows, which were put upon the market, embodying substantially the features and elements which were shown in the sample plow which Hunt had furnished to the defendant. The proof clearly shows that the features in the Hunt plow which attracted the attention of the officers of the defendant, and induced them to enter upon its manufacture, were the hinging or pivoting of the heel of the land side to rigid standards extending up from the land side to the beam, and the device shown in the patent, by which the nose or point of the plow could be raised or lowered by means of another standard attached to the plowshare nearer to its point, by means of a combination of levers working with the last-mentioned standard; the defendant's managers being of opinion, from an inspection of these features of the plow, that this pivoting at the rear of the land side was a valuable improvement in the plow art. The is-

sue of the patent for some reason was delayed until the 25th of September, 1883; and, after the patent came out, and was examined by the officers of the defendant, it was apparent that it did not cover the features which they deemed the most valuable in the organization of the plow, the patent having but one claim, and that being in these words:

"In a wheel plow, the combination with the slotted plow beam, D', and the movable forward standard, U, of the levers, W and α , connecting rods, V, Z, the rack bar, X, and its catch plate, Y, substantially as herein shown and described, whereby the plow point can be readily raised and lowered, and will be securely held, as set forth."

It will be readily seen from this claim that it does not cover the pivotal joint at the heel of the land side, by which the share was attached to the frame of the plow, and from which it received its propelling force, and by which its running depth at the heel was regulated, but that the claim of the patent only covers the levers and standard by which the point of the plow is raised and lowered. After inspecting the patent, and consulting counsel, and being advised that the patent did not cover this feature of attaching the land side to the rigid standard by a pivot joint, the defendant notified George W. Hunt that they could not proceed with the manufacture of the plow under the contract. The proof also shows that the lot of plows which the defendant had manufactured prior to the issue of the patent were put upon the market and sold, but that they were unsatisfactory to purchasers, and were all returned to the defendant after a short trial and use; the chief fault found with them being that the lever device, by which the point of the plow was raised and lowered, and by which it was assumed the point would be held in the ground, was wholly insufficient and inoperative for that purpose, not by reason of faults of mechanical construction, but by reason of radical defects in the principle upon which such levers worked. It also appears from the proof that George W. Hunt, shortly after receiving the patent, assigned the same to the present complainant, his son, Homer H. Hunt, and that no license to manufacture under the patent was ever given or offered by said George W. Hunt or the complainant to the defendant; that some time after the complainant had become the owner of the patent he was at the defendant's shop, and, after some discussion, a copy of the contract, which I have quoted, which the defendant had made with George W. Hunt, was thrown upon the table by the complainant, and marked "canceled," either by himself or the secretary of the defendant in his presence, and left there in the defendant's office, and that the secretary of the defendant company, who participated in the discussion with the complainant at that time, also at the same time marked the defendant's copy of said contract "canceled;" that about the 7th of January, 1885, defendant received a letter from the complainant, which stated, in substance, that if he heard nothing satisfactory from the defendant by the 11th day of that month he should proceed, without further notice, to lease to some other company the right to manufacture said wheel plow, and should consider, "if you make no objection at that time, that you have no objection against my licensing to another

company." The proof also shows that no objections were made in response to this letter, and that defendant acted from that time on upon the assumption that the contract was canceled, and at an end between them. The proof also shows that soon after the officers of the defendant discovered that the Hunt patent did not cover the feature of the plow which it considered most valuable, an attempt was made, at the expense of the defendant, to obtain a reissue of the patent so as to cover such feature, but this attempt was unsuccessful, for the reason that the patent office decided that it was old in the art to hinge the heel of the plow to a fixed standard, substantially like that shown in the sample plow submitted to the defendant by Hunt, and represented by him to illustrate and describe the plow which was covered by his patent, which he stated had been allowed by the patent office. It also appears that, after finding by experience that the lever system of the Hunt patent covered by the claim was wholly useless, a Mr. Bartlett, then in the employ of the defendant, devised another system of levers, entirely different in their organization and operation, for raising the point of the plow, and also for holding it to its work; and that defendant constructed plows after that in a modified form, embodying the land side of the plow, hinged at the heel to the carrying standard, with the Bartlett controlling levers; but soon after putting that plow upon the market they found that the Bartlett device infringed the patent granted to one Rozander S. Higgins on the 25th of September, 1883, and the defendant, in order to continue the manufacture of plows under Bartlett's device, was obliged to purchase the Higgins patent. The changes made by the defendant after it had become apprised of the terms of the patent, and had also learned by experience the inadequacy of the lever devices covered by the patent, are not merely colorable changes, such as were made in the case of *Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. Rep. 803, but, on the contrary, were radical and substantial changes, embodying new combinations of levers, for which other patents had been granted. The contract between the defendant and George W. Hunt, in regard to the patent, permits the defendant to surrender the contract at any time when it shall decide that it does not wish to continue the manufacture and sale of the plow referred to in the contract; and it is natural and businesslike to assume that, if the patent did not protect the defendant in the exclusive right to make and sell plows with all the valuable features exhibited by the sample plow, then defendant would not wish to manufacture under the contract or a license. It is not necessary, in acting under this clause, that the parties should actually have manually surrendered and canceled this contract, if the conduct of the defendant is such as to manifest a clear and unequivocal intention so to do. The surrender of the contract is as effectually accomplished by notice to George W. Hunt, or to the complainant, that the defendant would not further proceed under the contract, as if the parties had solemnly come together, and either canceled or torn the contract in pieces. After the defendant had satisfied G. W. Hunt, or the complainant, that it would not manufacture plows under the patent, that ended the obligations of

the contract, unless defendant had continued to construct plows embodying the principle of the patent, which the proof shows it did not do.

Undoubtedly the chief inducement of the defendant to enter into this contract was the understanding that George W. Hunt had obtained or would obtain a patent which should protect the defendant in the manufacture of plows embodying substantially all the features which were shown in the plow brought to defendant's shop, and which they adopted as the model for the manufacture of the lot made before the issue of the patent. Unless the patent protected the defendant in this manufacture, certainly the defendant could not afford to pay Hunt or his assigns a royalty upon it; that is, the defendant's officers expected the patent would come and give the exclusive right to make a plow with the heel of the land side pivoted to the rigid standard, T, and combinations of levers and standards by which the point of the plow could be raised and lowered on this pivoted heel. The pivoted heel was not covered by the patent as issued, and could not be in the then state of the art, and the lever device on trial proved to be worthless.

There is some conflict of testimony between the complainant and the defendant as to just what was done in the matter of the actual canceling of this contract, but I have no doubt, from the testimony, that the defendant clearly and unequivocally gave the complainant to understand that it would avail itself, and had availed itself, of its right to cancel and surrender the contract. The proof also shows that the defendant has fully paid to George W. Hunt all the royalty he is entitled to for the first lot of plows manufactured, besides also showing that this royalty, as well as the cost of those plows, was a total loss to the defendant. I am therefore of opinion that no case for an accounting is established by the proof in this case, and the bill must be dismissed for want of equity.

GALT *et al.* v. PARLIN & ORENDORFF CO.

(Circuit Court, N. D. Illinois, S. D. October 31, 1892.)

PATENTS FOR INVENTIONS—NOVELTY—WHEEL HARROWS.

The 5th, 6th, and 7th claims of reissued letters patent No. 8,765, dated June 24, 1879, to Jay S. Corbin, for an improvement in wheel harrows, consisting of the combination with a gang of rotating harrow disks of a lever for setting the same, are void for want of novelty, the improvement being merely a change in the location of the lever previously used.

In Equity. Suit by Thomas A. Galt and others against the Parlin & Orendorff Company for infringement of a patent. Decree dismissing the bill.

John G. Manahan, for complainants.

Bond, Adams & Pickard, for defendant.

BLODGETT, District Judge. This is a bill in equity for an injunction and accounting by reason of the alleged infringement of patent No. 197,-

545, granted November 27, 1877, to Jay S. Corbin, for an improvement in "wheel harrows," reissued June 24, 1879, No. 8,765.

The inventor says in his specifications:

"My invention relates to the improvement of that class of machines known as 'wheel' or 'disk' harrows, in which the disks are arranged in two or more gangs upon horizontal rotating shafts; and has for its object the construction of the machine in such manner as to adapt the gangs to follow the uneven surface of the ground; also to provide for the easy and rapid setting of the gangs at any desired angle to the line of draught while in motion or at rest, and holding the same when set; * * * also to provide a ready means of setting the gangs at different angles relative to the line of draught."

The reissued patent has 11 claims, but infringement is charged only as to the 5th, 6th, and 7th.

The original claims relating to the part of the harrow in controversy are:

"(5) The combination with a gang of rotating harrow disks of a lever connected to the gangs for setting the same at an angle with the line of the draught substantially as described. (6) The combination with a gang of rotating harrow disks of a lever for setting the same at an angle with the line of draught, and a rack and dog for holding the disks in position when set, substantially as described."

The 5th, 6th, and 7th claims of the reissue are:

"(5) The combination in a wheel harrow of the following elements, viz.: A draught frame or a draught plank projecting laterally from the tongue, disk gangs pivoted to the draught frame or draught plank, and a set lever mounted on the tongue, and connected with the disk gangs between the points at which said gangs are connected with the draught frame or draught plank, substantially as set forth. (6) The combination, substantially as set forth, in a wheel harrow, of the following elements, viz.: A tongue, a draught frame or draught plank projecting laterally from the tongue, disk gangs pivoted to the draught frame or draught plank, a lever mounted on the tongue, and rods connected with the levers and the metal bearings which support the inner ends of the disk gangs. (7) The combination, substantially as set forth, in a wheel harrow, of the following elements, viz.: A tongue, a draught plank or draught frame projecting laterally from the tongue, disk gangs pivoted to the draught plank or frame, a lever mounted on the tongue, connected with the inner end of the disk gangs, and a rack and dog for holding the disks in proper position when set."

It will be seen from these claims that the only controversy in the case is over what is called in the specifications the "set lever," by which the angle at which the disks shall cut the ground is regulated. This lever consists of a vertical arm pivoted to the tongue forward of the driver's seat, the lower end of which extends below the tongue, and from which two rods extend, one to the inner end of each of the gang shafts or axles, so that by the movement of the lower end of this lever forward or backwards the angle of the gangs is regulated. There is also upon the top of the tongue a rack or sector, with a dog working in it, to hold the gangs at the required angle. The defenses relied upon are want of novelty in this lever device, and noninfringement.

The proof shows that this patentee is only an improver, and a late improver at that, of this class of agricultural instruments; that in Septem-

ber, 1859, a patent was issued to S. G. Randall for a disk harrow embodying all the elements of the complainant's machine, except that no set lever for changing the angle of the gangs is shown in the patent. The proof, however, abundantly shows that in constructing his harrows in accordance with his patent Randall had a lever for adjusting the angle of the disk gangs which, although operating substantially in the same way, and performing the same work, as that done by the complainant's lever, was not mounted upon the tongue or frame of the machine, but was so placed that it must be operated by a person standing or walking behind the machine. There is also in proof a patent granted to E. C. Winters, in May, 1875, on a revolving cultivator, which is a machine analogous in its use to that of complainant, in which a set lever, mounted on the tongue, is shown, which operates to change the running depth of the spades or cutters which are shown in that device. In several other machines referred to in the testimony the regulation of the angles of the disk gangs by means of rods and levers is shown. So far as the terms of the claims on which infringement is charged in this patent are concerned, they are, as it seems to me, completely met by the old Randall lever of 1863, applied to the harrow shown in the patent of 1859; that is, Randall had a combination with a gang of rotating harrow disks of a lever connected to the gangs for setting the same at an angle with the line of draught, and its operation was substantially as described, but it was not located in the same place; and undoubtedly it was more convenient to locate this lever, which Randall had introduced into the organization, upon the tongue, than it was to locate it where Randall had it, at the rear of his frame; but, as it seems to me, no inventive talent was called into action to apply the lever shown in Winters' patent to the complainant's gang. It seems to me that this patent is but for an aggregation of parts. The idea of changing the angles of the disk frames is Randall's. The idea of doing that by means of a lever is Randall's. The lever used by Randall is substantially, in its mode of operation and effect, the same as that used by complainant; and simply to relocate that lever, or place upon the tongue of complainant's machine the Winters lever, does not seem to have required any inventive talent. It was merely a mechanical act to transfer Winters' lever to the tongue of complainant's machine. That it was an improvement upon the machine may be admitted, but that it was such an improvement as will sustain the patent I do not think, because this class of machines, so far as the proof shows, has always been operated, so far as the angles of the disk gangs are concerned, to a greater or less extent by means of a lever. Such a lever for shifting or changing the seeding shoes and hoes of the seeding machine from a straight to a zigzag line is shown in the Davis patent of 1868; and the same device is also shown in the Schmitt patent of February, 1869, on a seeding drill; and in the Manny mower patent of 1871, for tilting and lifting the cutter apparatus. In fact, it may, perhaps, be said to be a part of common knowledge that levers of this character, for the purpose of regulating the movements of plows, cultivators, seeders, and harrows, are in constant use; and all this patentee has done

is to take one of those old levers, and mount it on his tongue, for the purpose of adjusting the angle of his disk gang, instead of placing the lever where Randall placed it. It performs the same function, and no other, when placed on the frame of the machine as it did in Randall's old machine. If Randall's lever had been patented, it is quite clear the Corbin lever would have been an infringement. If Randall had attached a rod to his lever, and extended the same forward to the driver's seat, so that the angle of the disk gang could be controlled from the driver's seat, he would have had a device operating upon the same principle and producing the same result as is done by the complainant's lever; and no one, I think, would contend that it would have been patentable to so attach a rod to the Randall lever, and hold it by any common locking device. I am therefore clearly of opinion that this patent must be held void for want of novelty.

AMERICAN PAPER-BAG CO. v. VAN NORTWICK *et al.*

(Circuit Court of Appeals, Seventh Circuit. October 1, 1892.)

1. PATENTS FOR INVENTIONS—LICENSE—ROYALTIES—NOVATION.

Plaintiff agreed to deliver to defendants certain machines made under a patent owned by plaintiff, and to give a license for its use upon payment by lessees for the use of said machines by themselves, "or by any other person for them or for others." Defendants organized a corporation of which they were the sole members, and the machines were delivered to and used by the said corporation. *Held*, that the fact that the delivery was made to the corporation instead of to the defendants personally did not constitute a novation, since such delivery, made with the defendants' consent, neither extinguished the old obligation nor released the original debtors.

2. SAME—CORPORATION—ESTOPPEL.

Nor did such delivery constitute any breach of the contract, since the defendants, by consenting thereto as officers of the corporation, estopped themselves from alleging that it was made against their individual wishes.

3. SAME—DELIVERY OF LICENSE—WAIVER.

A patentee who has delivered certain of his patented machines under a contract in which he agrees to give a license for their use upon royalty is not prevented from collecting the royalty by the fact that he has not delivered the license, especially when the failure to deliver the license was caused by the licensee's refusal to meet the patentee and sign the license.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Action by the American Paper-Bag Company for the use of Frank T. Benner, trustee, against William M. Van Nortwick and T. R. Troendle, to recover royalties. Judgment for defendants. Plaintiff brings error. Reversed.

Oliver & Showalter, for plaintiff in error.

Goudy, Green & Goudy and *Offield & Towle*, for defendants in error.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge. The American Paper-Bag Company, being the owner of certain letters patent of the United States on the construction of machines for the manufacture of satchel bottom paper bags, on the 16th day of June, 1884, contracted in writing with the defendants in error and one H. J. Rogers to deliver to them on lease and license 12 such patented machines, for which a stipulated price was to be paid. The defendants agreed to accept and to execute, on their part, a license for the use of such machinery, of which a copy was annexed to the contract, "and thereafter to pay the license fee, and to perform all other terms and conditions as specified in such license." The plaintiff agreed to grant a license for the use of the machinery so leased "according to the said copy hereto annexed." The proposed license annexed to the contract provided, *inter alia*, that an account should be kept of all bags made by the lessees, "or by any other person for them or for others," by the aid of the leased machines, and that the lessees should pay a royalty of 5 cents for every 1,000 bags so made, payable as expressed. The machines were delivered in December, 1884, and were operated until their destruction by fire in March, 1886. The action was brought to recover the stipulated royalty upon the 150,000,000 bags alleged to have been manufactured during that period by the aid of such machines. A trial by jury was waived. Upon the hearing in the court below, at the conclusion of the plaintiff's case, no counter evidence being offered, defendants moved the court to strike out and exclude all the evidence, as not tending to sustain the issue on the part of the plaintiff. The court sustained the motion, to which ruling the plaintiff duly excepted. This ruling and exception authorize a review of the evidence so far as essential to the question whether the facts proven made a *prima facie* case sufficient, in the absence of counter evidence, to justify a recovery by the plaintiff. The record does not disclose the precise ground of decision. It is said here that it proceeded upon the theory of a novation. The decision is also sought to be sustained upon the ground that the machines were not delivered to the defendants, were not operated by them, and that no license was tendered to or executed by the defendants.

1. We are satisfied that the theory of a novation cannot be sustained. We search the record in vain for evidence to uphold such contention. It appears that the defendants, soon after the execution of the contract in question, organized the Western Paper-Bag Company, to which company these machines were delivered, and by such company they were operated. The defendants were the officers and managers of that company, and, so far as disclosed by the record, the only persons interested therein. The correspondence with the plaintiff was conducted by the several defendants, at times in an individual capacity and at times in a representative capacity, as officers of the company. We find therein no suggestion that the company should assume any liability of the defendants upon the contract, no promises to pay such liability, no consent to substitution on the part of the plaintiff, no release of the defendants. It is essential to a novation, by substitution of a new debtor, that the original debtor be discharged, and that the substitute assume and be bound for

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the debt. There must concur the intervention of a new debtor accepted by the creditor for and in release of the original debtor. This is elementary. It is said that consent, substitution, and release are to be inferred from the fact that delivery of the machines was made by the plaintiff to the Western Paper-Bag Company, and that the use of the machines for which royalty is here sought was by the company, and not by the defendants individually. Those facts go to the question of liability of the defendants under the contract, and are considered further on; but, standing alone, they are not sufficient to work a novation. Delivery of the machines to the company without consent of the defendants would work a failure of contract by the plaintiff, not a substitution of debtor. Delivery by the procurement or consent of the defendants is in fulfillment of the contract, not of itself availing to discharge the original debtor. The same is true with respect to liability for royalty for use of the machines. The defendants covenanted to pay royalty on all bags made by them, "or by any other person for them or for others." If such use by the company was by the procurement or consent of the defendants, their liability under the contract would not thereby be affected, unless there existed the other necessary conditions of a novation. If such use was without the consent of the defendants, delivery of the machines being also without their consent, there would be no liability under their contract. There would be no debt to be assumed, and no need to invoke the doctrine of novation. If the Western Paper-Bag Company, by reason of the possession and use of the machines, ought equitably to indemnify the defendants for their liability to the plaintiff for such use, that would not avail as a novation. Indemnification is not substitution. Nor would the defendants be discharged—being otherwise liable—if the paper-bag company, by reason of the use of the machines, with knowledge of the terms of the contract and license, were also bound to respond to the plaintiff for the royalties here sought to be recovered. Addition is not substitution. In such case the one party is bound by reason of contract stipulation; the other, if liable at all, upon equitable considerations for the use of another's property and protected right. Nor would it avail to a novation if the Western Paper-Bag Company had expressly agreed with the defendants to discharge their liability to the plaintiff. Assumption of liability is not novation unless there concur the consent of the creditor to accept the company in lieu of the defendants and a discharge of the latter. Such consent cannot be implied merely from the delivery of the machines by the plaintiff to and their use by the company. Such delivery and use may well consist with the continued liability of the defendants under their contract; may well speak the disinclination of the plaintiff to trust the company for accruing royalties, and a looking to and reliance upon the defendants to respond under the terms of the contract. The inference of a novation sought to be drawn merely from such delivery and use is repelled by the fact that the defendants were the only officers of the company and the only persons interested therein. It is not reasonable to infer that the plaintiff would, without motive and against its interest, discharge the personal liability

of the defendants for the doubtful responsibility of a corporation of whose financial condition it had no knowledge, and of whose existence it was only inferentially informed. There are wanting here the essentials of a novation. There is here neither the substitution of a new obligation nor a new debtor. There is here neither the extinguishment of the old obligation nor release of the original debtor. There is here neither consent of the creditor nor promise by the supposed substituted debtor.

2. It is insisted for the defendants in error that they should not be held to their contract, because the machines were delivered by the plaintiff to the Western Paper-Bag Company, and that the use of them for which royalty is here sought to be recovered was by that company, and not by the defendants. At the date of this contract there were three paper manufacturing companies in which the defendants were interested: The St. Louis Paper Company, at St. Louis, Mo.; the Van Nortwick Paper Manufacturing Company, at Batavia, Ill.; and the Appleton Paper & Pulp Company, at Appleton, Wis. Soon after the contract the defendants organized the Western Paper-Bag Company, and were its sole officers and managers, and, so far as appears, alone interested therein. That company would seem to have been formed for the sole purpose of operating under this contract the machines in question. The plaintiff had such knowledge only of that corporation as might be derived from its letter heads upon which the correspondence was in part conducted, and from the official signatures of the defendants, and the use of the corporate name in some of the correspondence. The correspondence was conducted principally upon letter heads of the different corporations, dependent, it would appear, upon the location of the writer. In the latter part of the period of the correspondence, the letter heads of the Western Paper-Bag Company were chiefly used. These letters were signed by one or other of the defendants, sometimes officially, sometimes individually; and, whether signed in one way or the other, they invariably speak of "our machines." These letters were mainly written by the defendant Troendle, sometimes by the defendant Van Nortwick. So the letters of the plaintiff were addressed, during that period, sometimes to Van Nortwick individually, sometimes to him in his representative capacity, sometimes to Troendle individually, sometimes to him as vice president, and sometimes to the Western Paper-Bag Company.

It is clear from the correspondence that delivery of these machines to the Western Paper-Bag Company was with the consent and at the request of the defendants. They alone, so far as appears, and so far as the plaintiff knew, were interested in the company. The plaintiff was not advised of any transfer of the defendants' interest in the machines. It assumed that the company and the defendants were one in fact. It was of no concern to the plaintiff that the defendants had chosen to incorporate and to conduct the business under a corporate name. Delivery could be rightfully made pursuant to the direction of the defendants. Such delivery would be in fulfillment of the contract. Delivery to the company was at the direction of the defendants. Their individual request or assent thereto could as well be expressed by their official signatures

as by a personal direction. If one, having a personal right to property, directs a certain disposition of it, he is, as against one complying with the instruction, personally bound by the direction given, although in so doing he acted in a representative capacity. In such case he cannot be heard to complain of an act he has caused to be done. So here the defendants by their conduct induced delivery of the machines to the corporation with which they were connected and of which they were the moving spirits. It is no answer to say that therein they acted in a representative capacity. If they had personal objection to such delivery, they should have made it manifest. They were silent when it became them to speak. They cannot now object that the delivery, which as representatives of the company they sought and obtained, was counter to their individual wishes. They are estopped. *Swain v. Seamens*, 9 Wall. 254, 274; *Bronson v. Chappell*, 12 Wall. 681. The delivery here was the precise delivery the defendants desired and requested. Under such circumstances, delivery to the company was delivery to the defendants.

The royalties sought to be recovered arose from the use of the machines by the Western Paper-Bag Company. The contract determines the liability of the defendants for royalties upon all bags made by the defendants, "or by any other person for them or for others," by aid of the leased machines. The use of the machines by the company was by permission of the defendants. They were delivered to the company for such use by the defendants' direction. In 1885 the company, by the defendant Rogers, as its president, and the defendant Van Nortwick as its treasurer and manager, contracted in writing with the Mutual Paper-Bag Company for the embodiment in the machines of certain patented improvements. That contract has appended the individual consent of each defendant to the disposition of the machines stated in that contract. If that written consent does not speak their continued personal property in the machines, it does declare the rightful possession of them by the company, and their assent to the use of them by the company. The defendants were in fact the company. The manufacture by the company of the paper bags, by aid of the machines, was, if not a making of bags by the defendants themselves, a making by another for them, within the meaning of the contract, for which, by the terms of their agreement, they must respond to the plaintiff.

3. It is urged that the plaintiff failed to prove an execution and tender of license as provided by the contract. The evidence discloses that in March, 1885, soon after the delivery of the machines, the plaintiff at Boston exhibited to the defendant Troendle the licenses, counterparts of the copy license annexed to the contract, and requested their execution. He objected to the omission of some condition, not declaring its purport, but stating that it was contained in some document then at his hotel. He afterwards said he could not find the document, but would forward it upon his return to Illinois. He failed to keep that promise. In May following, the plaintiff addressed a letter calling attention to the matter. Failing a reply, the plaintiff, in June, again wrote upon the subject. The

defendant Van Nortwick, after some delay, replied, regretting the omission to answer the previous letter, and stating that one of them would soon visit Boston and would see the plaintiff upon the subject. That promise was not kept. The licenses were never demanded by the defendants nor executed. If tender of the licenses were essential to recovery under the contract, we are of opinion that the conduct of the defendants operated as a waiver of performance. The proper licenses were tendered for execution. Failure of execution and delivery was due to the inattention or evasion of the defendants. They are not permitted to take advantage of their own wrong. The licenses contained mutual obligations. The duty of the parties to execute them was concurrent. The defendants' failure to perform excused performance by the plaintiff. *U. S. v. Peck*, 102 U. S. 64.

We are, however, of opinion that tender of an executed license is not a condition precedent to recovery of royalties arising from use of the patented machines. By the contract the defendants agreed to pay a specified royalty for such use. They, or another for them, have had the use and reaped the benefit. The delivery of the executed formal license in no way affected that obligation, and was not by any term of the contract a condition precedent to its fulfillment. The obligation to pay was dependent upon the use, not upon the license. The defendants were in no way injured, nor their interest jeopardized, by the omission. Aside from the grant of use, the licenses were mainly for the benefit of the lessor, regulating and restricting the use. The contract was of itself a license to use, fully protecting the defendants against any claim of infringement of the plaintiff's right. It estopped the plaintiff to assert infringement. An agreement to license is as efficacious as a license in that respect, the conditions being performed by the licensee. A license would be presumed from the mere acquiescence of the plaintiff in such use, and from the relation and acts of the parties. *Blanchard v. Sprague*, 1 Cliff. 288, 297; *McClurg v. Kingsland*, 1 How. 202; *Chabot v. Overseaming Co.*, 6 Fish. Pat. Cas. 71; *Herman v. Herman*, 29 Fed. Rep. 94. The defendants cannot be permitted to escape the obligations of their contract, or the stipulated payment for the use enjoyed, by reason of failure of formal license, which afforded them no additional protection, especially when such failure was brought about by their own negligence or artifice. The judgment is reversed, and the cause remanded, with directions to award a new trial.

Mr. Justice HARLAN was not present when this decision was announced, but he participated in the hearing and decision of the case, and concurs in this opinion.

CAVERLY v. DEERE *et al.*

(Circuit Court, N. D. Illinois, S. D. October 31, 1893.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—HANDLE CUTTERS.

Letters patent No. 303,116, issued August 5, 1884, to Sarah Caverly, for a machine for rounding bent handles, consisting of a cylindrical cutter head, revolving vertically, having in the center of its periphery a groove, with cutter knives set diagonally, and adjusted from both sides of the cutter head into the groove, are void for want of novelty, such cutter heads, either made in a single piece or made of two disks, having been in use long before the date of the invention.

2. SAME.

The fact that in the machines made under said patent the cutters were set at an angle of 45°, which enabled them to do better work than older machines in which the cutters were set at a different angle, does not render the patent valid, since there is nothing in the specifications defining the angle at which the cutters should be set.

3. SAME—DATE OF INVENTION—EVIDENCE.

Testimony of three sons and a daughter of a deceased patentee, to the effect that the patentee made a model of the patented machine 13 years before his application for patent, and made an operative machine 12 years before such application, is insufficient to carry the date of the invention back of the application, where it appears that these witnesses are not mechanics, and that the three sons were mere boys when the machines were alleged to have been made, and their testimony is not corroborated.

In Equity. Suit by Herschel Caverly, administrator of Sarah Caverly, deceased, against Deere & Co., for alleged infringement of a patent. Decree dismissing bill.

D. B. Nash, for complainant.

Bond, Adams & Pickard, for defendants.

BLODGETT, District Judge. This is a bill in equity charging defendants with the infringement of patent No. 303,116, granted August 5, 1884, to Sarah Caverly, assignee of Amos K. Caverly, for a "machine for rounding bent handles," and for an injunction and accounting. The inventor says of the invention covered by the patent:

"My invention relates to machines for forming such round or oval or bent-wood handles and other woodwork, whether bent or straight; and it consists in a cylindrical cutter head mounted on an ordinary frame, and revolving vertically by suitable gearing, constructed, preferably, of two cylinders or disks bolted together, having in the center of its periphery a groove the shape and size of the curve or oval on the dressed handle, and the cutter knives adjusted from both sides of the cutter head into the groove. * * *

"The cutter head is of cylindrical form, made of steel, iron, or other suitable material, constructed, preferably, of two cylindrical pieces or disks, each having such a curved or concaved cut on its inner face, extending from beyond its diameter to its periphery, that, when they are placed with their curved faces together, the curves or concaves in the disks will form a groove in the head the size and shape of the dressed handle. When the cutter head is constructed in two pieces, the latter are securely fastened together by bolts passing through bolt holes in each, and nuts, or otherwise prevented from having independent motion. Each of the disks forming the cutter head has one or more openings or ditches, flaring at the top on the outer face thereof, decreasing in width in their inward progress, and terminating at the bottom in narrow crescent-shaped openings in the curve on the inner face of the disk, the metal being concaved and sharply inclined at one end of the recesses, to per-

mit the ready shedding of the chips from the cutter, and convexed and inclined in like manner at the opposite end to form beds for the concaved knives.

"The cutter knives are thin plates of steel, beveled at their cutting ends like ordinary plane blades or bits, concaved on their cutting faces to fit a convexed bed at one end of the openings in the cutter head, adjustable thereon to regulate the depth of their cutting action by set screws working through a slot in the knives, and secured by said set screw to the head. * * *

"The number and mode of adjustment of the cutter knives used may be varied as the size of the head or the character of the wood to be shaped may render expedient. I have found that, for general purposes, six knives—three in each half of the head, the knives thereof on one side alternating in their appearance on the concave with those on the other—is a very satisfactory and efficient arrangement. The bent handle is held by the operator on the rest block, and guided by him into the groove in the head, which, revolving rapidly—say two thousand revolutions per minute—by the action of its cutters, shapes the side of the handle exposed to the cutters the form of said groove. The handle is then turned over and guided into the groove in like manner, shaping the other side, and completing the rounding of the handle. * * *

"The knives are adjusted to the disks of the cutter head upon sharply inclined beds formed in one end of the openings in the disk, thus presenting the cutting edges of the knives diagonally to the plane of the curved portions of the disks, similar to the manner in which plane bits are secured to the plane frame, the incline on the other side forming a channel for the discharge of the chips made by the cutters, and are adjustable back and forth within the disks by set screws working in slots in the knives. By this longitudinal adjustment the depth of the cutting action of the knives may be regulated."

The patent has four claims, which are:

"(1) A cutter head, consisting of a cylinder with a groove in the center of its periphery and recesses from either side, terminating in narrow openings on such groove, for the adjustment of the cutter knives. (2) A cutter head constructed of two cylindrical disks, each with such a concave on its inner face, extending from beyond the diameter to the periphery, that, when secured with their curved faces together, the concaves form a groove on the periphery of the head corresponding to the shape and size of the dressed work, with one or more recesses extending from the outer face of each disk, diminishing in width as they progress, and terminating in a narrow opening in the curve, forming beds for the cutters, and spouts for the discharge of chips, with knives secured in the openings. (3) A cutter head constructed of two cylindrical disks, each with such a concave on its inner face, extending from beyond the diameter to the periphery, that, when secured with their curved faces together, the concaves form a groove on the periphery of the head corresponding to the shape and size of the dressed work, with one or more recesses extending from the outer face of each disk, diminishing in width as they progress, terminating in a narrow opening in the curve, forming beds for the cutters and spouts for the discharge of chips, with slotted knives secured in the openings, and adjustable longitudinally therein by set screws. (4) The combination of the frame, the cutter head with groove in its periphery, and one or more openings from each side, terminating in a narrow slit on the groove, one or more knives so curved that the bevel on their cutting ends presents a flat surface, and gearing by which the head is actuated."

The defenses are:

"(1) That the claims are void for want of patentable novelty. (2) That the patentee was not the original and first inventor. (3) That the invention was in public use by the inventor and others more than two years before the patent was applied for. (4) That the defendant does not infringe."

An attempt is made by the proofs to carry this invention back to about the year 1868 or 1870, but the proof introduced for that purpose is of so uncertain and unsatisfactory a character that I do not consider it as establishing the invention at an earlier period than the date of the application for the patent, which was in November, 1883. This proof comes from the children of the patentee, Caverly, mainly the testimony of the three sons, Herschel, Ralph, and Thomas, and a daughter, Vesta, who testified, in substance, that their father made a model of his machine as early as 1870, and made an operative machine as early as 1871. At that time Herschel was about 15 years old, Ralph was about 13, and Thomas about 9 years old, and the daughter upwards of 20 years old. No remnants of the old machine or model are produced. No one is called, except these members of the family, who ever saw either the model or the operative machine, and although the operative machine required castings and iron work which Mr. Caverly, not being an iron worker, but a wagon maker, by trade, would have required the services of some other person to make for him, or at least to make the castings, yet none of the persons who in any way made any of these parts are called as witnesses. The witness Herschel Caverly testifies that the working machines made by his father, one or more of them, were taken to Deere & Co.'s plow shop, and also to Harris' jobbing shop, and there tried by the application of power, but no one is called from those shops who ever saw or heard of such exhibition. Neither of these witnesses are mechanics or accustomed to machinery; one of them is a lady who is not shown to have any special knowledge of mechanical matters, or more than women generally have; and it seems to me impossible that they can carry in their memories the peculiar characteristics of this machine, so that the court can say, from their testimony, that it is clearly established, from the proof, that this invention was made so long prior to the application for the patent. They may have seen a cutter head, or a model of a cutter head, made by their father, but neither of them say they know the angle at which the cutter bits were set. They say that the illustrative model produced in evidence, and which has been made since this suit was commenced, is like the cutter head made by their father, and the same may be said of the "Grand de Tour," "Louisville," and "Moline" cutter heads, which are in evidence. To carry the date of the invention back of the application for the patent, the proof must be clear and convincing, and this is far from coming up to that standard.

Upon the question of novelty, the proof shows that between 1865 and 1868 a cutter head was made and put in use in the Grand de Tour Plow Works, at Dixon, Ill., which showed a grooved head with cutters inserted in the groove, and in all respects operating like the machines covered by the patent, except that the cutting knives were set so that they struck the wood at a more obtuse angle. One of these old cutter heads is produced in evidence, and the testimony in relation to it shows that it was used for five or six years, during which time many thousands of plow handles were shaped and finished upon it, and it did

satisfactory work, and was in use until that company adopted the practice of buying their plow handles ready finished, instead of finishing them themselves. The proof also shows that between the years 1862 and 1867 a cutter head was put in use in the plow factory of B. F. Avery, at Louisville, Ky., which was constructed in the same manner as Caverly says he prefers to construct his; that is, of two disks, each having such a curved or concaved cut on its inner face, extending from its diameter to its periphery, that, when they are placed with their curved faces together, the curves or concaves in the disks will form a groove in the head the size and shape of the article to be dressed; and this cutter head is produced in evidence. The cutters in this cutter head were inserted into the groove from the sides of the disks, leaving openings for the chips to pass out from the cutters, and I can see no difference in principle between that cutter head and the Caverly cutter head. There may be a slight difference in the angle at which the knives struck the wood for the purpose of cutting, but this is all the difference, as the cutter knives in this head are inserted in the sides of the disks upon sharply inclined beds, so as to present their cutting edges diagonally to the plane of the curved portion of the disks, thus meeting all the requirements of the Caverly construction. Mr. C. H. Pope, the expert called by the defendants, testifies that this B. F. Avery & Co. cutter head was in all essential respects the same as the one used by the defendants, and which is charged here to be an infringement of complainant's patent, and that it was an operative machine, and did good work. The proof also shows that a similar cutter head was put in use in the Louisville Agricultural Works between 1871 and 1872, and for some years after, and as long as said works were kept in operation. For several years prior to 1880, a cutter head was in use at the works of the Moline Plow Company at Moline, Ill., one half of which was introduced in evidence. This cutter head, like that shown by Caverly, was constructed with two disks so beveled as to form the groove when the disks were brought together, with openings in the sides of the disks through which the cutting knives were inserted into the groove, and in all respects, as far as construction and operation were concerned, they seem to have been the same as that covered by the Caverly patent, except that the angle at which the cutter knives struck the wood was not quite as sharp as that covered by the Caverly patent. Mr. Bartlett, the intelligent expert witness examined in behalf of complainant, testifies that he improved this cutter about 1880, and that after his improvement it was substantially like that described in the Caverly patent. There is also in proof a patent granted March 31, 1863, to A. A. Wilder for "a machine for bending and checking hoop bolts," which shows a grooved cutter head with knives which the inventor says "are of chisel form, and are fitted obliquely in slots, and secured in proper position by set screws which pass through oblong slots in the cutters, and into the parts as shown." The cutting edges of the cutters project a suitable distance beyond the beveled sides of the parts of the cutter wheel. It will thus be seen that cutter heads, either made of

a single piece, with a groove of the proper form to shape the material to be operated upon, or made of two disks with beveled edges, which, when brought together, form a groove, and furnished with knives inserted from the outside, so as to present cutting edges in the groove for the shaping of the material, were old long before the date of this invention. The first claim of the patent is for a cutter head consisting of a cylinder with a groove in the center of its periphery, and recesses from either side, terminating in narrow openings on such groove for the adjustment of the cutter knives. All there is in this claim is certainly anticipated by the Wilder patent, from which I have just quoted. Evidently, from the reading of the Caverly patent, no particular shape is prescribed for the groove, but it was to be of such shape as was desired for the shaping of the material to be operated upon.

The second and third claims of this patent are objected to by the defendants, upon the ground that they are based upon a preferential mode of constructing the device. The patentee says in his specifications:

"The cutter head, B, is of cylindrical form, made of steel, iron, or other suitable material, constructed preferably of two cylindrical pieces or disks," etc.

In the language of the supreme court in *Sewall v. Jones*, 91 U. S. 135: "This is not of the substance of the patent. A recommendation is quite different from a requirement. The latter is a demand, an essential, a necessity. The former is a choice or preference between different modes or subjects, and is left to the pleasure or judgment of the operator. He may adopt it. * * * The principle is this: The omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal. Accordingly, when the inventor says, 'I recommend the following method,' he does not thereby constitute such method a portion of his patent."

But, without being hypercritical, I am unable to see what there is described in the specifications, or in the second, third, and fourth claims, which was not in the older devices shown in the proof. The Moline and Louisville cutter heads were made with two disks; they had cutter knives inserted through the recesses extending from the outer face of each disk into the groove, and forming beds for the cutters, and spouts for the discharge of the chips, the slotted knives were secured in the opening, and adjusted longitudinally thereon by set screws. In other words, all the elements of the complainant's patent are found in these old working cutter heads of the Grand de Tour Plow Company, the Louisville Agricultural Works, the Avery Plow Company, the Moline Plow Company, and the Wilder patent, and most of them date back much earlier than even the witnesses for the complainant would carry Caverly's invention.

It is strenuously urged, however, on behalf of complainant, that the angle at which Caverly set his cutters was such as to make his machine operate better than either of the prior cutter heads which have been referred to. The proof shows by the complainant's expert, Bartlett, that 45 degrees is the proper angle at which the plane bit or cutter should be

set, in order to do the most effective and smoothest work, and the complainant's proof tends to show that the knives in the complainant's patent are set at about that angle. It may be sufficient to say that there is nothing in the complainant's patent which defines the angle at which the cutters are to be set. He says:

"They are adjusted to the disks of the cutter head upon sharply inclined beds, * * * presenting the cutting edges of the knives diagonally to the plane of the curved portions of the disks, * * * similar to the manner in which plane bits are secured to the plane frame."

This language does not instruct the persons making a machine after the manner described in the Caverly patent as to what angle to set the cutters in order that they may do the best work. The Wilder patent of 1863 provided that the cutters should be fitted "obliquely" in slots through the cutter head, and Mr. Bartlett, plaintiff's witness, says that the common joiner's plane irons had been set for very many years at about the angle of 45 degrees. This, then, was common knowledge, and all persons familiar with the use of the ordinary plane knew that 45 degrees was about the right angle for effective cutting by the plane bits. Caverly comes no nearer in defining the angle at which the knives shall be set than does Wilder. Wilder says, "They are to be set obliquely," and Caverly says, "They are to be set diagonally," to the plane of the curved portion of the disks; so that neither of these patents instructs the public just at what angle the knife should be set, but leaves that to the skill of the mechanic who constructs the machine. For some reason the cutting bits in the Grand de Tour head were set with but a slight incline to the face of the work. The Louisville, Avery, and the Moline cutters were set at something more than 45 degrees; some of the complainant's witnesses say they were set as high as 60 degrees, but whether these knives are set at 45, 60, 80, or 85, it is but a matter of more or less, which was left to the judgment of the mechanic who constructed the machine, and is not a matter of invention. It was not new to set plane irons, or other cutting tools, at an angle of 45 degrees, but, on the contrary, that was a very old mode of setting them. "It is the invention of what is new, and not the arrival at a comparative superiority or a greater excellence in that which is already known, which the law protects as exclusive property, and which it secures by a patent." *Smith v. Nichols*, 21 Wall. 112. The proof shows that all these old cutters worked, and worked fairly well; that a great deal of work was done upon them. It may be that the Caverly cutter head is better by reason of the change in the angle of the cutters, but "the change was only in degree, and consequently not patentable." *Guidet v. Brooklyn*, 105 U. S. 550.

The proof also shows that the "Moline cutter head," one disk of which is in evidence, was in actual and public use in the defendants' shops at Moline more than two years before the application for the Caverly patent was made; and the proof also strongly tends to show that Caverly worked in the shop while it was so in use; and that his place of work was so near where this cutter head was located as to raise the presump-

tion that he must have known of such use. But such public use would defeat his patent, whether he knew of it or not. It being then abundantly shown from the proofs that grooved cutter heads, with cutting knives located in the groove, and set with some degree of angularity, were known and in use long prior to the alleged invention by Caverly, there is no patentable invention shown in complainant's patent, because merely to change the angle of the cutters so they should conform to the old and well-known angle of the plane bits is only such an improvement on the old cutter heads as any skilled mechanic could make, and did not involve invention. If these old devices had been wholly inoperative, and Caverly had discovered that, by setting the cutters at an angle of 45 degrees, they would become operative,—that is, if the old ones produced no result and his produced a new result,—then his device might have risen to the dignity of an invention. "The specification ought to distinguish the invention from things before known, and to enable any one skilled in the art to make and use the same." *Hogg v. Emerson*, 6 How. 437. But the proof shows that these older devices not only worked, but that they worked fairly well, and hence the most that could have been said for Caverly is that his machine was better than those that had preceded it, if he had instructed the public by his patent at just what angle the bits should be placed. But the trouble with his patent is he does not do this. He merely says they are "sharply inclined," and "presenting the cutting edges of the knives diagonally." These directions fall far short of telling the angle at which the bits should be set. And as I have already said, all the older cutter heads showed their cutters set at an angle,—the later ones much sharper than the earlier ones. And the instruction in the Caverly patent is no more definite as to the angle than that of the Wilder patent, which directs that the cutters be set "obliquely." I conclude from the proof in this case that the merit of setting the cutters at about the angle of a plane bit is really due to Mr. Bartlett, who quite closely approximated to that angle in his improvement of the old Moline cutter head in 1880. Mechanical improvements have also been made of late in this class of machines by making the groove deeper, so that it holds the handle more firmly while being dressed. This improvement, however, did not come from any instruction given by this patent, but from experience in the use of the machine.

For these reasons the suit will be dismissed, for want of equity.

WASHINGTON & I. R. Co. v. COEUR D'ALENE RY. & NAV. Co.

(Circuit Court, D. Idaho. October 21, 1892.)

1. PUBLIC LANDS—RAILROAD RIGHT OF WAY—HOW AND WHEN ACQUIRED.

The act of March 3, 1875, (1 Supp. Rev. St., 2d Ed., 91,) among other things grants a right of way over public lands to any "duly-organized" railroad company which shall have filed with the secretary of the interior a copy of its articles of incorporation and "due proof" of its organization. *Held*, that the "due organization," and the furnishing of "due proof" thereof, are conditions precedent to the acquirement of any right to such right of way.

2. SAME.

Under this act, when a railroad company, organized under a territorial statute requiring its route to be set out in some detail in its articles of incorporation, subsequently changes its route, by filing supplemental articles, so as to cross certain public lands, it is "organized," for the purpose of building a road over such lands, only from the date of the supplemental articles, and can only acquire a right of way on furnishing due proof, in the manner specified, of such organization.

3. SAME.

Where the only evidence that a railroad has filed the documentary proof of organization is a copy, certified by the commissioner of the general land office, of a communication from the president of the railroad to the secretary of the interior, stating that the former transmits therewith the necessary documents, which communication is indorsed as received at the interior department on a certain date, such date is the earliest at which the railroad can have acquired the right of way.

4. SAME—DUE PROOF OF ORGANIZATION.

Laws Mont. T. July 6, 1886, § 801, provide that the due incorporation of a company shall, without further proof or acts, operate as its organization. *Held*, that the filing with the secretary of the interior of a copy of articles of incorporation of a railroad under said statute, and a copy of the statute, operates as proof of the organization, within the meaning of 1 Supp. Rev. St. 91, and the right of way over public lands therein granted is acquired at the date of such filing.

5. SAME—UNAUTHORIZED SURVEY.

A survey by a railroad which has not yet complied with the conditions of the statute confers no rights, as against another railroad which has complied with such conditions, but has as yet made no survey.

6. SAME—UNSURVEYED LANDS—ERRONEOUS PLAT FILED BY MISTAKE.

Section 4 of the act (1 Supp. Rev. St., 2d Ed., 91) provides, among other things, that a profile of the road, if on surveyed public lands, shall be filed within 12 months. A railroad surveyed three routes over unsurveyed public lands, and by mistake filed a plat showing the wrong route. Another railroad had previously made an unauthorized survey, but took no further steps until the first road was completed and in operation. *Held*, that the first road was not required to file any plat, and the second road was not misled or damaged by the filing of the erroneous plat.

At Law. Action of ejectment by the Washington & Idaho Railroad Company against the Coeur d'Alene Railway & Navigation Company and others for a right of way over public lands. Judgment for defendants.

D. C. Lockwood, for plaintiff.

McBride & Allen and *Albert Hagan*, for defendants.

BEATRY, District Judge. This action is ejectment for a railroad right of way, consisting of a strip of ground 200 feet wide by 4,100 feet long, at the town of Wallace, Idaho, and on the unsurveyed public lands of the United States. Only the first-named defendant appears in the action, and each party, for its claim to the premises in controversy, relies upon the provisions of the act of congress approved March 3, 1875, (1

Supp. Rev. St., 2d Ed., 91,) by section 1 of which it is provided that the right of way through the public lands "is hereby granted to any railroad duly organized under the laws of any state or territory, * * * which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same." The construction of this statute cannot be the subject of doubt. It requires the performance of certain conditions prior to the operation of the grant. The right is not to a corporation to be, but to one that is, organized; not to one which shall subsequently file its articles of incorporation, and due proof of its organization, but to that which has done so. The government simply makes an offer which ripens into a grant or a contract the instant the prescribed conditions are performed. An attempt to exercise the privilege does not, through relation, become a vested right by a subsequent performance of those conditions, but the several steps recited in the statute—the organization of the company and the due filing of its articles of incorporation and the proof of such organization—must be taken by any corporation before it can obtain any claim whatever to such right of way over the public lands, and any of its acts or claims made to procure such right prior to a compliance with the statutory conditions, being without the authority of law, can confer no rights, and certainly not as against the company which does comply with the law. Attention has not been directed to any construction of this statute by the national courts, but the foregoing views may be inferred from, if not fully sustained by, *New Brighton & N. C. R. Co. v. Pittsburgh, Y. & C. R. Co.*, 105 Pa. St. 13. *Railroad Co. v. Sture*, (Minn.) 20 N. W. Rep. 229; *Railroad Co. v. Davis*, (Fla.) 7 South. Rep. 30; and *Larsen v. Railway Co.*, (Or.) 23 Pac. Rep. 976.

From the testimony it appears the plaintiff company was organized July 3, 1886, under the laws of Washington Territory, but whether duly organized according to those laws has not been shown, nor are they, as they then existed, now accessible to the court; but from the fact that plaintiff, in its articles of incorporation, set out in some detail the general description of the proposed route its road would take, it may be presumed the statute of said territory provided, as most statutes upon the same subject do, that such route and the termini must be described in the articles of incorporation. It appears by plaintiff's said articles that its proposed road was to run from a point in said territory to the town of Wardner, in Shoshone county, Idaho, which did not include the right of way or ground in controversy. It follows, therefore, by plaintiff's own showing, that when it was so organized it was not for the purpose of building a road over this ground, and that it did not then claim any right of way over it. It did, however, by supplemental articles of incorporation, entered into on the 8th day of November, 1886, provide for an extension of its road through the town of Wallace, over the premises in controversy, and therein described the route of the same. This latter date is therefore the earliest at which plaintiff was organized to build a road over such premises.

That plaintiff has filed with the secretary of the interior copies of its articles of corporation, original and supplemental, and due proof of its organization, is not clearly shown. The only evidence tending to establish such facts is what is certified by the commissioner of the general land office to be a copy of a communication of the president of plaintiff company, addressed to the secretary of the interior on December 2, 1886, in which it is stated that he transmits therewith, to said secretary, "a copy of the articles of incorporation," and a copy of the Washington statute under which the incorporation was made, which bears an indorsement of its receipt at the interior department, on the 22d day of December, 1886, and that it "incloses copy of articles of incorporation and due proof of organization." While this is not an explicit statement that a copy of the supplemental articles was also filed, yet it may be admitted it was included, and it follows that the 22d day of December, 1886, was the earliest date when, by a compliance with the other conditions of the statute, the plaintiff was fully authorized to enter upon the disputed premises for the purpose of claiming or occupying them as a right of way for its road. Upon this last-named date the grant from the government would take effect, provided such premises were then unclaimed public land.

The defendant (the Coeur d'Alene Railway & Navigation Company) was incorporated under the laws of Montana territory on the 6th day of July, 1886, and in its articles describes and includes, as a portion of its proposed railroad route, the premises in question. On the 20th day of the same month it filed with the secretary of the interior a copy of its said articles, and a copy of the Montana statute under which it was incorporated, copies of both of which, officially certified to by the commissioner of the general land office, are in evidence. Section 301 of said Montana statute provides that the due incorporation of a company shall, without further proof or acts, operate as its organization; hence filing with the secretary proof of the incorporation operated also as proof of the organization. It thus appears that defendant, by said 20th day of July, had fully complied with the statute, and was on that date authorized to take any steps necessary for the possession and acquisition of the right of way in controversy, and in this respect was prior to plaintiff. On October 29, 1886, defendant ran the survey of its line over such premises, being the day after the plaintiff surveyed its route over practically the same line. But, as before concluded, the plaintiff was not authorized to take any possession of the premises prior to the 22d day of December, 1886. Its said survey, on the 28th day of October, 1886, conferred no rights whatever upon it as against defendant.

It is also urged by plaintiff that defendant surveyed three different lines at said town of Wallace, indicated on exhibits as "A," "B," and "C," the last being the one in dispute, and that on the 8th day of November, 1886, it filed in the local land office a plat of its route in which line B was indicated as the one adopted, and that plaintiff was thereby misled to its injury. The evidence shows that the filing of line B was not to

deceive plaintiff, but was done by mistake, and that C was the line adopted, and the one of which it was intended to file a plat. But can plaintiff complain of this? The only provision of said act of congress requiring the filing of such plat in the local land office is that of section 4, directing that, within 12 months after the location of any section of 20 miles of road, if upon surveyed lands, or if upon unsurveyed lands within 12 months after the survey thereof by the United States, the plat of same shall be so filed. It may be doubted that the filing of such plat is required for the purpose of giving notice to others who may desire to occupy such lands, but, as such filing is not required until after the lands are surveyed, it seems more probable that it is to operate as notice to the government that it may exclude from its sales of lands such located rights of way. However this may be, it appearing that, at the times above named, the lands were unsurveyed, the defendant was not required to file any plat. But it further appears that plaintiff, after making its unauthorized survey on said 28th day of October, did no other act upon the premises nor took any possession thereof, until it made another survey in the year 1888, prior to which defendant had completed its road over said premises, and was in full operation and possession of the same. Plaintiff cannot, therefore, complain that it was misled or damaged by such erroneous filing of said plat. The judgment must be that plaintiff take nothing by this action, and that defendant recover its costs, and it is so ordered.

O'HARROW v. HENDERSON *et al.*

(Circuit Court, D. Indiana. October 10, 1892.)

No. 7,953.

REMOVAL OF CAUSES—JOINT DEFENDANTS—SEPARABLE CONTROVERSY.

An action for wrongful arrest and imprisonment and for malicious prosecution, instituted in a state court against two defendants jointly, cannot be removed by either into the federal court, under Act March 3, 1875, § 2, upon the ground of a separate controversy; and the fact that the defendant seeking removal has filed separate defenses does not make such cause of action separable.

At Law. Action by John W. O'Harrow against John W. Henderson and the Adams Express Company. On motion to remand. Granted. Statement by BAKER, District Judge:

On the 1st day of April, 1885, the plaintiff, O'Harrow, filed his complaint in two paragraphs in the superior court of Marion county, Ind., against the defendant Henderson and the express company. The first paragraph is for the recovery of damages for wrongful arrest and imprisonment without warrant or process of law. The second is for malicious prosecution. On the 17th day of April, 1885, the defendant the Adams Express Company filed its motion in writing to quash the return of service of process upon it, which was overruled by the court. On the 17th day of April, 1885, the defendant Henderson filed his separate answer in three paragraphs. Two paragraphs were special, and one in denial. On the 30th day of April, 1885, the defendant Henderson filed his separate, verified petition, accompanied by a proper bond, praying for the removal of the cause from the state court into this court. On the 2d day of May, 1885, the prayer of the petition was granted, and the said cause was ordered to be transferred into this court. The plaintiff moves to remand.

Claypool & Ketchum, for plaintiff.

Baker & Daniels, for defendants.

BAKER, District Judge, (*after stating the facts.*) This is an action sounding in tort for wrongful arrest and imprisonment and for malicious prosecution. The wrongs are alleged to have been jointly committed by the defendants. The cause must be remanded. One of two or more defendants, sued as joint wrongdoers, cannot remove such cause of action from a state court into the United States circuit court. It has often been decided that an action brought in a state court against two, jointly, for a tort, cannot be removed by either of them into the circuit court of the United States, under Act March 3, 1875, c. 137, § 2, upon the ground of a separate controversy between the plaintiff and himself. The fact that the defendant asking the removal has filed separate defenses does not make the cause of action separable, although the plaintiff might have brought the action against either alone. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 v.52F.no.9—49

Sup. Ct. Rep. 730; *Plymouth Consolidated Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. Rep. 1034; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. Rep. 1265; *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. Rep. 203. Remanded. Exception by defendant.

ST. LOUIS R. CO. v. PACIFIC RY. CO.

(Circuit Court, S. D. California. November 18, 1892.)

1. CIRCUIT COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS.

Under Act Aug. 18, 1888, (25 St. at Large, p. 493,) § 1, providing that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant," the circuit court for the southern district of California has no jurisdiction of such a suit by a Missouri corporation against an Illinois corporation, although the latter was organized for the purpose of doing business in the southern district of California, and has its principal office there.

2. SAME—JURISDICTION BY CONSENT.

The fact that defendant filed an answer on the merits would not authorize the maintenance of such a suit, for this would be to give jurisdiction by consent in a case not within the general jurisdiction of the court.

At Law.

W. P. Gardiner, Allen, Cowrey & Miller, and Edwin Walker, for plaintiff.

S. C. Hubbell and J. S. Chapman, for defendant.

ROSS, District Judge. This is a motion to dismiss the suit for want of jurisdiction, made after the filing of an answer to the merits, but before trial. The answer, however, also denied the jurisdiction of the court. It is well settled that the circuit courts have no jurisdiction except such as is conferred by the constitution and laws of the United States, and that to bring a case within it the jurisdiction must be affirmatively shown. The controversy between the parties to the present suit grows out of contract, and the asserted jurisdiction of this court is founded solely on the diverse citizenship of the parties. The complaint alleges that the plaintiff is, and at all times therein mentioned has been, a corporation duly organized under the laws of the state of Missouri, and a citizen and inhabitant thereof, having its principal place of business in the city of St. Louis, of that state; that the defendant is, and at all the times mentioned in the complaint has been, a corporation duly organized under the laws of the state of Illinois, and a citizen of that state, having its principal place of business, however, at the city of Los Angeles, state of California, and is, and has been during the times mentioned in the complaint, an inhabitant of the city of Los Angeles, state of California; that the defendant corporation was organized for the purpose of doing business in Los Angeles city, the chief object of which was and is the construction, extension, and operation of street-car lines,

which purposes were expressed in its articles of incorporation; that there is, and at all the times mentioned in the complaint has been, a statute of the state of California providing that every corporation created after its passage by the laws of any other state, and doing business in the state of California, shall, within 60 days from the time of commencing to do business in this state, designate some person residing in the county in which the principal place of business of such corporation in the state of California is, on whom process issued by authority of or under any law of said state of California may be served; and that said statute further provides that such service shall be made on such person in such manner as shall be prescribed in case of service required to be made on foreign corporations, and such service shall be deemed to be a valid service; that the defendant corporation did heretofore, pursuant to this state statute, designate one John J. Aiken, who then was and since has been a person residing in the county of Los Angeles, state of California, as a person upon whom process issued by authority of or under any law of the state of California may be served; and that the defendant corporation has consented to be sued in this district, as a condition upon which it acquires the right to do business in the state of California.

In the case of *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935, the precise point adjudged was that under the act of March 3, 1887, (24 St. p. 552,) as amended by the act of August 13, 1888, (25 St. p. 433,) fixing the jurisdiction of the circuit courts of the United States, a corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States held in another state, in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state. But the sole reason why such a corporation cannot be compelled to answer to such a suit is because the court has no jurisdiction over the parties. In that case, the supreme court, after referring to the judiciary act of September 24, 1789, and to the subsequent acts of congress in relation to the jurisdiction of the federal courts, including the act of March 3, 1887, as amended by that of August 13, 1888, say:

"The act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 St. p. 552; 25 St. p. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but, where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' *Machine Co. v. Walthers*, 134 U. S.

41, 43, 10 Sup. Ct. Rep. 485. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. Rep. 303; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. Rep. 141; *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. Rep. 207. As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides, within the state of which he is a citizen; and that this act, therefore, having taken away the alternative permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident. In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen.

* * * The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that, 'where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons, who were not contemplated, than as to natural persons, who were. If, as it is more reasonable to suppose, congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a state in which it had not been incorporated."

Applying this reasoning to the facts of the present case, it is obvious that this court has no jurisdiction of the parties to the suit, because neither is a citizen of this state. Nor is either a resident of this district or of this state. In *Shaw v. Mining Co.*, *supra*, the court cite with approval the previous cases of *Insurance Co. v. Francis*, 11 Wall. 210, and *Ex parte Schollenberger*, 96 U. S. 369. In the former case the court said:

"A corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot, on that account, acquire a residence there."

And in *Ex parte Schollenberger*:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws."

To make applicable the rule that the right to be sued in a particular district is a mere privilege, which may be waived by plea to the merits, the parties and subject of controversy must be within the general jurisdiction of the court as defined by the statute. To apply that rule to a case not within such general jurisdiction would be to affirm that consent can give jurisdiction, which manifestly cannot be done. The motion to dismiss the suit for want of jurisdiction must be granted, and it is so ordered.

ELECTROLIBRATION CO. v. JACKSON.

(Circuit Court, W. D. Tennessee. September 20, 1892.)

No. 444.

1. EQUITY PRACTICE—DEMURRER—SETTING FOR ARGUMENT.

The failure of the plaintiff to set down a demurrer for argument on the rule day, when the same is filed, or on the next succeeding rule day, (according to equity rule 38,) it having been the practice of the circuit court for the western district of Tennessee to treat all days in term time as rule days, is not, in that court, sufficient ground for dismissing the bill.

2. PATENTS—PLEADING—SUFFICIENCY OF BILL—DESCRIPTION OF PATENT.

A bill which describes an invention as "a certain new and useful apparatus, fully described in the ——— letters patent hereinafter mentioned and named therein, 'a new and useful improvement in thermo-electric batteries,'" and then refers to the letters patent by their date only, without giving the number, and without referring to any record in the patent office, by book and page, does not describe the invention with sufficient particularity. And the fact that the letters patent were filed on a motion for preliminary injunction, and are before the court, will not cure the defect, since they are not a part of the record. *Wise v. Railroad Co.*, 33 Fed. Rep. 277, and *Post v. Hardware Co.*, 25 Fed. Rep. 905, approved.

3. EQUITY PLEADING—SUFFICIENCY OF BILL—EXHIBITS.

The rule that a bill in equity should contain a clear and explicit description, sufficient to give the defendant notice of the subject-matter of the complaint against him, is not abrogated by equity rule 26, which forbids unnecessary recitals of documents; and, if exhibits are attached, the bill should contain explicit reference to them.

In Equity. Suit by the Electrolibration Company against John A. Jackson for infringement of patent. On demurrer to the bill. Sustained.

B. M. Estes, for complainant.

Cooper & Pierson, for defendant.

HAMMOND, District Judge. The demurrer, and the arguments upon it, present questions of technical nicety not often raised in these days of loose practice. We have a very elaborate code of some 90 or more rules of equity practice, promulgated by the supreme court under its powers in that behalf, intended to regulate with uniformity the practice in all the equity courts of the United States. Except in a general way, very little attention has been paid to them, and I doubt if any case can be found in any of the courts where they have been scrupulously and exactly enforced, or where they have been even nearly followed. Be-

sides, we mix our state and federal practice almost indistinguishably, and quite unconsciously. The defendant here insists that rule 38 has not been complied with, and that this bill should be now dismissed for such noncompliance. The rule requires that, if the plaintiff shall not set down a demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and the bill be dismissed of course, unless a judge shall enlarge the time. Jones, Rules, 97. Taken in connection with rule 33, the evident purpose was to speed the cause during vacation. *Id.* rule 94. For I take it that the reference to rule days generally implies that the proceeding is necessary on a rule day, because the court is not in session, and it cannot be otherwise taken before the clerk or master upon a rule day held for that purpose. Our state practice makes every day in term time a rule day, and our lawyers have come to so treat it in this court as well, and I think properly; for certainly whatever may be done before the clerk or master on a rule day would be as well done before the court itself, if in session. And our court is so continuously in session, owing to the constant presence of one of the judges, that the practice of rule day orders has fallen into desuetude, very much as Mr. Gibson describes in relation to our state practice also. *Gibs. Suits Ch. § 1007*, note.

Here the plaintiff seeks to avoid the effect of rule 38 by stating that he applied to the deputy clerk to know if there was kept an order book, as required by equity rule 4, Jones, Rules, 69, and was told there was none. But on inquiry of the clerk himself we find there is an order book, but not an entry has been made in it for more than seven years. This could do the plaintiff no good, because it does not appear that he applied to the clerk to enter an order setting the demurrer down for argument upon a rule day, and could not comply with the rule, because there was not an order book, under rule 4, but only that since the application to dismiss was made for noncompliance with rule 38 he has discovered that the order book was not kept. Obviously, if the fact were so, it would not avail him to escape the penalty of the rule, because he made no attempt to comply which failed for want of a book; and, if he had, the book could have been immediately supplied for the occasion. But I think the penalty has not been incurred for the other reason. Theoretically, under rule 1, Jones, Rules, 67, the courts of equity "shall be deemed always open," etc. In fact, the court is nearly always open in this district, and the habit is quite universal to do in open court what these rules allow to be done on rule days, and hence the order book has been quite useless. Owing to the summer vacation, and prolonged sickness in the family of the judge, the argument of this demurrer has been delayed, no doubt, and the court should exercise its power, under rule 38, to enlarge the time if necessary. But this need not be done, because the practice has been followed which generally obtains, and the argument has been had here and now. No formal order in writing upon the minutes is necessary to set the demurrer down for argument, though that would be a better practice, no doubt, as it would

be to set an equity case down for hearing formally, which is rarely done at all. When the case is ready for hearing, or the demurrer or plea is ready to be argued, the parties appear, informally, in court, and proceed with the matter, no attention being paid to a formal entry setting the hearing down in writing on the minutes, order book, or docket. That practice, regular and proper as it may be, does not and has never obtained among us. The minutes show that the demurrer or plea was argued, or the hearing finally had, as the case may be, and by necessary implication the proper setting down is and may be assumed, as it will be in this case; and the application to dismiss the bill for noncompliance with rule 38 is refused.

The second ground of demurrer, that the bill does not allege that the plaintiff has been in the undisputed possession of the invention for some length of time, is overruled for the same reasons given upon the application for a preliminary injunction, when the point was taken and not sustained; and so the third ground of demurrer, that the bill is without equity, is overruled for the reasons also stated upon the application for preliminary injunction, when that matter was also fully argued and determined.

This leaves the first ground of demurrer, which I think is well taken, but it is easily cured by an amendment, to which the plaintiff is entitled, as a matter of right, under our statutes, and it has leave to amend in that regard. The point is that the bill has not described the invention with that certainty which good pleading requires to put the defendant upon notice of that which is complained against him. The bill is said to follow the form laid down in *Walk. Pat.*, and to have been drawn by an expert patent lawyer; but, while this may be so, it cannot prevail against the adjudication in *Wise v. Railroad Co.*, 33 Fed Rep. 277, directly in point upon this question, which decision is, in my judgment, well grounded upon principle and authority, as is *Post v. Hardware Co.*, 25 Fed. Rep. 905. The bill in this case thus describes the invention which is the subject of the controversy,—“a certain new and useful apparatus, fully described in the specifications of the letters patent hereinafter mentioned, and named therein ‘a new and useful improvement in thermo-electric batteries.’” It then states the date of the letters patent to be March 31, 1891, says they were signed and sealed by the secretary of the interior, and countersigned by the commissioner of patents, and granted the exclusive right to make, use, etc., for 17 years. It does not even give the number, nor refer to any record in the patent office, by book and page, to which the defendant might resort for fuller information. There might be any number of patents of that date for improvements in thermo-electric batteries, and even any number granted to Webb, described as the original patentee. It is perfectly plain that defendant, under such general allegation, would have to search the patent records from beginning to end, to be sure that he had all they disclose about improvements in thermo-electric batteries of that date to Webb. But the defendant is not required to go to the patent office at all, and should not be, for this fuller information. The bill should dis-

close it. It is not required that at his own expense he shall search the records at Washington for the description of the plaintiff's invention, for an infringement of which the plaintiff is suing him. It would be a wrong to him if this were so. Good pleading requires that the bill, on the face of it, should give him this notice with reasonable fullness, without any trouble or expense to him for searching records to supply the deficiencies of description and information. This is the cardinal rule of pleading, at law and in equity, and it is plain that this description does not, without such labor and expense, give the defendant any reasonable notice of the character and nature of the plaintiff's invention or improvements.

The demurrer says that the bill should make "proferat" of the letters patent, and the plaintiff replies that "proferat" is unknown to equity pleadings. Technically, this may be so, but the equivalent of proferat is known; and whenever the law pleading must make proferat, the equity pleading must allege and prove with fullness enough to give all the benefit that proferat would give, and under a rule the production of the document would be compelled. But this is beside the question, in my judgment. It is not a question of proferat, or of the right of the plaintiff to see the document at all, but only one of fullness in pleading. Neither is it necessary to violate the rule of the ordinance in chancery against "stuffing" a bill with the writings *in hæc verba*, invoked by counsel. Story, Eq. Pl. § 266; Equity Rule 26. While there should be no verbosity, there should be clear, explicit, and sufficient description to give the defendant notice of the subject-matter of the complaint. Rule 26 had not abrogated this requirement.

As to exhibits, they are a mere matter of indulgence. In good pleading, strictly, the bill should give the requisite full information of itself; but indulgence to loose practice and convenience has allowed exhibits with explicit reference to them in the bill, and they may be referred to in aid of the bill; but they may not be omitted altogether, as here, and the pleader content himself with a naked reference by its date to some document of record in a far-away place. In *Harvey v. Kelly*, 41 Miss 490, 493, the late Chancellor ELLETT of this city, who was an elegant pleader of the old school, well versed in the law of good pleading, under both ancient and modern forms, says:

"It is indeed admissible to a certain extent, in pleading in chancery, to file written evidence as exhibits, and to refer to them as a part of the bill or answer; but good pleading requires that everything that is material to the case should be set forth in the pleading itself by proper averments. This may be done in general terms, and the exhibit may be referred to for greater certainty as to particular details, but the pleading ought to contain the substance of the case."

No authority says that an indefinite, general, and wholly undefined statement of the invention or other thing in controversy, without exhibiting the document describing it, shall, by mere reference to the document, stand for a specific statement or description in the bill; or that a general statement, accompanied by an exhibit of the document, or a

copy of it, meets the rule of good pleading which we have above stated, with the reasons for its requirement. In Daniell, Ch. Pr., it is said that "it is usual to refer to the instrument in some such words as the following, viz., 'as by the said indenture, when produced, will appear,' and the effect is to make the whole document a part of the record." 1 Daniell, Ch. Pr. (5th Ed.) 367; Id. (1st Ed.) 476. But this does not say that the bill in such a case shall not, by proper allegation, inform the defendant of the nature of the document, but is a rule to give the plaintiff the benefit of the averring part without reciting it *in hæc verba*, or exhibiting it, as the author says; and in the very next text he condemns the inconvenience of this indulgence, and says: "It is always necessary in drawing bills to state the case of the plaintiff clearly, though succinctly, upon the record; and, in doing this, care should be taken to set out precisely those deeds which are relied upon, and those parts of the deeds which are most important to the case." 1 Daniell, Ch. Pr. (5th Ed.) 368; Id. (1st Ed.) 476.

It is true that on the motion for injunction the letters patent were filed as evidence, and the document is before us, among the papers in the case. But it is not a part of the record. Not even the loose reference mentioned above is contained in this bill to make it a part of the pleading, which alone is the technical record. Reference to it is gained by implication only, from the fact that its existence is stated. It is not pleaded at all. So found in the papers, it cannot aid this pleading. Demurrer sustained.

MONROE v. BRITISH & FOREIGN MARINE INS. Co., Limited.

SAME v. UNION MARINE INS. Co., Limited.

(Circuit Court of Appeals, First Circuit. October 5, 1892.)

Nos. 7, 8.

1. MARINE INSURANCE—"ABSOLUTE TOTAL LOSS"—ABANDONMENT.

Under a marine policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial.

2. SAME.

A shipment of cattle insured against "absolute total loss only" was in part jettisoned, the vessel having struck upon a reef. Part of the jettisoned cattle reached shore, and were taken possession of and sold by a salvors' association, which had been employed by the underwriters to go to the wreck and act for the interests of all concerned, with an agreement that they should have a lien on the property saved, with power of sale for their reimbursement, but it did not appear for what reason the sale was made. *Held*, that the owner of the cattle could not recover on the policy, in the absence of proof that the underwriters directed an unauthorized sale, or that salvage was actually claimed and the sale made in satisfaction thereof, and that he could not by due diligence have discharged the lien of the salvors, and thus secured the remnants of the cargo.

3. SAME—JETTISON OF CARGO.

A jettison of cargo, either to lighten ship or for the purpose of being saved, does not of itself constitute an "absolute total loss," within the meaning of a marine insurance policy, when part of the goods are in fact saved.

4. SAME—ADJUSTMENT BY AGENTS—EXTENT OF AGENCY—EVIDENCE.

In an action on marine insurance policies issued by British companies through their agents in Boston, when nothing is clearly proven as to the extent of the agents' authority except that they were empowered to issue the policies, receive the premiums, and represent the underwriters in legal proceedings in Massachusetts, it cannot be presumed that they have authority to adjust a loss occurring on the British coast, under a policy issued by them.

5. TRIAL—DIRECTING VERDICT—FEDERAL COURTS.

A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way.

In Error to the Circuit Court of the United States for the District of Massachusetts.

These two actions were brought by Albert N. Monroe against the British & Foreign Marine Insurance Company, Limited, and the Union Marine Insurance Company, Limited, both being British corporations, on policies of insurance issued by them, respectively. The cases were tried together in the circuit court, and in each case a verdict was directed for defendant. Separate writs of error were sued out by the plaintiff, and the cases were argued together in the circuit court of appeals. Judgments affirmed.

The property covered by the policies consisted of 264 cattle shipped on the steamship Missouri at Boston, and consigned to James Nelson & Son, Liverpool. The bills of lading also provided that, "if animals are landed at Birkenhead, consignee is to take delivery of them there." The contracts of insurance were alike, except that one was for \$16,000 and the other \$17,000. Plaintiff had a general blanket policy issued by each company through their agents in Boston, Endicott & Macomber, under which his shipments of cattle from time to time were insured. This was effected in each case by the issuance of a "domestic certificate" in the following form:

"This is to certify that on the 18th day of February, 1886, this company insured, under and subject to the conditions of policy No. 10,550, for A. N. Monroe, for account of whom it may concern, sixteen thousand dollars, on 264 head of cattle valued at \$33,000, per Str. Missouri, at and from Boston to Liverpool. Loss, if any, payable to the order of A. N. Monroe in funds current in the city of Boston, at the office of Endicott & Macomber, upon the surrender of this certificate.

[Signed]

"ENDICOTT & MACOMBER, Attorneys.

"Premium, _____."

On the margin of each certificate was printed the following:

"Against absolute total loss of vessel and animals only, but this company to be liable for its proportion of the assured's assessment in general average levied upon all interests."

The policies contained the so-called "sue, labor, and rescue clause," as follows:

"And, in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment."

Also the "jettison clause," in the following terms:

"In all cases of loss by jettison, the same shall be settled on the principles of general average only."

Early on the morning of March 1, 1886, the ship went ashore on the Welsh coast at a place called Port Darfach, a few miles from Holyhead, and finally became a total wreck. In the attempts to get her off, many of the cattle were jettisoned by order of the master, some of which swam ashore or were towed ashore by salvors. Owing to injuries, it was necessary to butcher some of these, and only 108 were left. Soon after the vessel went ashore the Liverpool Salvage Association, an association of seven underwriters, of whom two were officers in the defendant companies, was requested by the underwriters to send an agent to the vessel "either to take charge of the property, or to advise the master or owners, and to act in reference thereto as may be considered best for the interests of all concerned." It was also agreed "that the association is to have an absolute lien upon all property saved and taken charge of by it, and its proceeds, for the amount to become due under this agreement, with power of sale for or towards their reimbursement." The agent of this association arrived early at the scene, and the cattle, when landed, were in his charge. The consignees, James Nelson & Sons, had sent one Thomas Colebourn to the wreck, and by an arrangement with the salvors' association the cattle were placed in his charge, and sent to Birkenhead, and thence to Liverpool, consigned by the association of salvors to James Nelson & Sons, who sold them, and accounted to the association for the proceeds, in whose possession they still remain. In all that was done by Nelson & Sons, they acted apparently as the consignees of the salvors, and not as the consignees of the plaintiff under the bills of lading.

Plaintiff testified as to certain interviews had by him with the Boston agents, Endicott & Macomber, immediately on learning of the wreck, tending to show that he verbally abandoned the property to the underwriters, and demanded his insurance, and that they made statements to the effect that the money would be paid, or that "it would be all right."

Thomas P. Proctor and Chas. Theo. Russell, Jr., for plaintiff in error.

The court ought not to order verdict for the defendant if plaintiff has offered any evidence to sustain the allegations in his declaration. *Lamb v. Railroad*, 7 Allen, 98; *Todd v. Railroad*, Id. 207; *Witherby v. Sleeper*, 101 Mass. 138. In these cases the order of the court was based upon the fact that there was not a *scintilla* of evidence, or that there were no facts in dispute. "There does not seem to us to be even a *scintilla* of evidence to prove any act of delivery or acceptance." *Denny v. Williams*, 5 Allen, 1, 9. "If the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions." Id. 5.

The plaintiff contends that there was evidence for the jury of an absolute total loss of vessel and animals, within the meaning of the contract of insurance, and places his contention upon five grounds:

First. The drowning or jettison of all the insured cattle took them, by peril insured against, out of plaintiff's possession or control, even if some of them were landed and sold by salvors. As there was no restitution, or offer of restitution, to plaintiff, the loss to him is absolute and total.

Second. There was evidence for the jury that the defendants, through their agents, so acted in taking, selling, and retaining the proceeds from the sale of the wrecked cattle that they thereby accepted the loss as total.

Third. There was evidence for the jury that the defendants, by their agents Endicott & Macomber, agreed to pay the loss in suit, in consideration of plaintiff's continuing his insurance upon other shipments of cattle, and defendants thereby waived all defense.

Fourth. There was evidence for the jury of an absolute total loss by the necessary sale of the wrecked and damaged cattle by and for the salvors.

Fifth. Under the contract of insurance the plaintiff can recover, upon his proof of notice of abandonment, a constructive total loss, if more than one half of the cattle were drowned.

(1) Three fifths of plaintiff's cattle were drowned in the ship. About two fifths were jettisoned to lighten ship, got ashore, and were taken and retained by salvors. The wreck ended the voyage and the contractual relation between vessel and cattle. The cattle ceased to be a consignment, and the remnant became merely salvage. The latter were either in the possession of the defendants' agents or of an independent salvor, with a paramount lien for the salvage service. The evidence is clearly to the effect that they were sent to Liverpool, not to complete the voyage under the bill of lading, but merely as salvage, to be disposed of for the salvage association, and they were sold by their agent for them. No freight was paid for the carriage of the cattle, and they were taken by the salvors and sent to their broker without delivery of any bill of lading. The cattle were merely flotsam and jetsam.

This, then, was evidence for the jury that there was an absolute total loss of the cattle to the plaintiff. The test is not annihilation, but deprivation. The defendants contracted that no peril of the sea or jettison should prevent the arrival of the ship in Liverpool, not as salvage covered with salvage lien, but as a consignment of use to and under the control of the plaintiff. If none of the cattle arrived at their destination, as property of the plaintiff, with the right of possession in him, they were as absolutely lost as though they sank with the ship in mid-ocean. The loss is total in the absence of proof not only of rescue, but of restoration, or offer of restoration, to the insured.

An absolute total loss is defined in the leading case of *Roux v. Salvador*, 8 Bing. N. C. 286, by Lord ABINGER: "But if the goods were damaged by the perils of the sea, and necessarily landed before the termination of the voyage, and are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped; * * * if, though imperishable, they are in the hands of strangers, not under the control of the insured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination,—in any of these cases the circumstance of their existing *in specie* at that forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."

Mr. Parsons says: "Goods are totally lost as to the insured when he has lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before. It is this lost condition to the insured that is usually intended when total loss is spoken of. * * * Actual total loss occurs either if the thing insured is wholly destroyed as that thing, or if the

property insured, while remaining *in specie* what it is, is wholly lost to the insured, which means that it is entirely out of his power or that of the insurer to recover the property." 2 Pars. Ins. pp. 68, 74; 2 Arn. Ins. p. 952.

Says Mr. Phillips: "A total loss of a subject of insurance is where, by the perils insured against, it is destroyed, or so injured as to be of trifling or no value to the assured for the purposes and uses for which it was intended, or is taken out of the possession and control of the assured, whereby he is deprived of it, or where the voyage or adventure for which the insurance is made is broken up by the peril insured against." 2 Phil. Ins. § 1485.

So, if some of the goods are landed and stolen at the place of destination, the loss is nevertheless total, because "the portions of the goods which were saved from the wreck, though got ashore, never came again into the hands of the owners. It is therefore a total loss to them." *Bondrett v. Hentigg*, 1 Holt, 149. So, if the insured vessel is sold for salvage, the loss becomes total to the owner by reason of the consequent deprivation. *Cossmann v. West*, L. R. 13 App. Cas. 160.

"A total loss, in one sense, means where goods go to the bottom of the sea, or where the goods are burnt or utterly destroyed; in another sense, a total loss means that the man who owns the goods is deprived of them in some way or other." MARTIN, B., in *Stringer v. Insurance Co.*, L. R. 5 Q. B. 605.

So seizure by government: "It is quite certain that the insured may claim as for actual total loss if the property or interest insured be taken from him, although there may be hope of recovery." 2 Pars. Ins. p. 900.

There was evidence for the jury of this deprivation that constitutes an absolute total loss. The only cattle saved were held and sold by the salvage association, without notice to the plaintiff, and the proceeds retained by the association, two sevenths of which association is made up of defendants' representatives. The broker employed by them to sell the cattle says: "The salvors declined to give up the cattle to Mr. Monroe or any one else. The salvors had possession of the cattle, and did not ask any person's consent." Any demand by plaintiff was therefore useless. Moreover, he was kept from making any such demand by the assurance of the agents in Boston that the loss would be paid. There is no evidence as to the expenses or salvage claimed by the salvage association. They have made no claim upon plaintiff, have rendered him no account, but have simply kept and still keep the entire proceeds from the sale. The presumption from the retention of the salvage proceeds is that the salvage association is entitled to the entire net sum to pay the expenses incurred. Not only has there been no restoration to plaintiff of the salvaged remnant of the insured property, and no proffer of restoration, but the salvage proceeds are actually in the possession of defendants' salvage association.

The cattle, then, were totally lost to the plaintiff by perils of the sea. Both ownership and possession were taken from him. "The goods were in the hands of strangers, not under the control of the insured." The insured "had lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before." "They were taken out of the possession and control of the assured." Authorities cited *supra*.

(2) The plaintiff claims that there was evidence for the jury that, after the loss, the defendants, acting as they necessarily must, through their agents, regarded and accepted the loss as total, and so led the plaintiff to believe.

The defendants, by the terms of the policies, had the undoubted right "to sue, labor, and travel for, in, and about the defense, safeguard, and recovery" of, the cattle; "nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment." The right conferred by this "sue and labor" clause is well settled. It enables either party, as the at-

torney of the other, to take, without prejudice, proper steps to preserve and save the insured property. It is a power of attorney. The underwriter can do what is necessary to preserve the property; but if he goes beyond his agency, and does any act assertive of ownership in, or title to, the insured goods, as by pledging or selling, or agreeing to the pledge or sale, of them, then the underwriter takes it as his salvage, and thereby assumes the loss to be total.

Under the "sue and labor" clause the defendants could take possession to save and restore. But if, instead of saving and restoring, they did any act implying or asserting ownership, and, *a fortiori*, if they sold or pledged the insured property, they assumed the loss to be total, and are estopped to deny its totality. *Wood v. Insurance Co.*, 6 Mass. 479; *Insurance Co. v. Chase*, 20 Pick. 142; *Reynolds v. Insurance Co.*, 22 Pick. 191; *Copelin v. Insurance Co.*, 9 Walk. 461.

"I think it may be laid down, as a general proposition, that whenever the underwriter does any act, in consequence of an abandonment, which can be justified only under a right derived from it, that act is of itself decisive evidence of an acceptance; and cases may even be put where the act of the underwriter will in law prevail over his express declaration. As if, after an abandonment, he shall proceed to sell the vessel, with an express protest against the acceptance, and a declaration that he did it for the benefit of the owner, his act would nevertheless conclusively bind him in point of law." STORY, J. *Peele v. Insurance Co.*, 3 Mason, 81; *Peele v. Insurance Co.*, 7 Pick. 254; *Insurance Co. v. Younger*, 2 Curt. 322; 2 Arn. Ins. (2d. Ed.) p. 969.

"The question is wholly one for the jury. 'Any act of the underwriter, in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance.' * * * The question for the jury was whether upon the evidence, taken in connection with the provisions of the policy, there were any such acts." FULLER, C. J. *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 433, 10 Sup. Ct. Rep. 934; *Shepherd v. Henderson*, L. R. 7 App. Cas. 49; *Northwestern Transp. Co. v. Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. Rep. 336.

So far as concerns the question of acceptance, the principle must be the same in cases of actual as in cases of constructive total loss. In each the question is purely one of fact. Did the underwriters assert ownership, or do any act which the insured would be justified in believing was assertive of title? If so, the underwriters have taken the salvage, and are bound to pay the loss.

The evidence shows that the defendants did, by their agents, so deal with the salvaged cattle as to assert title, and make the loss an absolute total loss with salvage.

There was no consent or participation on the part of plaintiff, or any agent of his, to this sale and assertion of title.

What right had the defendants on March 3d, after knowledge that some of the cattle had got ashore, to interfere with plaintiff's property, and without his assent to put a lien upon it, unless they recognized the loss as total, and were protecting their salvage?

(3) The plaintiff contends that there was evidence that the defendants, through their agents, Endicott & Macomber, agreed to pay the loss in consideration of the plaintiff's effecting his future insurances with them.

(4) The plaintiff contends that there was evidence for the jury that the loss became an absolute total loss by the necessary sale of the salvaged cattle. Whether the authority for the sale came from the salvage association or the defendants, or from the master of the vessel, it certainly did not come from the plaintiff or from his agent.

The law as to what constitutes total loss by necessary sale is defined in this circuit in *Hall v. Insurance Co.*, 37 Fed. Rep. 371: "I have come to the conclusion, after very full consideration, that the only test of the power of the master to sell is to inquire whether the vessel was in such a situation that to sell her was the only prudent and wise course. It is said in the cases that the sale must be by necessity; but I do not understand that, in order to show a necessity for a sale, the master must show that no other course was open to him. It is sufficient if he show that there was no other prudent course." CARPENTER, J.

There was evidence for the jury of such necessity: (1) The salvaged cattle were sold as wrecked cargo; (2) they were in a maimed and damaged condition; (3) they could be fed and kept for the salvage lien only at great and disproportionate expense; (4) the defendants consented to the sale, and are estopped to deny its necessity.

(5) Under the contract of insurance plaintiff can recover a constructive total loss on proof of a loss exceeding one half the cattle and seasonable abandonment to the defendants.

The term in the margin of the certificate, "Absolute total loss of vessel and animals," means merely, "Actual total loss," and does not exclude a constructive total loss. "It is to be borne in mind that a constructive total loss is as much a total loss in law as if the subject of insurance had been actually annihilated. A policy, therefore, against total loss only, covers a constructive loss also, unless the parties, if they intend to exclude this, do so by some such words as, 'without benefit of abandonment.'" *Arn. Ins.* (6th Ed.) p. 951.

As 156 head of the shipment of 264 cattle were drowned in the ship, there can be no doubt that the loss exceeded half the value. Monroe made a seasonable oral abandonment, and gave notice to defendants' agents in Boston.

This was sufficient notice of abandonment. It need not be in writing, and no particular form is required. Anything that conveys to the underwriters or their agents the information or understanding that the insured surrenders to them the goods saved, is sufficient. 2 *Phil. Ins.* § 1678; *Insurance Co. v. Southgate*, 5 Pet. 604; *Insurance Co. v. Ashby*, 4 Pet. 139; *Same v. Catlett*, 12 Wheat. 383.

An insurance contract "covers a constructive total loss based on damages exceeding one half the insured value from perils insured against, and an abandonment, although the cargo subsequently arrives at the port of discharge *in specie*, and very little diminished in quantity." *Mayo v. Insurance Co.*, 152 Mass. 172, 25 N. E. Rep. 80.

John Lowell and Henry M. Rogers, for defendants in error.

The judge of the circuit court was right to order verdicts for the defendants. There is no evidence reported in the transcript which would have warranted the jury in finding verdicts for the plaintiff. The rule of the federal courts is that "the judges are no longer required to submit a case to a jury, merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is, or may be in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon which the burden of proof is imposed." *Commissioners v. Clark*, 94 U. S. 278, 284, per Mr. Justice CLIFFORD.

In the very early case of *Pauling v. U. S.*, 4 Cranch, 219-222, MARSHALL, C. J., says: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw." *Carter v. Carusi*, 112 U. S. 478-484, 5 Sup. Ct. Rep. 281, and cases there cited by the court. So, also, in the state courts, the rule is the same. *Dehny v. Williams*, 5 Allen, 1; *Brooks v. Somerville*, 106 Mass. 274, 275; *Connor v. Giles*, 76 Me. 132-134; *Pray v. Garcelon*, 17 Me. 145; *Head v. Sleeper*, 20 Me. 314.

In England the doctrine is the same. *Jewell v. Parr*, 13 C. B. 909, 915, 916; quoted with approval by HAND, J., in *Claflin v. Meyer*, 75 N. Y. 260-266. MAULE, J., says: "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

At the outset of the case, the court will have to interpret the clause in the policies, "against absolute total loss of vessel and animals only." What rule of interpretation, what principle, shall be applied to determine the question, was there an absolute total loss or not? The court in *Kemp v. Halliday*, 6 Best & S. 723-752, answers this question clearly and fully:

"The question of loss, whether total or not, is to be determined just as if there was no policy at all. If the subject-matter is, by the underwriter's peril, put in such a situation that, supposing there was no policy, it would be totally lost to the owner, then, as between the assured and the underwriter, there is a total loss; not otherwise. And the question whether the thing is lost to its owner is to be treated in a practical business-like spirit, and if the thing cannot be saved by any means which the owners or their representative, the captain, can reasonably use to save it, it is a total loss; but if, by any reasonable means which were reasonably within their reach, they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owner to take those reasonable means. If they do not take those means, they cannot make the loss total by their own neglect." *Kemp v. Halliday*, 6 Best & S. 723-752; *Irving v. Manning*, 1 H. L. Cas. 287-306.

We may quote, too, from the language of MATHEWS, J., in the case discussed later in our brief, (*Brooke v. Insurance Co.*):

"No injustice takes place, no violence is done to the principle of equity and natural right, by interpreting contracts according to the legal and ordinary import and meaning of the words used in making them, as arranged in grammatical construction,—such meaning as every person acquainted with the structure of language would attach to them." 5 Mart. (N. S.) 546.

What is meant by absolute total loss?

The clause of this policy, "against absolute total loss of vessel and animals only," is to be interpreted naturally, in accordance with the clear, obvious, and ordinary meaning of the words. There is no mystery attaching to the words, "an absolute total loss," or as it is sometimes called, "an actual total loss," in law or in fact. The text writers and the courts are in entire harmony with each other and with the common and accepted views of business men.

"An actual total loss occurs when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless." McArthur, Ins. 138; Arn. Ins. (4th Ed.) 844; (1887,) Arn. Ins. (6th Eng. Ed.) p. 951; 2 Pars. Ins. 68.

"Total loss of maritime property under insurance is either actual (or, as it is sometimes called, 'absolute,') or constructive, (or, as it is sometimes called, 'technical.')

"For the purposes of practice, and of insurance law, a vessel is totally lost when it is lost as a vessel, and goods are totally lost when they are lost as goods; and either vessel or goods are totally lost, as to the insured, when he has lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before."

"If," says Lord ABINGER, "in the course of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound by the very terms of his contract to pay the whole sum insured." *Roux v. Salvador*, 3 Bing. N. C. 266.

"There must be no rational hope, no practicable possibility, of recovering possession of the property, and prosecuting the adventure to its termination; for only when such hope and possibility have ceased is it an actual total loss." 2 Pars. Ins. 68, 69.

"Whenever the thing insured is, by the operation of a peril insured against, reduced to such a state as to be no longer capable of use under its original denomination, there is an actual total loss." *Wallerstein v. Insurance Co.*, 44 N. Y. 209; *Burt v. Insurance Co.*, 78 N. Y. 400.

The phrase "total loss" simply, which is the phrase commonly used in insuring what are known as "memorandum articles," since it does not contain the word "actual" or "absolute," is satisfied by a constructive total loss, with a seasonable abandonment. No case in which the word "absolute" or "actual" is not used, and no case in which there has been an abandonment, is pertinent to the inquiry in this cause; but there are several cases in which, the insured having failed to abandon, the courts have inquired whether, as a fact, the loss was absolutely or actually total. These cases are pertinent, and they decide the law to be such as we have already stated, namely, in cases of a ship, when the ship has ceased to be a ship, and in cases of goods, when the goods have become utterly lost *in specie*, or entirely valueless, or would have become so if conveyed to the port of destination. *Chadsey v. Guion*, 97 N. Y. 333; *Burt v. Insurance Co.*, 78 N. Y. 400; *Kemp v. Halliday*, *supra*; *Hills v. Assurance Corp.*, 5 Mees. & W. 569.

We submit that this whole case was decided on the 1st day of March, 1886, when 108 cattle out of the 264 that had been shipped by the plaintiff at Boston, were safely landed, or, if not then, when they were transferred by the authority of the master to the port of destination.

We submit, further, that it is impossible for the plaintiff even to state his case accurately, and bring it within the above definition of an absolute total loss, for it is undisputed that, of the 264 head of live cattle that were shipped by the plaintiff at Boston, 108 were landed alive at Birkenhead, the port of destination. He cannot show that these 108 animals were to all intents and purposes worthless, for it is admitted they were sold by the consignees themselves at the port of destination, for the benefit of somebody, for upwards of £20 sterling a head, or for £2,195 13s. 8d. in all; or show that the plaintiff ever lost possession of them, or power of control over them, for he asserts that he never made any attempt to get them into his possession, and has made no application to have the proceeds of their sale paid to him, notwithstanding the fact that the evidences of title, to wit, the bills of lading, are in his hands, and have been so since March 1, 1886, the very day of the disaster. *Biays v. Insurance Co.*, 7 Cranch, 415; *Morean v. Insurance Co.*, 1 Wheat. 219.

The plaintiff, failing to show an absolute total loss, is forced to contend that there was a constructive total loss of his cattle.

Upon this point we submit:

(1) the word "absolute" in our policy is used not only as including "actual," but also as excluding "constructive." It means, therefore, without privilege of abandonment. We are contending for the clear, ordinary, and obvious meaning of the word "absolute" in our policy of insurance.

(2) In cases where the right exists to claim for a constructive total loss, there must first be an abandonment by the assured to the underwriters. But, where the insurance is against absolute total loss only, there is no necessity for nor right of abandonment. *Burt v. Insurance Co.*, 78 N. Y. 400.

(3) The object of an abandonment is to turn into a total loss that which otherwise would not be so, and an abandonment must be made seasonably, *i. e.*, before any portion of the goods have arrived at their port of destination. *Forbes v. Insurance Co.*, 1 Gray, 371; *Pierce v. Insurance Co.*, 14 Allen, 320, 322, per GRAY, J.; *Gracie v. Insurance Co.*, 8 Johns. 183; *Marcadier v. Insurance Co.*, 8 Cranch, 89; *Saltus v. Insurance Co.*, 14 Johns. 188; *Chadsey v. Guion*, 97 N. Y. 333.

(4) Even if this were a case where there existed the right of abandonment, no abandonment as a fact has been made. As to what constitutes a legal abandonment, see *McArthur*, Ins. pp. 145, 146, 147.

The further contention of the plaintiff, as we understand it, is as follows:

That when the insured cattle went into the sea they were an absolute total loss to the plaintiff, even though they swam ashore, or were towed ashore, and were afterwards sold, alive and well, in the market at Liverpool, the port of destination.

Against this construction it is to be noticed that by the terms of the policy it is provided that "in all cases of loss by jettison the same shall be settled on the principles of general average only." Again, in the policy, the obligations resting upon the insured under the "sue, labor, and travel" clause would preclude the possibility of the assumption that when insured animals are wet they are drowned, or when landed thereafter alive and well they are dead. If the plaintiff failed to do what he was bound to do he cannot claim for a total loss, for the law is settled that the owner of a shipment cannot make the loss total by his own neglect. *Irving v. Manning*, 1 H. L. Cas. 287-306.

The bills of lading are still in the hands of the plaintiff. He says he has never done anything about his cattle; never heard anything about them; never claimed anything from those in whose possession they were; nor claimed the proceeds from any one.

The further contention of the plaintiff is that the defendants, either by their own acts, or by the acts of their duly-constituted agents, have exercised such control over the property of the plaintiff as, in effect, to assert their ownership of it, so as to dispossess him; that they have in law, at least, acknowledged an abandonment by the plaintiff to them, and a constructive total loss; or that there has been a recognition of an absolute total loss, and that it is too late for them to change their legal position, and that, consequently, they are liable under the policies. It is an elaborate assumption, but it is only an assumption, and rests only on such "stuff as dreams are made of."

If it be conceded that the salvage association did take possession of the plaintiff's cattle, and there is no doubt it did, it only took possession of them as salvor, and there is no law of any country that makes a salvor the owner of the property saved, or a thief for saving. Salvors, at best, have only their lien for expenses. No one ever doubted that salvors should be encouraged. They are the special wards of courts of admiralty, and in high honor, and their

possession of property is a legal and authorized possession, and the owner or consignee can always obtain his goods by paying salvage. It was the duty of the consignees, in this case as agents of the owner, so to take his cattle and pay the expenses, and, by neglecting to do so, the loss cannot be thrown upon the insurance companies.

The consignees cannot plead ignorance of what was going on, for they were in close conference with the Liverpool Salvage Association, and acting with and for it, under written agreements not produced. All the evidence shows that the salvage association was as much the agent of the plaintiff's consignees as of anybody.

It is certain that the defendants had nothing to do with the sale of the cattle, nor did they ever receive any money from the sale of the cattle, or interfere with it in any way.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. In *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266, the supreme court said as follows:

"There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

In *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569, this was affirmed. The court, page 472, 139 U. S., and page 570, 11 Sup. Ct. Rep., said:

"But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905, the court said:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

Although this did not state in terms that a verdict might be directed for either party whenever the court would be compelled to set aside one returned the other way, yet in view of the above citations, and especially in view of the expression in the yet later case, (*Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. Rep. 972,) it cannot be questioned that this test is still a proper one. Courts cannot be expected to stultify themselves by taking verdicts which in a sound judicial discretion they should immediately set aside. Applying this to the cases at bar, the direction of the court below to return a verdict for each defendant must be sustained.

The plaintiff put in conversations with Endicott & Macomber, the agents of the defendants, and claimed that as the result of them the defendants had accepted a total loss, or were estopped from disputing it. The court, however, regards these conversations as irrelevant. They took place at Boston, part on the day of the wreck and the remainder within a day or two after, necessarily in ignorance of the true condition of facts on the other side of the Atlantic, as plaintiff, of course, should have well understood; and they promised nothing except that everything "would be all right," which was wholly indefinite. The plaintiff failed to prove that Endicott & Macomber had an agency so broad as to authorize them to adjust a loss of this nature occurring in England, where the defendant corporations were themselves present and had their habitat. Nothing is proven clearly, except that Endicott & Macomber had authority to issue the policies, receive the premiums, and represent the underwriters in legal proceedings taken in Massachusetts. If the plaintiff claims more than this he should have called out the agents' powers of attorney or other written authority, or pointed out to the court some local statute clearly and specifically applicable. It is inadmissible to presume that local attorneys or agents have power to interfere with the adjustment of losses occurring abroad, especially in the country of the residence or domicile of the insuring corporations. To encourage a rule of that nature would be very unreasonable, in view of the fact that local agents rarely, if ever, have the knowledge necessary to enable them to deal with such matters.

It seems to the court that the question of the lack or existence of an abandonment is also of no consequence. The loss cannot be converted from a partial to a constructive total one with any effect in this case, and an abandonment has no use except for that purpose. This is sufficiently explained in *Stringer v. Insurance Co.*, L. R. 4 Q. B. 676, and L. R. 5 Q. B. 599, approved in *Cossmann v. West*, L. R. 13 App. Cas. 160.

Neither did jettison of the cattle create an absolute total loss. Whether they were jettisoned for the purpose of being saved, or to lighten the ship, is unimportant. Even derelict does not constitute an absolute total loss, if brought into a port of safety within a reasonable time, and if also the salvage charges are paid by the underwriters, or if under such circumstances that a prudent owner ought to pay them. *Cossmann v. West*, *ubi supra*.

Carr v. Insurance Co., 109 N. Y. 505, 17 N. E. Rep. 369, cited by plaintiff, lays down the following rule:

"The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily nor permit it to be sold under judicial process in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an 'actual total loss,' whatever may have been its original character."

This divides into two branches:

First. A voluntary sale of the vessel by the underwriters. Undoubtedly the underwriters may so deal with property in peril as to convert what otherwise would be a partial loss into an absolute total one, or so

as to bar themselves from denying that such a loss has accrued. But when the assured has obtained the benefit of a low premium by covering absolute total loss only, then in view thereof, and also in view of the fact that public policy requires that all interested should be encouraged to use the sale and labor or rescue clauses to the fullest extent, whatever may be done in that direction by the underwriters, as well as by the owners, in unintentional excess of power, should not be made a trap.

Second. As to the effect of permitting property to be sold under judicial process, *Carr v. Insurance Co.* does not seem to state all proper qualifications. When a vessel or other property is taken possession of by captors or salvors, of course the owner is dispossessed, at least for the time being, and, unless he can restore his possession by reasonable efforts, the loss becomes absolutely total; but he is bound to use such efforts. In *Carr v. Insurance Co.* the vessel was in fact sold for a much less sum than the amount the underwriters agreed to pay the wreckers, so that a prudent owner would not have interfered to prevent a sale. And, inasmuch as the underwriters did not return the wreck free from salvors' liens, the misfortune was, as a matter of fact, converted into an absolute total loss. So in *Cossmann v. West, ubi supra*, the property saved was of less value than the salvage services, and the underwriters did not discharge the lien. The fact must appear that the sale was under such circumstances that a prudent owner would not interfere to prevent it. In short, if the property passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot in either case recover the possession except by disproportionate exertions, expense, or hazard; otherwise it does not.

It is plain that in the case at bar the underwriters properly asked the intervention of salvors. The vessel and property aboard were in such condition that it was beyond the power of the master, owners, or underwriters to rescue her or her cargo, and the aid of salvors was necessary. Although the salvors were employed at the outset by the underwriters, and although they constituted an association in which the underwriters had shares or other interests, yet after their employment they ceased to be agents of the underwriters, and took and held possession in their own right for the benefit of whom it might concern. They did not differ in this respect from other salvors whose position and rights remain generally the same, whether they come to the assistance of a wreck as volunteers or at the request of the interests concerned. Having thus taken possession, it must, for the purposes of this writ of error, be conceded in behalf of the plaintiff that the salvors sent the cattle to Liverpool or Birkenhead, consigning them to themselves, and ordered them sold by James Nelson & Sons; that though this firm were the consignees the sale was for the benefit of the salvors and on their account; that, according to Nelson's statement, the salvors declined to give them up; and that they did not ask anybody's consent to the sale. Also it is true that the written employment of the salvors, though perhaps signed by

one of the underwriters after the rescued cattle were sold, really took effect from its date, and before they arrived at Birkenhead or Liverpool, and that it authorized the salvors to sell in order to effectuate their lien; and it may be that, if it had been made to appear that they did sell for that purpose, and that the underwriters had no lawful right to thus empower them, the result would have been a conversion authorized by the underwriters, sufficient to bar them from denying an absolute total loss.

For the reasons already stated, it rested on the plaintiff to show this, or that the sale of the cattle could not have been prevented by him with due diligence. But he has not even put in evidence the written directions from the salvors to James Nelson & Sons to make the sale, nor shown for what reason the sale was made, nor when it took place, nor how much time intervened after the arrival of the cattle at Liverpool or Birkenhead. Neither has he made to appear whether any salvage was claimed, or, if claimed, what the amount was, or that it was tendered or offered, or that the salvors were told that the plaintiff or his consignees would pay it, or would pay what was justly due. The statement of the witness Nelson, that the salvors declined to give up the cattle, was too general to be strictly admissible as evidence, and, being unsupported by detail, has no weight, although the point of its admissibility was not raised. On the other hand, it does appear beyond question that part of the consignment did arrive at Birkenhead, which, as well as Liverpool, was a place of delivery under the bill of lading. It also appears that the plaintiff was not unrepresented there, because James Nelson & Sons were his consignees and had the bill of lading; and, although the witness Nelson protests that they did nothing on account of their consignor, yet they were in position to act. It was also his duty not to be unrepresented.

On the whole, if the plaintiff claims to bring himself within the exceptional rule of *Cosman v. West*, *ubi supra*, and to excuse himself from the general principles stated in *Thornely v. Hebson*, 2 Barn. & Ald. 513, it was for him to bring out all the facts necessary therefor. As part of the cattle arrived at Birkenhead, an absolute total loss cannot be made out, unless, as already said, the plaintiff shows that the underwriters directed an unauthorized sale, or that, with due diligence, he could not have discharged the claim of the salvors, and thus secured the remnants of the consignment. On important elements making essential parts of this proposition, he has failed to furnish any proofs; and on that account the circuit court would unavoidably have set aside a verdict in his favor upon this necessary branch of his case.

The point taken by the plaintiff, that no notice was sent him of an intention to sell the cattle, is not valid, inasmuch as his consignees actually sold them, and therefore knew they were to be sold. The further proposition, that the sale was a legal or physical necessity, is also ineffectual; because the record fails to show that there was not sufficient time and opportunity to discharge the lien of the salvors, and take possession of the cattle, before the time of any necessary sale could arrive.

In this respect the conditions were essentially unlike those which appeared in *Bondrett v. Hentigg*, Holt, N. P. 149, where the goods were stolen on a barbarous coast; for, in the cases at bar, the courts and laws were in the same full vigor where the property arrived as in the United States, and presumably the consignees had opportunity for enforcing all legal rights.

On the whole, the suits turn on the circumstances of the sale at Birkenhead or Liverpool of the remnants of the consignment. The rules applied by us are elaborated in Arnold on Marine Insurance, (6th Eng. Ed.) in the opening of chapter 6, and in chapter 7, vol. 2, pp. 951, 952, and page 988 and sequence, and are reinforced by the conclusions in *Thornely v. Hebson*, *ubi supra*. The expression of Lord TENTERDEN (ABBOTT, C. J.) in this case is very apt:

"If, in this case, it had appeared that the owners had used all the means in their power, and were still unable to have paid this salvage, it would have been very different; but that is not so, and I am therefore of opinion that the assured is not entitled to recover for a total loss."

Copelin v. Insurance Co., 9 Wall. 461; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. Rep. 934; and *Shepherd v. Henderson*, L. R. 7 App. Cas. 49,—cited by the plaintiff,—reiterate, for the sake of applying them to the pending facts, rules of law fundamental and well known as applicable to abandonments under policies which cover constructive total losses, but have no close relation to the suits at bar.

We understand the proposition that the policies should be treated as effecting a separate insurance for each head of cattle, so that the loss of any one created a claim against the underwriters for an absolute total loss so far as that one was concerned, is not now insisted on.

The judgment of the court below in each case is affirmed.

MCKEAN v. ARCHER.

(Circuit Court, D. Indiana. October 28, 1892.)

No. 8,748.

1. LIMITATION OF ACTIONS—CONSTRUCTION OF STATUTE.

Act Ind. April 7, 1881, provides that actions must be brought within the times named, as follows: "Upon promissory notes, bills of exchange, and other contracts for the payment of money, hereafter executed, within ten years: provided, that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law," etc. *Held*, the words "existing law" apply to laws existing when the contract was made, and not when the suit was brought; and therefore contracts executed prior to the act are still enforceable within 20 years, as before.

2. SAME—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

The fact that the statute continues in force one period of limitation for past contracts, and provides a different period for future contracts, does not render it invalid, as lacking a uniform operation, or being in the nature of special legislation, for it is general and uniform upon all persons or things, under the same circumstances.

At Law. Action by Samuel McKean against Robert N. Archer on a note. Heard on demurrer to the answer. Demurrer sustained.

B. V. Marshall and Jump; Lamb & Davis, for plaintiff.

Cleveland & Matthews and A. C. Harris, for defendant.

BAKER, District Judge. Action to recover the contents of a note executed in this state for \$5,025.93, bearing date July 1, 1877, due one day after date. Answer that the cause of action did not accrue within 10 years next before the commencement of the suit. Demurrer to the answer for want of facts.

At the time this cause of action accrued, the statute of limitations of this state prescribed 20 years as the period within which such actions must be brought. 2 Gavin & H. St. of Ind. p. 159, § 211, par. 5. On the 7th day of April, 1881, another statute of limitations was enacted, which took effect September 19, 1881, and yet remains in force. This statute is as follows:

"The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards: * * * *Fifth.* Upon promissory notes, bills of exchange, and other written contracts for the payment of money, hereafter executed, within ten years: provided, that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law limiting the commencement of actions, and not afterwards."

On the one side it is claimed that the note is to be governed by the statute of limitations in force at the time the cause of action accrued thereon. On the other side, it is insisted that it must be governed by the statute of limitations in force when the suit was instituted.

The current of authority, both English and American, is almost unbroken, that statutes of limitation operate on the remedy only, and do not affect the right; and that the statute in force at the time the suit is brought, and in the forum where it is brought, must control. This rule has often been regretted by eminent judges as a departure from sound principle, but it is now so firmly settled that the statute of limitations does not enter into and form a part of the contract that it is no longer open to debate. It follows that the sufficiency of the answer hinges on the construction of the statute above quoted. That part of the act which precedes the proviso, *ex vi termini*, applies only to promissory notes, bills of exchange, and other written contracts for the payment of money executed after the enactment of the statute. It is apparent that it was the legislative intent that all notes, bills, and contracts for the payment of money executed after the enactment of the statute should be limited by the clause preceding the proviso to the period of 10 years, and that all such contracts executed prior to that time should be governed by the terms of the proviso. The proviso declares "that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law limiting the commencement of actions, and not afterward." The

language of the proviso is not entirely free from obscurity. On the one hand it is claimed that the words "existing law" mean the law existing at the time suit is instituted, and hence that the 10-years limitation applies. On the other hand, it is insisted that these words refer to the law in force at the time the contract was executed, and therefore that the 20-years limitation governs. In my opinion, the words "existing law" refer to the limitation law in force at and prior to the date of the enactment of 1881; and as to all written contracts for the payment of money executed before September 19, 1881, the prior 20-years limitation is continued in force. If it was the purpose of the legislature to apply the 10-years limitation to contracts theretofore executed, the proviso was needless. All that was necessary, if such was the purpose, would have been to have omitted the proviso, and the words "heretofore executed" in the clause preceding the proviso. It is the duty of courts to construe statutes so as to give effect to the entire language employed, where such a construction is practicable. Nothing less than imperative necessity will justify a court in rejecting words or clauses used in a statute. Here no such necessity exists. Construing the words "existing law" as referring to and continuing in force the statute existing at the time the note in suit was executed, effect is given to all the words of the statute. The statute thus read constitutes a just and harmonious enactment. All notes, bills, and contracts for the payment of money executed on or after September 19, 1881, are governed by the 10-years limitation prescribed by the act of 1881; and all such contracts executed before that date are governed by the 20-years limitation continued in force by the proviso. But the provision in question, if the words "hereafter executed" in the clause preceding the proviso had been omitted, would be construed as prospective. *Murray v. Gibson*, 15 How. 421; *Sohn v. Waterson*, 17 Wall. 596; *King v. Tirrell*, 2 Gray, 331; *Dickson v. Railroad Co.*, 77 Ill. 331; *McCormick v. Eliot*, 43 Fed. Rep. 469; *McKisson v. Davenport*, 83 Mich. 211, 47 N. W. Rep. 100.

It may be laid down as a general rule for the interpretation of statutes that they ought not to be allowed a retroactive operation, where this is not required by express command or by necessary implication. Without such requirement, they speak and operate upon the future only. Especially should this rule prevail where the effect and operation of the law are designed, apart from the intrinsic merits of the rights of the parties, to restrict the assertion of those rights. But, aside from these considerations, and out of abundant caution, the words preceding the proviso are expressly limited to notes, bills of exchange, and other written contracts for the payment of money, thereafter executed. As the note in suit was executed before the statute was enacted, it is, by its express language, excepted from the operation of the 10-years limitation. In *King v. Tirrell*, 2 Gray, 331, a cause of action arose against an administrator at a time when the right to sue was limited to the period of four years from the date of his bond. After the cause of action had accrued, the legislature of the state enacted a law prescribing two years as the time within which such actions must be brought. The latter

statute was held to be prospective, and that a cause of action existing when it came into effect was governed by the statute of limitations in force when the right of action accrued. In *Dickson v. Railroad Co.*, 77 Ill. 331, a cause of action accrued for personal injury. At the time the cause of action accrued, the right to sue was limited to the period of five years. Thereafter the legislature enacted a law prescribing two years as the period within which such actions must be brought. The court held the latter enactment prospective, and that the statute in force when the cause of action accrued furnished the rule of limitations. *Means v. Harrison*, 114 Ill. 248, 2 N. E. Rep. 64, was an action upon a promissory note dated January 25, 1872, payable two years after date. Action was commenced October 15, 1884. At the time the note was executed, the limitation was 16 years, under the act of November 5, 1849. By an act which went into effect July 1, 1872, the time of limitation of an action on a promissory note was made 10 years. The act of 1872 expressly repealed the act of 1849, with this provision in the repealing section: "But this section shall not be construed so as to affect any rights or liabilities, or any causes of action, that may have accrued before this act shall take effect." The question was, which act was to govern,—the act of 1849, which was in force at the time the note was executed, or the act of 1872, which was enacted and went into effect after the making of the note? The court held that the latter act was to be construed prospectively, and that the saving clause above quoted continued the law of 1849 in force as to notes executed prior to the time the act of 1872 took effect. *McMillan v. McCormick*, 117 Ill. 79, 7 N. E. Rep. 132, and *McKisson v. Davenport*, 83 Mich. 211, 47 N. W. Rep. 100, fully support the same doctrine.

Thus it is seen that the construction given to the act of 1881 is supported both by reason and authority. It is insisted, however, that such a construction brings the provision under consideration within the condemnation of the constitution of this state, and also of the fourteenth amendment of the constitution of the United States. The argument is that "the office of the proviso is solely to suspend the ten-years limitation in those cases where the contract happens to be executed before September 19, 1881, whether it falls due then or afterwards." *Cooley*, Const. Lim. p. 391, note 2, and *Holden v. James*, 11 Mass. 397, are cited to the proposition that "the statute of limitations cannot be suspended in particular cases while allowed to remain in force generally." Manifestly it is not the office of the proviso to suspend the statute in particular cases. The enacting clause preceding the proviso in clear and positive terms declares that the 10-years limitation therein prescribed shall only apply to notes, bills of exchange, and other written contracts for the payment of money thereafter executed. If the proviso were eliminated from the act, the 10-years limitation could not be applied to notes previously executed. The proviso does not suspend the operation of the enacting clause in question. It does not relate to nor embrace the same class of contracts as the enacting clause. The whole purpose and scope of the proviso is to continue the prior statute of lim-

itations in force as to all notes, bills of exchange, and other written contracts for the payment of money executed before the act of 1881 took effect. The real ground of objection evidently is that it is not within the domain of the legislative power to enact a statute of limitations which shall affect and operate upon written contracts thereafter executed, and continue in force the prior limitation law as to all contracts previously executed. Such statutes have been frequently enacted, and have been drawn in question before the courts of last resort. They have been enforced as valid enactments, without any suggestion by court or counsel that they were unconstitutional. See authorities *supra*. If the provision in question is unconstitutional, it is upon the ground that the law is special, and not of uniform operation, or because it denies equal privileges and immunities to all. It is not obnoxious to either objection. It is general and uniform in its operation. A law is general and uniform when it operates alike upon all persons and things within the jurisdiction of the state, under the same circumstances. This provision guaranties to all persons the same privileges and immunities, under like conditions. Equal protection of the law exists whenever, under like conditions, every person is secured in the enjoyment of the same rights by the law. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. Rep. 224. It is neither special, partial, nor arbitrary, and it must be held to be a valid exertion of constitutional power. The answer is insufficient. The demurrer is sustained.

In re HASKELL.

(Circuit Court, S. D. Ohio. November 14, 1892.)

No. 629

1. HABEAS CORPUS—WHEN LIES—PRESUMPTIONS.

Where a man has been indicted, tried, convicted, and sentenced by a state court having jurisdiction of the prisoner and the crime charged, and authority to pronounce the particular sentence, it will be conclusively presumed, in *habeas corpus* proceedings in a federal court, that the state adduced sufficient evidence to sustain the judgment.

2. SAME—BILL OF EXCEPTIONS NOT A PART OF THE RECORD.

The bill of exceptions in a criminal case is not a part of the record, in such sense that a court may look into it on *habeas corpus* proceedings collaterally attacking the judgment.

3. SAME—ISSUANCE OF THE WRIT.

Under Rev. St. § 755, the writ should not issue unless the petition itself shows that the party is entitled thereto.

Petition for *habeas corpus* and *certiorari*. Denied.

Statement by TAFT, Circuit Judge:

This is a petition for *habeas corpus* filed by George P. Haskell, and is as follows:

"In the United States Circuit Court in and for the Southern District of Ohio.

"Ex parte George P. Haskell. Petition and complaint for a writ of *habeas corpus* and *certiorari*:

"The above-named George P. Haskell, relator herein, makes this his complaint, and alleges and says that at the September, A. D. 1891, term of the court of common pleas in and for the county of Lucas and state of Ohio, he (relator) was indicted and charged with having committed the crime of 'forgery and uttering a forged instrument,' which is a felony under the laws of Ohio; that, under the allegation in said indictment, the said common pleas court of Lucas county, Ohio, was the only court in said state of Ohio that had jurisdiction to entertain a judicial trial of relator upon said charges; that said cause was entitled, 'The State of Ohio vs. George P. Haskell;' that on the fourth day of February, A. D. 1891, the said common pleas court of Lucas county, Ohio, did then and there proceed to the trial of said cause, and upon said trial the said state of Ohio, as plaintiff therein, offered and introduced all testimony and evidence it possessed against the said George P. Haskell in said cause; that the law of the state of Ohio in such cases requires of the state, as plaintiff, to prove, among other things, that the alleged offense, if committed at all, was committed in the said county of Lucas and state of Ohio. Relator also alleges and avers that the said state of Ohio, as plaintiff therein, did not produce or offer any proof or evidence that the said alleged offense was committed in said Lucas county, but passed the said fact and material allegation unproved; that, without the said fact and allegation being affirmatively proven by the said state, [plaintiff,] the said common pleas court of said Lucas county, Ohio, did not possess under the law any power or authority to pass judgment and sentence upon the defendant therein, who is relator herein; that at the conclusion of said trial a verdict of 'Guilty' was by the jury returned into said court, whereupon said court then and there proceeded to pass sentence and judgment against relator, and sentenced him to be confined in the Ohio penitentiary for a term of five years, for having committed the crime of forgery; that relator has been since the eleventh day of February, 1892, and still is, confined and imprisoned by virtue solely of said sentence and judgment in the Ohio penitentiary at Columbus, Ohio; that relator has exhausted each and every and all proceedings in all of the courts of the state of Ohio for his relief; that as a matter of fact the alleged 'forgery' for which he is so imprisoned was not committed in the county of Lucas, Ohio; that the bill of exceptions in said cause is by an order of said court made a part of the record of said cause, as provided by section 5302 of the Revised Statutes of Ohio; that said bill of exceptions contains all of the proof and evidence offered by the state of Ohio tending to prove where said alleged forgery was claimed to have been committed; that he is by means of said proceedings denied by the state of Ohio the equal protection of the law while within the jurisdiction of said state, and said imprisonment is in violation of the constitution of the United States, and therefore null and void. All of which more fully appears from the files and records of the said common pleas court of Lucas county, Ohio, in the said cause of The State of Ohio vs. George P. Haskell, which are now in the possession of John P. Bronson, Esq., clerk of said court of common pleas of said Lucas county, Ohio, at the city of Toledo, in said county. Wherefore, the said George P. Haskell, relator herein, prays that a writ of *habeas corpus* may issue to O. C. James, Esq., as warden of the Ohio penitentiary at the city of Columbus, Ohio, that he bring up the body of relator, and show his cause for said imprisonment; also that a writ of *certiorari* issue to John P. Bronson, Esq., as clerk of the common pleas court of Lucas county,

Ohio, at the city of Toledo, in said county, that he forthwith forward to this court all and singular the files and records of the case of State of Ohio vs. George P. Haskell, and relator will ever pray.

"GEORGE P. HASKELL.

"*State of Ohio, Franklin County—ss.:* George P. Haskell, who, being duly sworn according to law, deposeth and saith that he is the relator in the foregoing petition, and the facts therein set forth are true.

"GEORGE P. HASKELL.

"Subscribed and sworn to before me this 7th day of Nov., A. D. 1892.

[Seal.]

"S. A. STERNBERGER, Notary Public."

TART, Circuit Judge, (*after stating the facts.*) The petition is accompanied by what is averred to be a true copy of all the journal entries, including the indictment. The sections under which this court has power to issue a writ of *habeas corpus* are as follows:

"Sec. 751. The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*.

"Sec. 752. The several justices and judges of said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

"Sec. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed to trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

"Sec. 754. Application for writ of *habeas corpus* shall be made to the court or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

"Sec. 755. The court or justice or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

It is apparent from section 755 that, if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ. The section only declares the common-law practice in this respect. Hurd, *Hab. Corp.* 222; *Sims' Case*, 7 Cush. 285; *Ex parte Kearney*, 7 Wheat. 38.

It does appear from the petition herein that the petitioner is in lawful custody and should not be discharged. His claim is that he was convicted without any evidence proving venue of the offense within the territorial jurisdiction of the Lucas county common pleas court; that he was thereby deprived of his liberty without due process of law, and

was denied the equal protection of the laws by the state of Ohio, in violation of the fourteenth amendment to the constitution of the United States; and that he is therefore now "in custody in violation of the constitution * * * of the United States," within the words of section 753, above given.

Without considering the question whether such a defect in the evidence, if it could be made to appear, would render the petitioner's conviction a violation of the amendment relied on by him, it is sufficient to say that it must be conclusively presumed from the averments of the petition, and the indictment and journal entries accompanying it, that the fact of the commission of the offense in Lucas county was made to appear from evidence to the trial court. It is clear from the papers presented that the petitioner was indicted by a grand jury, and was tried and convicted by a petit jury, that the court had jurisdiction of the offense charged in the indictment, and had jurisdiction to pronounce the sentence which was imposed on conviction of the offense charged. Whether the evidence before the court sustained the averments of the indictment is a question which cannot be examined in the collateral *habeas corpus* proceeding. When the indictment charges a crime within the jurisdiction of the court, and the record of the court shows a trial and conviction and a judgment, properly founded on the indictment and within the lawful jurisdiction, it is conclusively presumed, in a collateral attack, that the evidence adduced was sufficient to sustain the indictment and judgment.

The failure of the state of Ohio to prove the venue of the offense in Lucas county, as alleged by the petitioner, can only appear from a consideration of the bill of exceptions stating all the evidence; but the bill of exceptions is not a part of the record of a judgment into which a court may look, in a proceeding where the judgment is collaterally attacked. It is only a part of the record in direct proceedings on error for the examination of a reviewing court, and can never be considered in *habeas corpus* to test the validity of the judgment. For this reason it follows that the sentence pronounced, under which the prisoner is confined, was within the jurisdiction of the court, and that the petitioner is not illegally restrained of his liberty. The application for the writ is therefore denied.

In re McKnight.

(Circuit Court, S. D. Ohio. November 14, 1892.)

No. 630.

HABEAS CORPUS—ISSUANCE OF THE WRIT—STATE COURTS.

The action of a state court in refusing to assign counsel for a prisoner's defense, in forcing him to trial without time for preparation and without opportunity to secure, by compulsory process, the presence of material witnesses, in violation of the constitution and laws of the state, cannot be considered by a federal court in *habeas corpus* proceedings, brought on the ground that the prisoner is denied the equal protection of the laws, and deprived of liberty without due process of law, in violation of the fourteenth amendment. *Ex parte Harding*, 7 Sup. Ct. Rep. 780, 120 U. S. 782, and *Ex parte Ulrich*, 48 Fed. Rep. 661, followed.

Petition for writ of *habeas corpus* and *certiorari*. Denied.

Statement by TART, Circuit Judge:

This is a petition for *habeas corpus* filed by Hiram P. McKnight, and is as follows:

"In the United States Circuit Court in and for the Southern District of Ohio.

"Ex parte Hiram P. McKnight. Complaint, petition, and affidavit for a writ of *habeas corpus* and *certiorari*:

"The above-named Hiram P. McKnight, relator herein, makes this his complaint, and respectfully represents to this honorable court that he (relator) is unlawfully restrained and deprived of his liberty, and imprisoned in the Ohio penitentiary at Columbus, Ohio; that said imprisonment is by virtue of an order or judgment of the court of the common pleas in and for the county of Wood and state of Ohio; that said imprisonment is by the state of Ohio, by C. C. James, Esq., as agent of said state and warden of said penitentiary; that heretofore, to wit, on the 16th day of January, 1892, relator was indicted by the grand jury of said Wood county, Ohio, and charged with having committed the crime of 'forgery and uttering a forged instrument;' that said charge was a felony, under the laws of Ohio; that thereafter, to wit, on the 20th day of said January, relator was arraigned upon said charge, and entered a plea of 'Not guilty' thereto; that the laws of the state of Ohio provide that the court shall, at the time of arraignment, assign said cause for trial at the same term; that said court did not assign said cause for trial at any time; that relator was without counsel, and wholly unable to employ counsel to assist him in his defense, and said court well knew of these facts; that the constitution and laws of Ohio provide that the court shall, if the prisoner comes without counsel, before it proceed with the case, assign him counsel, not more than two, who shall, at the expense of the state, assist the prisoner in his defense; that the court did not assign any counsel whatever to assist the prisoner (relator) in his defense to said cause, but said court did then and there appoint able counsel to assist the prosecution of said cause on the part of the state of Ohio; that thereafter, to wit, on the 7th day of March, A. D. 1892, relator was again brought before said court in custody of the sheriff of said county, and without warning, or said cause being previously assigned for trial, as provided by law, was by said court immediately placed upon trial of said charge; that relator then and there filed with said court his written objections thereto, and in accordance with due provisions of law set forth the facts that he (relator) had material witnesses who were absent, and without whom he could not safely proceed to the trial of said

cause, and that he had also been confined in jail, and had no counsel to assist him; that the constitution and laws of Ohio provide that the accused shall be allowed compulsory process to procure the attendance of his witnesses; that compulsory process to compel the attendance of relator's material witnesses was by said court denied to relator; that there is no process due to the laws of the state of Ohio wherewith a person may be charged with crime, arrested, imprisoned, tried, convicted, and sentenced, without first giving to the accused counsel to assist him in his defense, compulsory process to compel the attendance of his witnesses, and the cause assigned for trial a reasonable time before trial to allow the accused and his counsel so assigned to prepare for his defenses to the charge; that relator also says that he did not at any time waive his right to have the assistance of counsel in his defense, nor to have compulsory process to procure his witnesses in his behalf, nor the right to have said cause properly assigned for trial, to give him an opportunity to prepare for trial thereof; that he (relator) has made his application in due form of law to each of the circuit and supreme courts of the state of Ohio for a writ of *habeas corpus*, and that the cause of said imprisonment be judicially inquired into, and for proper relief according to law; that the said several state courts of Ohio upon said application suspend the writ of *habeas corpus*, and refuse to give to relator judicial investigation and inquiry into the cause of imprisonment. Relator further alleges and avers that said imprisonment is in violation of the constitution of the United States, and sections 1977, 1979, and 1980 of the Revised Statutes of the United States, and other acts of congress made in pursuance of said constitution; that relator is deprived of his liberty by the state of Ohio, without due process of law, and is denied the equal protection of the law while within the jurisdiction of said state of Ohio; that relator has been denied by the state of Ohio privileges and immunities secured to the citizens of Ohio and the United States; that said relator is a natural-born citizen of the United States; that the records and files of said case are now in the possession of the clerk of the supreme court of Ohio, Urban H. Hester, Esq., at the city of Columbus, Ohio. All of which more fully appears from the records and files of said cause, which is entitled 'The State of Ohio vs. Hiram P. McKnight.' Wherefore, the said Hiram P. McKnight, relator in the foregoing petition, prays that a writ of *habeas corpus* may issue from the honorable U. S. circuit court of the southern district of Ohio to C. C. James, as warden of the Ohio penitentiary, at the city of Columbus, Ohio, commanding him to bring the body of the said Hiram P. McKnight before said United States court in and for the southern district of Ohio, and show fully for what cause he holds and imprisons the said Hiram P. McKnight; that the cause of said imprisonment be fully inquired into; and that the same be declared in conflict with the constitution and laws of the United States, and the said Hiram P. McKnight be dealt with according to law. Also that a writ of *certiorari* may issue to Urban H. Hester, Esq., clerk of the supreme court at the city of Columbus, Ohio, commanding him to forthwith forward to the clerk of said United States circuit court for the southern district of Ohio, at the city of Cincinnati, Ohio, to be used upon the hearing of this complaint, all and singular the files and records of said cause. And the said relator will ever pray.

"HIRAM P. MCKNIGHT, Complainant."

"State of Ohio, Franklin County—ss.: Hiram P. McKnight, who, being first duly sworn according to law, deposeth and says that he is the complainant in the foregoing petition and complaint, and that the facts set forth therein are true.

HIRAM P. MCKNIGHT.

"Subscribed and sworn to before me this 1st day of November, A. D. 1892.

"GEORGE W. MERRILL, Justice of the Peace."

TAFT, Circuit Judge, (*after stating the facts.*) The sections of the statutes under which this court exercises jurisdiction to issue the writ of *habeas corpus* have been quoted in the opinion just filed in the case of *In re Haskell*, 52 Fed. Rep. 795. This court has no power to discharge the prisoner in the present case, unless it appears from the petition that the prisoner has been deprived of his liberty by the state of Ohio without due process of law, and has been denied the equal protection of the law, in violation of the fourteenth amendment to the constitution of the United States, and, further, that by reason thereof the sentencing court was without jurisdiction to pronounce the sentence. Before a court can interfere with the judgment of another court by *habeas corpus*, it must be able to say that the judgment is null and void.

It is clear from the petition that the court which sentenced the prisoner had jurisdiction of the person and of the offense charged in the indictment; that the indictment was properly found by a grand jury; that the case proceeded to trial and conviction before a petit jury; that judgment followed thereon; and that no want of jurisdiction in the court to pronounce the sentence appears on the face of the record. The only ground for denying the power of the court to pronounce the judgment consists in the refusal of the court, as alleged, to assign counsel for petitioner's defense, in accordance with the law of Ohio, and in the court's forcing the relator to trial without sufficient time for preparation, and without giving him an opportunity, by the compulsory process of the court, to secure the presence of his material witnesses, who were absent, and without whom he could not safely proceed to trial. Such matters are mere irregularities or errors which cannot be considered or corrected by a court in the collateral proceeding in *habeas corpus*. They do not go to the jurisdiction of the court to pronounce the sentence.

The right to have the assistance of counsel is not alleged to have been infringed. The averment is that the trial court failed or refused to assign counsel at the expense of the state, which is a very different thing. Failure to furnish counsel to a defendant is not a want of due process of law. If a state statute accords such a right to an indigent defendant, a denial of it is error, only, which does not affect the jurisdiction of the court, or render its sentence void. Nor is the failure of the court to allow the defendant compulsory process for the attendance of his witnesses a jurisdictional defect which can be considered on *habeas corpus*. It is doubtful from the petition whether the petitioner intends to state that the court refused to issue compulsory process, or only that, by denying a continuance, the court failed to give an opportunity to procure the attendance of absent witnesses. But conceding that the averment is of a refusal by the court of a compulsory process, the petition does not make a case for *habeas corpus*. This is conclusively settled by the case of *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780. There it was averred that the prisoner was deprived of his liberty without due process of law, because at the trial in a court of a territory of the United States the petitioner was deprived of his right to obtain compulsory process for the attendance of his witnesses, in violation of the constitution of the

United States, which in article 6 of the amendments expressly secures such a right to persons tried in courts of the United States. The court held that the objection to the sentence only went to the regularity of the proceedings, and not to the jurisdiction of the court to impose the sentence; that for such irregularity the judgment was not void; and that the writ of *habeas corpus* gave the court no power for its correction.

The case of *Ex parte Harding* is stronger than the case at bar, because there the supreme court was considering the validity of a trial and judgment in a court organized under the authority of the United States, and the right, a violation of which was assigned as the reason for the writ, was in terms secured to the petitioner in that case by the federal constitution. Here the judgment under consideration is that of a state court, and the right alleged to be violated is one not expressly secured by the federal constitution, but only by the constitution and laws of Ohio. It is only indirectly protected by the fourteenth amendment to the federal constitution. In *Ex parte Ulrich*, 43 Fed. Rep. 661, Circuit Judge CALDWELL held that the district court of the United States had no authority, by writ of *habeas corpus*, to declare a judgment of a state criminal court a nullity, and discharge the prisoner from imprisonment imposed by it, where such court had jurisdiction of the person, place, offense, and the case, and everything connected with it. Under these authorities, the petitioner does not state a case for the issuance of a writ, and his application is denied.

In re SANDERS.

(Circuit Court, E. D. North Carolina. November 14, 1892.)

1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — STATE REGULATION — ORIGINAL PACKAGES.

Acts N. C. 1891, c. 831, providing that persons selling seed in packages unmarked by the date when such seed were grown, except farmers selling seed in open bulk to other farmers or gardeners, shall be guilty of a misdemeanor, is unconstitutional and void under the interstate commerce clause of the constitution (article 1, § 8, cl. 3) with respect to the selling of seed in the original packages imported from another state.

2. SAME — POLICE POWER.

Where a certain subject-matter is exclusively delegated to congress by the constitution, any state legislation thereon is void, even if passed in the exercise of the police power.

Application of Simon F. Sanders for a writ of *habeas corpus*. Granted, and prisoner discharged.

Alfred Russell and D. L. Russell; for petitioner.

John D. Bellamy, Jr., for the State.

Goff, Circuit Judge. Simon W. Sanders presents his application for the writ of *habeas corpus*. In substance, it alleges that petitioner is restrained of his liberty by the sheriff of New Hanover county, North Carolina, who detains petitioner by reason of a certain *mittimus* or warrant issued

by a justice of the peace in and for said county and state, founded upon a judgment of conviction rendered by the justice for the violation of a certain statute of the state of North Carolina, passed by the general assembly of that state on the 5th day of March, 1891, entitled "An act to protect seed buyers in North Carolina," being chapter 331 of the Acts of the General Assembly of North Carolina for the year 1891, in this: that petitioner, as the agent of D. M. Ferry & Co., a firm composed of citizens of the state of Michigan, and doing business in that state, exposed to sale and sold at Wilmington, in North Carolina, certain seeds, which were shipped to petitioner from the state of Michigan by said firm of D. M. Ferry & Co., to be sold by him as their agent. It also alleges that the seeds so sold by petitioner were in the original packages as received from the state of Michigan, and it admits that the packages were not marked as required by the statute alluded to. Petitioner claims that the act of the general assembly of North Carolina, by virtue of which he was convicted, in so far as it applies to the act done by him, is in violation of the constitution of the United States, and that, therefore, no lawful conviction is possible under it, and that consequently he is restrained of his liberty wrongfully. The writ, as prayed for, was issued on the 8th day of March, 1892. The sheriff made return to the writ on the 24th day of March, 1892, admitting that he had petitioner in his custody, and that he held him in accordance with the terms of a warrant of commitment from a justice of the peace for the state and county mentioned. With his return the sheriff files a certified transcript of the record of the court of the justice, showing the trial, conviction, and commitment of the petitioner, from which it appears that the facts relative to the sale of the seed are correctly set forth in the petition filed in this matter. The sheriff, at the time he filed his return to the writ, produced before the court the petitioner, who was represented by counsel, and, there being no appearance for the sheriff nor for the state of North Carolina by counsel, the court ordered that the hearing of the matter involved in this proceeding be postponed until the next term of the circuit court of the United States at Wilmington, N. C., and committed the petitioner to the custody of the marshal of that district. At the spring term, 1892, of the circuit court at Wilmington the matters arising on the writ and return were argued by counsel for petitioner, for the sheriff, and the state of North Carolina, and submitted to the court.

The petitioner, as a member of the firm of S. W. Sanders & Co., of Wilmington, N. C., contracted with D. M. Ferry & Co., of Detroit, Mich., to sell for them garden, flower, and field seeds on certain terms and conditions set forth in a contract dated October 30, 1891. The seeds ordered were duly shipped by D. M. Ferry & Co. from Detroit, received by S. W. Sanders & Co. at Wilmington, and portions of them sold by petitioner. On the 5th day of March, 1891, the general assembly of North Carolina passed an act of which the following is a copy:

"An Act to Protect Seed Buyers in North Carolina."

"The general assembly of North Carolina do enact: Section 1. That any person or persons doing business in the state, who shall sell seed, or offer for sale any vegetable or garden seed, that are not plainly marked upon each package or bag containing such seed the year in which said seed were grown, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars or more than fifty dollars, or imprisoned not more than thirty days, for each and every offense: provided, that the provisions of the act shall not apply to farmers selling seed in open bulk to other farmers or gardeners. Sec. 2. That any person or persons who shall, with intention to deceive, wrongfully mark or label, as to date, any package or bag containing garden or vegetable seed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten or more than fifty dollars, or imprisoned not less than ten or more than thirty days. Sec. 3. That this act shall be in force from and after the 1st day of September, 1891. Ratified this, the 5th day of March, 1891."

The seeds so sent by D. M. Ferry & Co. were in packages which were not marked with the year when the seeds were grown, as was required by this statute, and the sales made by the petitioner were in the original packages received from Michigan. Petitioner claims that this statute is a regulation of commerce among the states, the power to make which is not possessed by the legislature of a state, but is, by article 1, § 8, cl. 3, of the constitution of the United States, vested exclusively in the congress provided for by that instrument. Counsel for the state of North Carolina contends that the act mentioned, while it may affect commerce, is not a regulation thereof, but is simply the exercise by the state of its police power to protect its citizens from fraud. The clause of the constitution above cited reads as follows: "The congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." The need of a national regulation of commerce among the states was one of the most influential causes leading to the formation of the constitution of the United States, the desire being to secure uniformity of the commercial regulations against discriminating or burdensome state legislation. It is now well established that congress has the exclusive right to regulate commerce, and that the grant to congress in the constitution relating to that subject carried with it the whole matter, leaving nothing for the state to act upon in cases where the subject is national in character. *Gibbons v. Ogden*, 9 Wheat. 1; *Cook v. Pennsylvania*, 97 U. S. 566; *Railroad Co. v. Fuller*, 17 Wall. 560; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. Rep. 681. Is this act of the general assembly of North Carolina, as applied to the sale in question, a regulation of interstate commerce? If so, it is void. The fact that congress has not legislated on this particular subject—has not especially regulated this character of commerce—does not authorize the state legislature to regulate it, but shows that congress intends such sales to be free in all the states, and not to be restricted or burdened by any state statute. *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 122 U. S. 336, 7 Sup.

Ct. Rep. 1118; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062. In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, the court says:

"The power granted to congress to regulate commerce among the states being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of congress to exercise that power in any case is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states."

The meaning of the decisions of the supreme court on this question is expressed by William Draper Lewis in his recent instructive work entitled "The Federal Power over Commerce, and Its Effect on State Action," (page 123:)

"Whenever the subject effected by state laws is in its nature national, or requires one uniform rule or plan of regulation, then the inaction of congress is evidence to the court of its intention that the commerce in this respect shall be free and untrammelled; but when the subject, from its local nature, does not seem to require a uniform rule of regulation, the inaction of congress is evidence to the court that that body is willing that the states can effect such subjects in the legitimate exercise of their reserved powers."

In one of the early cases in which this clause of the constitution received careful consideration, (*Brown v. Maryland*, 12 Wheat. 447,) Chief Justice MARSHALL, in delivering the opinion of the court, used this language:

"What, then, is the just extent of a power to regulate commerce with foreign nations and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If congress should pass an act requiring all seed sold in packages to be marked with the year in which the same were grown, and prohibiting the sale unless so marked, regardless of the country where grown, including imported and domestic seeds, as this act does, it would be the exercise by congress of the power granted by the constitution, and a regulation of commerce among the states. The difficulty of honestly complying with such legislation would be presented to the consideration of that body as a reason why the statute should be amended or repealed.

If this be true, (and can it be doubted that congress has the constitutional right to legislate on this subject?) and if the conclusion I reach is correct, that congress has exclusive jurisdiction of such regulation, does it not follow that this legislation by the general assembly of North Carolina is unconstitutional and void? If the states can legislate, as to the matter of the North Carolina statute, because of the absence of legislation by congress on the subject, as was claimed by counsel in the argument, would not the provisions of that act be held to be so unreasonable, such a burden on the business of the country, and so interfere with the rights and privileges of the citizens thereof, as to render it void? It virtually prohibits the sale in North Carolina of seed imported from foreign countries, for the packages would not be marked, and our dealers could not truthfully mark them as required by that statute. It prevents the sale in North Carolina of seed lawfully carried into that state in the mails of the United States, sent by dealers residing and doing business in other states, who pay to the government of the United States the postage or freight for the transportation of the same, under laws passed by congress. It favors the grower and dealer in seeds doing business in North Carolina to the detriment of the growers and dealers of all the other states, for the farmers of North Carolina are, in effect, regarded as growers and dealers in seeds, and exempted from the requirements of the law, and it would follow that all persons desiring to purchase from them would be "farmers or gardeners." It would thereby permit a certain portion of the citizens of that state to engage in that business, and prohibit all the rest from so doing. Why should the farmers of North Carolina be permitted to sell seed in open bulk to other farmers or gardeners, and the petitioner, or D. M. Ferry & Co., or any citizen who desires to engage in that traffic, be prohibited from so doing? How does this protect seed buyers? What is meant by "open bulk?" The natural meaning of the words is, "in the mass; exposed to view; not tied or sealed up." Used in the connection they are in this act, they do not relate to the quantity that may be sold, nor does the statute restrict it to an ounce or less, or require a bushel or more to be sold. Any quantity of any garden or vegetable seed, not in a package or bag, but in open bulk, may be sold by a farmer to other farmers or gardeners, without the mark relating to the year when grown. The effect of this is that all dealers must sell their seeds through farmers, or be excluded from the market. The farmer may sell seeds, free from any restrictions or marks, but any one else selling the same kind of seeds, even if from the same original mass or bulk, if the same be in packages or bags, must have plainly marked upon them the year when grown,—the words that give purity to the contents, and eliminate all fraud from the sale. This statute virtually prevents the importation into the state of North Carolina of all garden and vegetable seeds in paper packages or bags, for sale in the packages in which imported, and destroys that extensive and useful trade, so far as that state is concerned. If one state can do this, all can. If North Carolina can impose this burden, other states can and will impose similar or heavier ones, to the great damage

of a commerce in which not only this petitioner and D. M. Ferry & Co. are interested, but in which many citizens of many of the states have invested their means, and to which they have devoted their time and energies. In *Ex parte Kieffer*, 40 Fed. Rep. 399, Mr. Justice BREWER says:

"The moment you find any act of the legislature or any ordinance of a city which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commercial clause of the United States constitution."

It was argued that the statute in question is but the legitimate exercise of the police power of the state. What is the "police power," conceded to and proper to be exercised by the state? About this eminent jurists have differed, and have found it difficult to draw the line between it and the powers granted to the general government. Mr. Justice STRONG, in delivering the opinion of the court in *Railroad Co. v. Husen*, 95 U. S. 465, said, on this subject:

"It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe v. Railroad Co.*, 27 Vt. 149: 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state, according to *sic utere tuo ut alienum non ledas*, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as national persons are concerned."

It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted with contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 7 How. 283, by Mr. Justice GIER, in the sacred law of self-defense. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious and infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. I do not deem it necessary to review the cases on this subject. It was really disposed of in *Gibbons v. Ogden*, the reasoning of Chief Justice MARSHALL being, to my mind, conclusive, and, as expressed in said case, never having been departed from in matters where exclusive jurisdiction is given to congress. As he well says: "The nullity of an act inconsistent with the

constitution is produced by the declaration that the constitution is supreme." Mr. Justice MILLER, in *Henderson v. Mayor*, 92 U. S. 259, on this question says:

"It is clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

I conclude that the police power of a state cannot be held to embrace a subject confided exclusively to congress by the constitution of the United States. If the subject-matter of state legislation is included in the exclusive grant of commercial power to congress, then the state enactment is void, even if it passed in the exercise of the police power of the state. The authorities in support of this are numerous, and from them I cite *Railroad Co. v. Husen*, 95 U. S. 465; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851; *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. Rep. 681.

Other questions are submitted by counsel for petitioner, but, holding as I do on the matters I have mentioned, I do not find it necessary to pass upon them.

For the reasons that I have given I conclude that the act of the general assembly of the state of North Carolina entitled "An act to protect seed buyers in North Carolina," being chapter 331 of the Acts for the year 1891, is inoperative and void, and that the petitioner is in custody in violation of the constitution of the United States. I therefore order that he be discharged from custody.

STRAUSKY *et al.* v. ERHARDT, Collector.

(Circuit Court, S. D. New York. November 17, 1892.)

1. CUSTOMS DUTIES—ACT OF MARCH 3, 1883—HOLLOW WARE.

Blue and white kitchen utensils, consisting of pots, kettles, saucepans, coffee-pots, and similar ware, made of sheet steel, and glazed or enameled, held not to be dutiable as "hollow ware, coated, glazed, or tinned," under Schedule C, par. 201, at 8 cents per pound, but dutiable at 45 per cent. *ad valorem*, as "manufacturers' articles or wares" composed wholly or in part of iron, steel, etc., under Schedule C, par. 216, of the act of March 3, 1883.

2. SAME.

"Hollow ware" means cast-iron ware, in the act of 1883.

At Law. Motion for a direction of a verdict. Granted.

Maurice Strausky & Co. imported into the port of New York, in January, February, and March, 1890, certain steel kitchen utensils, hollow in form, glazed or enameled, blue and white, which he put upon the market, in his trade circulars, as "Strausky's Steel Ware." The collector classified them under Schedule C of the act of March 3, 1883, as manufactures of steel, etc., (paragraph 216,) and assessed duties

thereon at 45 per centum *ad valorem*. The importers protested and brought suit claiming the merchandise to be dutiable at 3 cents per pound as "hollow ware," under the same schedule and act, (paragraph 201.) The testimony of wholesale dealers was to the effect that, in the trade, the term "hollow ware" was restricted to cast-iron utensils, and did not cover the articles in suit. At the close of the testimony, Asst. U. S. Atty. Henry C. Platt moved for a direction of a verdict for the defendant on the following grounds: (1) That congress had defined the tariff meaning of the term "hollow ware," in the first act in which the words had been used, viz., the act of March 2, 1861, where it was associated (paragraph 44) solely with castings of iron; and in the act of June 30, 1864, (paragraph 352,) the same association was made of hollow ware with cast-iron articles exclusively. (2) That the evidence established the fact that the trade meaning of the term corresponded with the congressional definition. (3) That the rulings of the treasury department had always been in conformity with such interpretation of the term.

W. Wickham Smith, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) Upon examination of the prior acts, I am satisfied that congress was of the understanding that "hollow ware" meant vessels of this general kind, which we have here, made of cast iron. For the reason, therefore, that there seems to have been a congressional meaning given to the words "hollow ware," and embodied in statutes before the passage of the act of 1883, I assume that congress intended to use the words with the same meaning in the later act that it did in the prior act. Verdict directed in favor of the defendant.

CARPENTER STRAW-SEWING MACH. CO. v. SEARLE *et al.*

(Circuit Court, S. D. New York. November 15, 1892.)

1. PATENTS FOR INVENTIONS — REISSUE — NEW ELEMENT — STRAW-BRAID SEWING MACHINE.

Reissued letters patent No. 10,600, granted May 26, 1885, to the Carpenter Straw-Sewing Machine Company, as assignee of Mary P. C. Hooper, upon original letters patent dated January 4, 1876, for improvements in straw-braid sewing machines, are void as to the amended fifth claim, wherein a new element, viz., a lip, is added to the combination claimed.

2. SAME — REISSUE — WHAT CONSTITUTES "THE SAME INVENTION."

For a reissue to be valid as covering "the same invention" as that in the original, within the meaning of Rev. St. § 4916, the patentee must have described and intended to secure in the original the invention of the reissue.

3. SAME — BROADENING OF CLAIM — LACHES.

Where a claim in reissued letters patent covers a combination to which a new element has been added, it is in legal contemplation "broadened," and is invalid when it covers machines used for long years by innocent parties, without infringe-

ment of the original patent, with the knowledge of the patentee, and without interference by him. *Hubel v. Dick*, 28 Fed. Rep. 132, followed.

4. SAME—NARROWING OF CLAIM—LACHES.

Even where the invention covered by reissued letters patent is described in the original and the claim of the reissue is narrower, but covers machines used for long years by innocent parties without molestation and without infringement of the original patent, such narrowed claim is void. *Miller v. Brass Co.*, 104 U. S. 350, followed.

In Equity. Suit by the Carpenter Straw-Sewing Machine Company against Haskell A. Searle and others for infringement of a patent. Bill dismissed.

M. B. Philipp and A. J. Dittenhoefer, for complainant.

Charles Howson and Stephen H. Walker, for defendants.

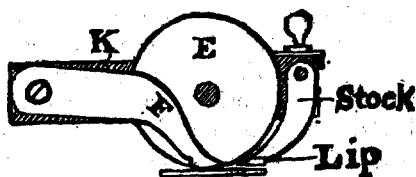
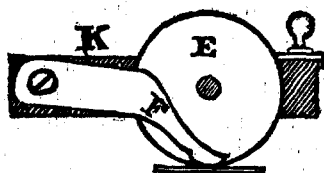
COXE, District Judge. This is an action in equity, based upon reissued letters patent, No. 10,600, granted to the complainant, as assignee of Mary P. C. Hooper, for improvements in machines for sewing straw braid. The reissue is dated May 26, 1885, 9 years, 4 months, and 22 days after the original, which bears date January 4, 1876. The defenses are—*first*, that the reissue, as a reissue, is void; *second*, insufficiency of description in specification and drawings; *third*, lack of novelty and invention; *fourth*, noninfringement.

The fifth claim only is involved. It is as follows: "(5) The combination of the presser foot, F, the lever guide, K, carrying the presser foot, the roller guide, E, and the lip, substantially as described." The words "and the lip" do not appear in the fifth claim of the original. Thus a new element, the lip, has been added to the combination of the claim. In the original specification the inventor states as follows: "The invention further consists in the combination of a presser foot, a lever carrying the presser foot, and a roller guide." This sentence appears in the reissue with the words "and a lip" added. The original says: "Said strips of braid are introduced under a front lip, and from thence under a presser foot, F, to and under a rising and falling back clamp, G." For the first five words of this quotation the reissue substitutes the following: "The back strip of braid is." Both original and reissue have the following statement: "The front lip, under which the braid is introduced, the guide wheel or roller, E, and the presser foot, F, are all carried by a lever, K," etc. No other mention of the lip is found in the original patent. It will be observed that the description of the lip is vague, shadowy and uncertain. With the single statement that the braid is introduced under a front lip which is carried by the lever the specification, on this subject, begins and ends. The lip is undesignated by a letter of reference, its location is not pointed out or its function described. There is absolutely nothing to indicate that it was to operate as "a separator" or perform the important functions attributed to it in the reissue. The lip nowhere appears in the drawings or in the model filed in the patent office. Indeed, it would be impossible to attach a lip to the machine shown in the model and drawings. A metal stock must be added to support the lip.

The discrepancy between the original and the reissue can best be illustrated by placing diagrams of the two machines side by side:

Original.

Reissue.



It will be observed that the metal stock, carrying the lip, which is essential to the reissue, is entirely omitted from the original.

I am constrained to think that no one, however skilled in the art, could develop, from the specification, model and drawings of the original patent, the machine which is now put forward as an embodiment of the fifth claim of the reissue. The proposition that the omissions could be supplied by picking up suggestions found here and there in the prior art "is entirely too obscure and remote." *Ives v. Sargent*, 119 U. S. 652, 663, 7 Sup. Ct. Rep. 436. The drawings of the original were altered in the reissue by removing that part of the braid which projects beyond the table and which shows the strips of braid as being separated. At this point, beyond the table, a lip could not operate to separate the braids or press them upon the bed plate. The drawings of the original were in accordance with the statement of the specification that the strips (not the back strip only) are introduced under a front lip. In other words, the drawings of the original conform to the description of the original and are in direct conflict with the theory of the reissue that the "back strip of braid is introduced under a front lip." The drawings as they appear in the reissue are not so manifestly inconsistent with that theory.

The claim of the original patent was, in the words of the complainant's expert, "too broad." In plain language, if not anticipated, it was restricted to such narrow limits by letters patent No. 94,046 to Sidney S. Turner, dated April 24, 1869, as to render it valueless. Those engaged in the business of sewing straw braid had, therefore, nothing to fear from the fifth claim of the original. Complainant admits that a machine substantially like the alleged infringing machine was put on the market in the summer of 1877. There is no doubt whatever that for at least five and a half years prior to the application for the reissue a large number of such machines were in use in various factories. These machines were covered by patents issued subsequent to the original. For at least five years prior to the application for the reissue this use was known to the patentee. Concededly these machines could not be made to pay tribute under the original fifth claim. If they can be held

at all under the fifth claim of the reissue it is only by the introduction of the lip.

The excuses which are offered for the alleged errors in the original drawings, specification and model and for the long delay in applying for the reissue are, it is thought, insufficient within all the authorities. We have, then, the following facts: *First*, an original patent and a reissue nine years afterwards. *Second*, the introduction in the claim of the reissue of an element not found in the corresponding claim of the original. *Third*, the element thus introduced not found in the drawings or model of the original and but vaguely referred to in the specification. *Fourth*, drawings altered in the reissue so as not to be palpably inconsistent with the new claim. *Fifth*, adverse equities existing during a period of at least five years. It is thought that a reissue cannot be upheld in such circumstances. The mischief at which the reissue decisions strike is present here in all its objectionable features. The original claim was, practically, invalid. It protected nothing. The public had nothing to fear from that claim. In the light of this fact other parties built and used machines which, for aught that appeared in the original, they had a perfect right to make and use. For years they were permitted to do this, unmolested and without notice. They are now, after nine years' delay, confronted with a new and different claim which makes unlawful that which was perfectly lawful before. The original claim being dormant and useless during this long period the attempt is now made to reconstruct from it a claim that is useful. The effort is to make something out of nothing and in that sense the claim is broadened.

So much has been written on the subject of reissued patents that confusion often arises as to the grounds upon which they have been held invalid. Laches need not be present in all cases. I understand the law to be that a reissue is invalid—*First*, if its claim is broadened after unexcusable delay on the part of the patentee; and, *second*, if the claim covers a different invention from the one actually described and shown in the original. The statute (section 4916) provides for "a new patent for the same invention," and there can now be little doubt as to the meaning of this phrase. What say the authorities? In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, the court, after reviewing the decisions, restates the rule as to the power to reissue. It also states the qualifications to the rule, the first of which is "that it [the reissue] shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original." In other cases the court uses the following language:

"The mistake of the patentee [or his assigns] seems to have been in supposing that he was entitled to have inserted in a reissued patent all that he might have applied for and had inserted in his original patent. The appellant produces on the argument exhibits tending to show that the patentee before obtaining his original patent had made and done all those things which are embraced in or covered by the reissued patent. If this were true,

it would be nothing to the purpose. A reissue can only be granted for the same invention which was originally patented. * * * Hence there is no safe or just rule but that which confines a reissued patent to the same invention which was described or indicated in the original." *Manufacturing Co. v. Ladd*, 102 U. S. 408.

"If he [the patentee] was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent. * * * The law does not allow them [patentees] to take a reissue for anything but the same invention described and claimed in the original patent." *James v. Campbell*, 104 U. S. 356.

"We are of the opinion that the present reissue is invalid so far as the first claim of it is concerned because it is not for the same invention as the original patent, and is therefore within the express exception of the statute." *Freeman v. Asmus*, 145 U. S. 226, 241, 12 Sup. Ct. Rep. 939.

"The reissue is not only for a broader claim made many years after the original was granted, but it is for a different invention." *Matthews v. Machine Co.*, 105 U. S. 54.

"There was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands and which have no short or sectional bands." *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537.

"We are also of opinion, however, that the reissue is void on the other ground, viz., that it contains new matter introduced into the specification, and that it is not for the same invention as that described in the original patent. * * * In this view, therefore, the case comes within the rule as stated in *Coon v. Wilson*, 113 U. S. 268, 277, 5 Sup. Ct. Rep. 537. There, as here, the lapse of time and laches based upon it were considered immaterial, because the reissue patent was for a different invention from that described in the original." *Ives v. Sargent*, 119 U. S. 652, 7 Sup. Ct. Rep. 436.

"The question of laches is perhaps immaterial, for the reissue of the Campbell patent was not for the same invention described and claimed in the original." *Hartshorn v. Barrel Co.*, 119 U. S. 664, 7 Sup. Ct. Rep. 421.

"There is no evidence of any attempt to secure by the original patent the inventions covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned. In other words, those eight claims are not for the same invention which was originally patented." *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. Rep. 38.

"And as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. * * * The evident object of the patentee in seeking a reissue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention. This result the law, as we have seen, does not permit." *Russell v. Dodge*, 93 U. S. 460.

"It seems to us impossible to read this section [4916] carefully without coming to the conclusion that a reissue can only be granted for the same inven-

tion which formed the subject of the original patent of which it is a reissue. * * * By a new matter we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue." *Powder Co. v. Powder Works*, 98 U. S. 126, 137, 138.

Mr. Walker sums up a review of the authorities thus:

"Therefore no reissue claim can stand any longer upon a model alone, nor even alone upon a drawing of an original; and indeed neither models, drawings nor descriptions, nor all of them together, can support a reissue claim, except when the description in the original letters patent shows that the invention covered by that claim was intended to be secured in the original." *Walk. Pat. § 233*.

These quotations, which have perhaps been multiplied unnecessarily, leave no room for doubt that unless the court can find that the invention of the reissue is described as the invention in the original, and that the patentee intended to secure it as his invention in the original, the reissue is invalid,—it is not for the same invention. The question is not what the patentee actually invented, but what he said about it in the original, and if it appears from the original that the invention of the reissue was an afterthought not described or intended to be claimed, the reissue falls. Tested by this rule I cannot think that the patentee described and intended to secure in the original the invention of the fifth claim of the reissued patent. Everything points to a different conclusion. The model, the drawings, the statement of invention, the description of the combination and the claim, all point to the inference that it was not the purpose of the inventor to include the lip in the combination. The omission from the model if it stood alone might be regarded as a mistake; the drawings, the description and the claim, considered separately, might be treated as mistakes, but it is almost incredible that four mistakes of this character should occur and continue unnoticed for nine years. If we start with the supposition that the invention was what the patentee declared it to be in the original, we find model, drawings, description and claim in perfect harmony. The model shows a combination of three elements. So do the drawings. The description expressly states that the invention consists in such a combination, and the claim claims it. If, on the other hand, the attempt is made to establish the proposition that the invention of the original was what the patentee declares it to be in the reissue, we find the path beset with difficulties, contradictions and inconsistencies at every turn. Success in this undertaking can only be reached by a resort to the most heroic measures. Delays and tergiversations must be excused, omissions must be supplied, alterations made and a series of plain and consistent statements must be pronounced to be mistakes. It is, therefore, thought that the reissue is not for the same invention as the one actually described in the original.

The able brief filed by the complainant contains the following frank and clear statement:

"If the fifth claim of the Carpenter reissue were broader than any claim of the original patent or covered a machine that was not covered by a claim in the original patent, under the decisions of the supreme court it would probably not be valid, but this is not the case with the fifth claim of the Carpenter reissue."

This is unquestionably a correct expression of the law. If the claim has been broadened after nine years' delay the reissue is void.

I understand the case of *Hubel v. Dick*, 28 Fed. Rep. 132, as authority for the proposition that where a broad invalid claim has been permitted to remain unchanged for a long series of years, until adverse equities have arisen, and a reissue is granted with a new claim, which, though for a larger combination, seeks to hold as infringements machines which have been lawfully made for years, the reissue is broadened and is therefore void. Adding a new element in such circumstances makes an independent invention and thus, in legal contemplation, broadens the claim. At page 137 the court says:

"But it is said that the sixth claim of the second reissue is narrower than the corresponding claim of the first reissue, and, therefore, it is not within the scope of the cases which have been cited. It is, in a certain sense, a narrower claim, inasmuch as it contains a larger number of elements; but it describes a different invention. The claim is not a different mode of describing that which was specified in the first reissue, and is not a limitation and narrowing of the invention which was described therein, but it describes an independent and important invention, and thereby, after a lapse of five years, the patent was enlarged. The principles in regard to the invalidity of reissues, when unreasonably delayed, have become so well established that they cannot be successfully avoided by adding, after an unreasonable delay, in a second reissue, another element to a combination described in a void claim in the first reissue, the last added element making a different and previously unclaimed, invention."

For these reasons I am constrained to hold the fifth claim invalid.

But assume that the foregoing propositions are wrong; assume that the invention of the reissue is described in the original and that the claim of the reissue is narrower; how then stands the case? It is thought that no one can read the argument in *Miller v. Brass Co.*, 104 U. S. 350, and the other decisions which follow it, without being impressed with the conviction that the injustice which the court sought to correct was the attempt to levy tribute upon innocent parties who did not infringe the original patent and who had a right to feel themselves secure after long years of unmolested use. It cannot be doubted that any reissue which permits this wrong is within the mischief of these decisions. This case is in some respects *sui generis*, but there can be no doubt that, if sustained, the reissue will accomplish the very wrong which has been so sharply denounced by the supreme court. If an inventor, holding a patent with a void claim, has slept upon his rights for years until other rights have become fixed, what possible difference can it make, upon principle, whether he invades those rights and secures an

inequitable advantage by means of a broader claim or a narrower claim? The complainant here seeks to do by a narrower claim (assuming it to be narrower) precisely what other complainants have vainly sought to do by an expanded claim. It cannot be doubted that the attempt is as inadmissible in the one case as in the other. In both cases the patents, after years of acquiescence, and in the light of subsequent events, are manipulated to grasp devices which the originals could not lay hold of. To permit this to be done in any case violates the spirit of the law.

As these views dispose of the case it is not necessary to consider the other defenses. The bill is dismissed, with costs.

PHILADELPHIA NOVELTY MANUF'G CO. v. WEEKS.

(Circuit Court, S. D. New York. December 2, 1892.)

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PRIOR ART—INFRINGEMENT.

Letters patent No. 226,402, issued April 13, 1880, to Isaac W. Heysinger for a device for filing and binding papers, if sustainable at all, must, in view of the prior state of the art, be limited strictly to the structures shown and described; and, as the first claim is for a filing clip composed of a clamping arm and a base, the former being provided with a heel, which holds the arm locked when open, the heel is an essential element, and there is no infringement where this is lacking.

2. SAME—NOVELTY—MECHANICAL SKILL.

Letters patent No. 274,941, issued April 3, 1883, to Isaac W. Heysinger for a machine for inserting and clinching staples, are void as covering improvements obviously the result of mere mechanical skill.

In Equity. Bill by the Philadelphia Novelty Manufacturing Company against Albertus A. Weeks for infringement of patents. On final hearing. Bill dismissed.

Joshua Pusey, for complainant.

Hector T. Fenton, for defendant.

COXE, District Judge. This action is based upon two letters patent, granted to Isaac W. Heysinger and by him assigned to the complainant. The first, No. 226,402, is dated April 13, 1880, and is for a device for filing and binding papers. The second, No. 274,941, is dated April 3, 1883, and is for a machine for inserting and clinching staples. Both patents relate to tools for fastening papers together, which are adapted for use upon the desks of lawyers and conveyancers. The defenses are the usual ones—lack of novelty and invention, aggregation and noninfringement. It is freely admitted by the complainant that the patentee was compelled, by reason of the prior art, to move within exceedingly narrow limits. Tools very similar to his, operating in substantially the same manner and producing the same result, were in use at the date of his patents. The complainant's brief, after considering pre-existing structures, contains the following:

"Therefore, the Heysinger tool, broadly considered, is not new, the improvements being of the specific character described in the specification and pointed out by the claims, whereby certain minor advantages or conveniences are secured which are absent in previous tools of that general class."

By this frank admission, which is but a fair statement of the situation as established by the proof, the consideration of the patents is limited to small matters of detail which it is said cheapen the patented tool and make it more convenient for handling.

It is very clear that the claims of the patent of 1880 must be narrowly construed if they are to be sustained at all. The first claim covers a paper-filing clip with a guide slot for the staple driver and a recessed clinching anvil beneath the slot. The clip is composed of a clamping arm and a base, the former being provided with a heel, which holds the clamping arm locked when open. The specification also describes a pin on the base plate for holding the papers, but its use is made optional. It is not an essential ingredient of the claim. The heel, however, cannot fairly be omitted from the claim. It is a part, and an important part, of the clamping arm, expressly made so by the drawings and description. Without the heel the clip will not operate in the manner designated. Moreover, in order to remove all misunderstanding, the patent of 1883 limits the patent of 1880 to a spring clip having a heel for holding the arm, when open, in a locked position, from which position it is released by pressure on the slotted end, which then falls with a snap upon the papers and drives them down upon the pin before referred to. Conceding that the prior art permits a broad construction, the court would hardly be justified in omitting a part which the patentee has taken such pains to describe as an indispensable element of the claim. The defendant does not use the heel.

The second claim is for a detachable staple driver and the third claim is for a combination of the clip of the first claim and the staple driver of the second. Here, too, the claims must be limited strictly to the structures shown and described. So limited, the defendant does not infringe. The defendant's staple driver is made in substantial conformity to the tool patented to William J. Brown in 1879. At least, it is much nearer the Brown device than the Heysinger device. It is unnecessary to refer in detail to the many differences between defendant's device and the device of the second claim. They are not radical, and relate to minor matters of construction, but they are amply sufficient to differentiate the two in an art already crowded to repletion. Of course, if the first and second claims are not infringed, the third cannot be.

Regarding the patent of 1883 but little need be said. The first, third and seventh claims are pointed out in the complainant's brief as embodying the substantial features of the patented improvements. I cannot think that these claims cover patentable structures or combinations. As already noted, the field of invention, even in 1880, was a limited one. In 1883 it was still further circumscribed. Heysinger and others had, in the mean time, crowded in and left very little space

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in which the inventor could operate. After the patent of 1880 there was no room for the patent of 1883. It deals with improvements which are only such changes of form as would suggest themselves to ordinary workmen. For instance, ring staples, four-prong staples and other staples, varying in form, were very old. It was obvious that many of these could not be driven through the oblong slot and clinched on the anvil of the 1880 patent. It would naturally occur to a mechanic who had been accustomed to drive round bolts through round holes to make the hole square if he were given a square bolt to drive. So one familiar with the process of driving staples through paper would see at once the impossibility of making a cruciform fastening through an oblong slot. If he wished the staples to cross at right angles he would naturally make a cross-shaped slot and clinching base. If he wished to use a staple with a suspending ring he would at once see the necessity of making room for the ring to pass. Such changes seem so perfectly obvious that he who made them would require no assistance from the prior art. If, however, he needed advice, he had only to turn to the Magill and other patents to find the information ready at his hand. Conceding that the patent in hand shows improvements over the patent of 1880, they are not improvements which the law recognizes as patentable; they may be more convenient, but they perform no new function and produce no new result. The bill is dismissed, with costs.

BERGNER *et al.* v. KAUFMANN *et al.*

(Circuit Court, S. D. New York. November 29, 1893.)

DESIGN PATENTS—PATENTABILITY—ALBUM CASES.

Design patent No. 20,347, issued November 25, 1890, to Frederick Bergner, for an album case set upright on a baseboard, and having on its exterior an oval, ornamental frame, with an open center, is invalid, since the patentee invented neither the album case nor the ornamental frame, but merely conceived the idea of placing the ornament on the case; and this conception is not patentable, for the statute only provides for patents on designs for articles of manufacture and for ornaments to be placed upon or worked into such articles.

In Equity. Suit by Frederick Bergner and others against Isaac Kaufmann and others for infringement of a patent. Bill dismissed.

W. P. Preble, Jr., for orators.

A. v. Briesen, for defendants.

WHEELER, District Judge. This suit is brought upon design patent No. 20,347, dated November 25, 1890, for an album case set on a baseboard in an upright or nearly vertical position, having on its exterior an oval, ornamental frame with an open center. The defendants put diamond-shaped mirrors, with such ornamental borders, on similar album cases. This style of album case is not new. The patent therefore must be held to be for an ornament upon the case as an article of manu-

facture, under the third clause of section 4929, Rev. St., providing for design patents. Such ornamental frames were old, and well and generally known. The orator, who is the patentee, testifies, in answer to question 25: "I make no claim to be the designer of this frame." Besides this, the defendants' mirror does not look like this frame, and would not infringe the patent for this ornament.

The orator did not design an album case, proper; nor an ornament, proper, for an album case; but he appears to have conceived the idea of placing such an ornament upon an album case. The statute provides for patents upon designs for articles of manufacture, and for patents upon ornaments to be placed upon or worked into such articles, but does not appear to provide for a patent for the mere placing of an ornament on such articles. This patent does not, therefore, appear to be valid, or to be infringed. Let a decree be entered dismissing the bill.

MACK v. SPENCER OPTICAL MANUF'G Co. et al.

(Circuit Court, S. D. New York. November 28, 1892.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—EVIDENCE.

A patent should not be overthrown on the uncorroborated testimony of a witness 73 years old, professing to describe in minute detail alleged anticipating devices which he constructed 80 years before in the ordinary course of his trade; especially when it does not appear that anything has occurred during that time to aid or refresh his recollection. *The Barbed-Wire Patent*, 12 Sup. Ct. Rep. 443, 143 U. S. 275, followed.

2. SAME—INVENTION—OPERA-GLASS HOLDERS.

Claims 4 and 7 of letters patent No. 263,112, issued November 28, 1882, to William Mack, for improvements in opera-glass holders, show patentable invention, and are valid as covering a detachable telescopic opera-glass holder having at the upper end a clutch or fastening device adapted to clasp the transverse bars or cylinder of an opera glass. *Mack v. Levy*, 48 Fed. Rep. 69, distinguished.

3. SAME—MECHANICAL SKILL.

The opera-glass holder of this patent could not have been the result of mere mechanical skill operating upon the mirror holders, monkey wrenches, car couplers, gun wipers, toothbrushes, and mops of the prior art, but required the exercise of inventive faculty.

4. SAME.

Letters patent No. 339,543, issued March 13, 1889, to the same inventor, possess no patentable invention, in so far as they merely provide for corrugations on the telescopic sections of his prior patent to prevent twisting, and for the substitution of a longitudinally forked attaching device for the original clutch.

In Equity. Suit for infringement of two letters patent granted to William Mack. These patents have been the subject of judicial decision, on final hearing, in *Mack v. Levy*, 43 Fed. Rep. 69-73; on contempt proceedings, in the same case, 49 Fed. Rep. 857; and on motion for a preliminary injunction in the suit at bar, 44 Fed. Rep. 346. Decree for complainant.

H. A. West, for complainant.

Charles C. Gill, for defendants.

Coxe, District Judge. This action is founded upon two letters patent Nos. 268,112 and 399,543, granted to complainant for improvements in opera-glass holders and dated, respectively, November 28, 1882, and March 12, 1889. The decision in *Mack v. Levy*, 43 Fed. Rep. 857, establishes the following propositions: *First*, that the patent of 1882 must be narrowly construed because of similar structures made by one Stendicke; *second*, that even when so limited it discloses a patentable invention; *third*, that the claims must be strictly confined to the clutching device described; *fourth*, that the fourth and sixth claims which cover this clutching device were the only claims infringed; *fifth*, that the fourth and fifth claims of No. 399,543, the ones involved, if they describe an invention at all, must be limited to a handle in telescopic sections having a longitudinally forked attaching device at the end of the upper section; *sixth*, that so construed the said claims were not infringed. These propositions, so far as applicable to the present controversy, must be regarded as settled law.

A different state of facts is, however, presented by the present record. The exhibits introduced by Stendicke were constructed in 1890, in supposed resemblance to a cane made in 1856, and an opera-glass holder made in 1862, over a quarter of a century before. In the case of *Mack v. Levy*, there was nothing to throw discredit upon the testimony of this witness and it was taken for granted that the exhibits fairly represented what he had made 28 and 34 years before. Upon the present record, however, this evidence must be disregarded. The situations are very different. The witness has reached that period of life when his faculties, necessarily, must be somewhat impaired. That a person, 72 years of age, should be able to recollect the minute details of a tool made by him when he was 38, would, in any circumstances, be extraordinary. But should it appear that during this long interval he had been constantly engaged in working at his trade—making hundreds and probably thousands of optical instruments—should it be shown also that nothing had occurred for 30 years to direct his attention to the particular tool in question and that the case is barren of the slightest circumstance to aid or refresh his recollection, such an exhibition of memory would be amazing, if not miraculous. If any one doubts this let him attempt to recall the minute details of a trivial event which occurred in his daily vocation 30 years ago. A conveyancer who should swear to the *minutiae* of a deed which he drew in 1862 and has not seen or thought of since, would be doing no more than Stendicke has attempted. If the conveyancer had made an opera-glass holder or the optician had drawn the deed the task would be less difficult, for each act would be unusual and out of the ordinary course of business. But is it probable that any human intellect can retain with accuracy for 30 years the petty details of an eventless and humdrum occupation? It is, of course, possible that such testimony may be true, but the chance that it may not be true should be sufficient to deter a court of equity from striking down a valuable patent upon the strength thereof alone.

Not only is Stendicke's story inherently improbable, it is wholly without corroboration. True, a son of the witness was asked if he had an indistinct recollection of his father having made the Jarvis holder and he answered, "Yes." It appears, however, that the Jarvis holder was made, if at all, two years before the son's birth. Although the son may have inherited a memory of phenomenal power and capacity it would be hardly safe to trust it as to events which occurred two years before he was born.

There is no proof that the holder was ever put to practical use and the description of both exhibits is inaccurate and uncertain. In short, Stendicke's story is replete with contradictions and inconsistencies; it is a bewildering snarl of improbabilities. It would be too harsh to say that the truth is not in it; enough that the court has not the necessary analytical capacity to extract the truth from it. Even the most favorable view of Stendicke's testimony leaves the matter in doubt. It is wholly insufficient to carry conviction to the mind that the witness in 1862 made a structure like the one which, for the purposes of this controversy, he constructed in 1890. Nothing can be more certain than this. A fair doubt as to its reliability is always sufficient to dispose of testimony of this character. Such a doubt exists here. It is unnecessary to find, therefore, that the testimony is untrue; it is enough that it is unreliable. All that the court says upon this subject in the *Barbed-Wire Patent*, 143 U. S. 275, 284, 12 Sup. Ct. Rep. 443, is applicable here. I am familiar with no case where the court has overthrown a patent upon the unsupported statement of a witness as to acts done by him 30 years before in the ordinary course of business, especially when his story is inherently improbable and is contradictory in several important particulars. *Coffin v. Ogden*, 18 Wall. 120; *Telephone Case*, 126 U. S. 546, 8 Sup. Ct. Rep. 778; *Tatum v. Gregory*, 41 Fed. Rep. 142; *Electrical Co. v. Julien Electric Co.*, 38 Fed. Rep. 117, 127; *Thayer v. Hart*, 20 Fed. Rep. 693, and cases cited.

The Stendicke exhibits being out of the case, there is nothing which anticipates or materially limits the scope of the patent. A great number of patents and exhibits have been introduced, but it is thought that a fair summary of the prior art is that it shows each element of the combination separately, but not the combination itself.

The question of patentable novelty is not an open one; it has already been decided in favor of the complainant and that, too, when the invention was confined within much narrower limits than now. That there was a display of the inventive faculties can hardly be doubted.

The contention that an examination of the mirror holders, monkey-wrenches, car-couplers, gun-wipers, tooth-brushes and mops of the prior art would suggest to the skilled mechanic the telescopic, detachable opera-glass holder of the patent, cannot be maintained. The skilled mechanic might study them till doomsday and he would not think of it. Brains were necessary, not hands only, to connect a car-coupling tool or a tooth-brush with an opera-glass. To do this required thought—an exercise of the inventive faculties—which a mechanic does not possess.

The suggestion that any one could have done what the complainant did recalls the reply made by Charles Lamb to the young pedant who declared that he could write like Shakespeare if he had a mind to. "Yes," said Lamb, "if you—had—the—mind—to."

Mack was the first to produce a detachable, telescopic opera-glass holder. His was the first patent ever granted for such a structure. The detachable holder has become popular. Vast numbers of them are sold. All prominent opticians and jewelers keep them in stock. They may be seen at every playhouse. The complainant having conceived this new thought and embodied it in a practical device should be entitled to the rewards of his genius and labor. There can be no justice in restricting him to a construction which enables every one, who has sense sufficient to substitute a different clutch, to pick and plunder the patent with impunity. It is thought then that the patent covers any detachable telescopic opera-glass holder having at the upper end a clutch or fastening device adapted to clasp the transverse bars or cylinder of an opera-glass. Whether it covers others structures it is unnecessary to decide in this suit.

I do not understand that defendants are charged with infringement of the first claim. The claim is almost broad enough to carry out the patentee's expressed desire "to claim broadly holding an opera glass to the eyes by means of a handle attached thereto." It covers a detachable handle no matter of what construction and without regard to the place where it is fastened to the glass or the manner of its fastening. Substantially the same criticism can be made of the second and third claims. The fifth and sixth claims are restricted in terms and it is at least doubtful whether they are infringed.

The fourth and seventh claims describe and claim the invention with sufficient accuracy and both are infringed. They are as follows:

"(4) The combination with an opera glass, A, of the handle, B, in sections, as described and arranged, to close telescopically, the end section thereof provided with a fastening device or clutch in the manner set forth." "(7) As an article of manufacture an opera-glass handle made in sections and provided at its end with clutching devices, substantially as described."

Each of these claims, when construed in the light of what has been said heretofore, describes a detachable, telescopic opera-glass handle with a fastening device at the upper end to clutch one of the transverse bars or cylinder of the glass. The three holders of the defendants have all of these elements and both claims are infringed by each one of these holders.

Regarding the patent of 1889 but little need be said. The holder therein described is the holder of 1882 with corrugations on the telescopic sections to prevent twisting and with a longitudinally forked attaching device substituted for the clutch of the prior patent. The court, in *Mack v. Levy*, decided that there was nothing patentable in applying well-known frictional devices to the telescopic sections. This leaves nothing but the longitudinally forked end. If invention resides anywhere in the patent it must be found in the fastening mechanism. In

his former patent the complainant seems to recognize that this was only substituting one well-known fastening for another, for he says, "It is evident other forms of clutches and fastenings may be made within wide scope, as I do not wish to confine myself to fastenings shown." This proposition is unquestionably true. Mere changes of form in the clutching mechanism which produce no new result would readily occur to the skilled mechanic. The prior art is full of similar forks; they are even shown as applied to opera glasses. Indeed, it would seem that the idea might have occurred to any one who had seen an old fashioned clothes-pin. The first claim has an additional element—a tube or socket—but the defendants are not charged with infringing this claim. It follows that the complainant is entitled to the usual decree upon claims 4 and 7 of the patent of 1882.

KRICK v. JANSEN.

(Circuit Court, S. D. New York. August 25, 1892.)

1. PATENTS FOR INVENTIONS—PLEADING—ALLEGATION OF OWNERSHIP.

In a bill for infringement it is insufficient merely to allege that complainant became the owner of the patent on a certain date, without also alleging continued ownership at the time of filing the bill.

2. SAME—ALLEGATION AS TO PRIOR USE AND SALE.

A bill for infringement is demurrable when it merely states that the alleged invention had not been in public use or on sale for more than two years prior to the application with the patentee's consent or allowance.

3. SAME—NOVELTY—DEMURRER—FLORAL DESIGNS.

Letters patent No. 408,416, issued to William C. Krick, are for an improvement in floral designs, whereby, instead of tying single flowers to a toothpick and sticking them into a floral piece, so as to form a letter or design, the letter or design is first cut out of some stiff material, the flowers fastened to it, and when the form is complete it is fastened to the floral piece by toothpicks. *Held*, that a want of patentable novelty is not so manifest on the face of the patent as to render a bill for infringement demurrable.

In Equity. Suit by William C. Krick against Edward Jansen for infringement of a patent. On demurrer to the bill. First ground of demurrer sustained, and second ground overruled.

Isaac S. McGiehan, for complainant.

Goepel & Raegener, for defendant.

TOWNSEND, Circuit Judge. This is a demurrer to a bill in equity for relief for infringement of letters patent No. 408,416 for an improvement in floral letters or designs. The first ground of demurrer assigned is "that it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed for." Under this demurrer, defendant claims that the bill is defective (1) because it states that the alleged invention had not been in public use or on sale for more than two years prior to the application of complainant *with his consent or allowance*; (2) because complainant, while stating the date on which he

became the owner of the patent, has failed to allege ownership at the date of filing his bill. The complaint is defective in both these particulars. *Blessing v. Trageser*, 34 Fed. Rep. 753. The first ground of the demurrer is sustained, with liberty to the complainant to amend within 20 days without costs.

The second ground of demurrer assigned is want of patentable novelty on the face of the patent. The patent is for an improvement in floral letters or designs, whereby, instead of tying single flowers to a toothpick, and sticking them, when so tied, into a floral piece, so as to form a letter or design thereon, the letter or design is first cut out of some stiff material, and the flowers fastened to it. When the form is complete, it is fastened to the floral piece by toothpicks. The question is whether this improvement involves invention. The patentee alleges that he is the first inventor and discoverer of this improvement. He claims that the questions of novelty and utility were heard and decided in his favor by the commissioner of patents, and that his invention has displaced all other methods of making floral designs. The question of patentable novelty is a question of fact, and, except in a very clear case, it ought not to be decided until after an opportunity has been given to submit evidence thereon. *Blessing v. Trageser*, *supra*; *Dick v. Supply Co.*, 25 Fed. Rep. 105. And where this question is doubtful, an extensive use by the public may serve to resolve the doubt in favor of the patentee. *Topliff v. Topliff*, 59 O. G. 1257, 12 Sup. Ct. Rep. 825. I am not satisfied that the want of patentable novelty is so palpably manifest on the face of the patent that the bill of complaint should be dismissed on demurrer. The second ground of demurrer is overruled.

FRANCIS *et al.* v. KIRKPATRICK & Co., Limited.

(Circuit Court, W. D. Pennsylvania. September 17, 1889.)

No. 28.

1. PATENTS FOR INVENTIONS—INVENTION—SHEET-HEATING FURNACES.

Letters patent No. 408,475, granted August 6, 1889, to Evan James Francis and Charles Banfield, for "a bottom for heating furnaces, formed of segregated masses, broken pieces, or fragments of noncombustible material having interstitial passages, and presenting a broken or uneven surface," disclose a patentable invention.

2. SAME—ANTICIPATION.

The defense of anticipation examined, discussed, and overruled.

In Equity. Bill by Evan James Francis and Charles Banfield against Kirkpatrick & Co., Limited, for infringement of a patent. Decree for complainants.

J. I. Kay, for complainants.

D. F. Patterson, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This is a suit for the infringement of letters patent No. 408,475, for a bottom for the heating chambers of sheet-heating furnaces, granted August 6, 1889, to Evan James Francis and Charles Banfield, the plaintiffs, on an application filed December 23, 1887. The patent has a single claim, which is as follows:

"A bottom for heating furnaces, formed of segregated masses, broken pieces, or fragments of noncombustible material having interstitial passages, and presenting a broken or uneven surface, substantially as set forth."

In such furnaces it is necessary that the heat should pass freely under the sheets, in order to heat them uniformly, and, prior to the invention here in question, this was, and long had been, accomplished by a bed of coke of the depth of about six inches, spread over the bottom of the furnace. But there were very serious objections to the use of such a coke bottom. As the coke was combustible, it caused the bottom of the heating chamber to become hotter than the rest of the chamber, and consequently the lower sheets became too hot, and thus were often spoiled. Then, without the exercise of much care, and often in spite of customary care and skill, the ashes and sulphur from the coke adhered to the sheets, marking and spotting them, and also frequently causing several sheets to stick together so as to spoil them. Moreover, the coke bottom had to be often renewed at great expense and extra labor. To remedy these difficulties was the purpose of the invention described in the plaintiffs' patent. The specification states that the noncombustible substances forming the bottom may be broken pieces or fragments of cinder or slag, or oxide of iron, or asbestos, soapstone, etc., furnishing a remarkably cheap and durable bottom, free from dust, ashes, and sulphur, and which does not get hotter than the rest of the furnace; that the segregated character of these pieces or fragments causes interstitial passages to be formed, through which the heated gases are free to pass; and the upper side of the bed presents a broken or uneven surface; and thus the pile of sheets will be heated to the same degree at the top as at the bottom.

The patented improvement is certainly very simple, but the proofs clearly show that it possesses uncommon merit, and has accomplished the most beneficial results, obviating the evils incident to the coke bottom. As soon as it became publicly known, it was immediately and universally adopted in sheet-heating furnaces. That it was novel is indisputable. Under the proofs and the authorities, we do not hesitate to pronounce it to be a patentable invention. *Loom Co. v. Higgins*, 105 U. S. 580, 591; *Magowan v. New York Belting Co.*, 141 U. S. 332, 12 Sup. Ct. Rep. 71; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. Rep. 443.

It is shown that the plaintiffs perfected their invention as early as October, 1887, and in the latter part of that month put the same into public and successful use at the sheet-iron works of Wallace, Banfield & Co., Limited, at Irondale, Ohio. But it is alleged that the plaintiffs were not the original and first inventors, and that for several months before

their alleged invention furnace bottoms composed of broken bricks and of cinder were publicly used at the Canonsburg Iron & Steel Works at Canonsburg, Pa., and furnace bottoms composed of cinder were so used at the works of Summers, Bros. & Co., at Struthers, Ohio, at the defendants' works at Leechburg, Pa., at the Chartiers Iron & Steel Company's works at Mansfield, Pa., and at the Apollo Sheet Mills in Armstrong county, Pa.

As respects the alleged prior use at the Canonsburg mills, the defendants examined five witnesses. Richard S. Jones testifies that about two months before the death of Jack Cole, the then manager, (who died January 11, 1886,) they tried a furnace bottom made of broken bricks, which worked right, but streaked the sheets, and that, after using this brick bottom a week, they took it out, and put in cinder, and thenceforth continued to use cinder bottoms. John Williams agrees substantially with Jones, but there is strong evidence to show that he was not at those works between April, 1885, and May, 1886. John F. Budke, the superintendent of the company, testifies that the broken brick bottom was put in in the fall of 1885, and used until the next summer, and worked satisfactorily. He says:

"I worked that bottom on until the following summer, and Billy Richards, my roller, came to me and told me that Banfield and Francis claimed a patent on the cinder bottom, and I told him that I did not think they could claim a patent on it, and he asked me to try the cinder bottom in the big sheet furnace. I told him I would whenever we had time to alter the furnaces. In the mean time we would mix some cinder with the brick in the small furnace. We did use it in the large furnace in the July following, and have been using it ever since."

It seems, then, from Budke's account, that the use of cinder bottoms at Canonsburg was after he was informed by Richards of the plaintiffs' invention; but that invention was not made until the fall of 1887. The testimony of William H. Richards does not help the defendants. He cannot give any dates, and otherwise his recollection is deficient. The defendants' other witness on this branch of the case, Mark Lewis, Jr., stated: "We used coke at first, then used brick a while, then went back to coke, and then used cinder after that;" but he was not able to fix the date when cinder bottoms were first used. He further stated that he worked at the small furnace in which the broken brick bottom was used at the time it was tried, and he thought it was not used "very long," because pieces of the brick would stick to the sheet, and be rolled out with it, making a long white streak on the sheet. Mr. Lewis was called back to the stand by the plaintiffs in rebuttal, and he then testified that he thought the broken brick bottom was not used "longer than a day or two," and that they then returned to the use of coke bottoms. The plaintiffs rebutted this defense by several witnesses. Enoch Thomas, a roller at those works from 1884 to September, 1886, testifies with particularity about the trial of the broken brick bottom, which took place on his "turn." He says they used it for three heats only; that it marked the sheets and "made them waste." He states: "I told Cole that it

would not do. 'Well,' he says, 'damn it, throw it out.' Then we throwed it out, and that was the end of it. We put coke back in, and worked from that time on coke, until I quit there." Joseph A. Dean, who worked at this mill, first as a doubler, and then as a roller, from April 2, 1885, to April 2, 1890, gives the same account of the trial of the broken brick bottom as Enoch Thomas, and Dean testifies that they used coke bottoms until December, 1887. Reese Johns, a roller, and Robert Johns, a heater, who worked there during the years 1885 and 1886, testify that coke bottoms only were used down until they left, late in the fall of 1886. David Llewellen corroborates this. Elias Williams, a sheet heater, who worked at Canonsburg from September, 1886, to October, 1890, testifies that they used coke bottoms in the "big mill" till the spring of 1888, when they put in cinder bottoms, and that only a short time before was the change made from coke to cinder in the "little mill." George Gittings went to work as a catcher in the little mill March 10, 1887. He testifies that they were then using coke bottoms, and continued to use them as late as Christmas of that year; and he thinks they first introduced cinder bottoms several weeks later.

Such is the substance of the direct evidence on this branch of the case. Now, it is the established rule that he who sets up prior use as a defense to a suit for the infringement of a patent has the burden of proof upon him, and every reasonable doubt is to be resolved against him. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970; *The Barbed Wire Patent*, *supra*. The defendants have not only surely fallen short of that standard of proof, but we think the decided preponderance of the evidence is with the plaintiffs. The only reasonable conclusion is that the use of the broken brick bottom in the fall of 1885 was an unsuccessful experiment, speedily abandoned, and that cinder bottoms were not used at the Canonsburg works until after the public use of them at Irondale.

As to the use at the works of Summers, Bros. & Co., at Struthers, Ohio, little need be said. Undoubtedly the introduction of cinder bottoms into those works was not until after the plaintiffs had completed their invention, and put it into actual practice at Irondale, Ohio. What had been done previously at Struthers did not amount to the practice of the invention, either openly or secretly. The most that can be said is that occasionally,—William Summers states "every time the heater complained about the bottoms being dirty,"—for the purpose of holding the sheets up out of the ashes, a few shovelfuls of cinder were scattered across the rear end of the furnace bottom, when the coke had burned away there, and no coke was at hand to fill in at the rear; the coke, however, elsewhere on the bottom of the furnace being kept replenished. This was done by William Summers, the roller, and Frederick Bailey, the heater, secretly, and knowledge of the fact was carefully concealed from the mill manager. This casual use of cinder did not rise even to the dignity of experiment, for it does not seem to have then occurred to either Summers or Bailey that coke could be dispensed with, and a cinder bottom substituted therefor. It may be that the germ of the in-

vention was in this use of cinder, but it was unperceived. At any rate the matter was not followed up beyond the experimental stage. Such use, therefore, cannot avail as against the plaintiffs. *The Barbed Wire Patent, supra.*

It is significant that in the original answer, which was verified December 16, 1889, the defendants, in describing the construction of their heating furnaces at Leechburg, stated that "up until about a year last past" they had used a layer of coke on the bottom of the furnace, but that "within about a year last past" this layer of coke had been dispensed with. But on December 11, 1890, by an amendment to the answer, they fixed the time when they first substituted a layer of broken cinder for the coke at "some time in the spring of 1887."

The defense of anticipatory use at Leechburg rests upon the oral testimony of seven witnesses, doubtless honest enough, but who speak as to the time when cinder bottoms were introduced there from mere general recollection. No one of them pretends to exactitude, nor is any circumstance mentioned having any natural connection with the main fact, or tending to determine the date with certainty. They testified three years after the event. Upon the unreliability of such testimony, coming even from the best-intentioned witnesses, we need not enlarge. One of these witnesses, Harry E. Sheldon, the manager of the Leechburg works, having from recollection named the spring of 1887 as the time when the change from coke bottoms to cinder bottoms was made, was asked if he had then heard of their use elsewhere. His answer was: "How I first came to hear about cinder bottoms in sheet furnaces I cannot tell. I have been trying to think. Somebody told me, but who it was I cannot recollect; nor do I recollect where." But Sheldon's want of memory is well supplied by George B. Pavitt, a witness on the part of the plaintiffs, and John C. Wallace, a member of the defendant firm, and also a member of the Irondale firm of Wallace, Banfield & Co., who testified in behalf of the defendants. Being asked on cross-examination at which place (Irondale or Leechburg) the cinder bottom was first used, Wallace answered: "To the best of my knowledge, as far as I know anything about it, it was first used at Irondale. That was the first place I knew of its use. By 'Irondale' I mean at the works of Wallace, Banfield & Co., Limited." Pavitt, who is a sheet heater, states that he first saw the cinder bottoms used at the works of Wallace, Banfield & Co., Limited, at Irondale, Ohio, where he was then working, and that he then and there learned that Francis and Banfield were the inventors; that subsequently—to the best of his recollection, in December, 1887—he made a visit to Leechburg, and that they were then using coke bottoms at the defendants' Leechburg works; that on the occasion of this visit he conversed with Mr. Sheldon, the defendants' manager, about cinder bottoms, and he gives that conversation as this: "Mr. Sheldon asked me what I thought of the cinder bottom. I told him that it was a good thing. Then he asked me about what size they broke the tap to put in the furnace, and I told him about the size of an egg. That was the conversation between him and me." At the

time he testified Mr. Pavitt was in the defendants' employ. He seems to be an entirely disinterested and candid witness, and we discover no reason to doubt his truthfulness or the accuracy of his recollection. Moreover, as to his visit to Leechburg in December, 1887, and the then use of coke bottoms at the defendants' works there, Pavitt is directly corroborated by Charles S. Lynn, who was then a sheet heater in the defendants' employ, and Charles Woodhouse, their watchman. Both these witnesses testify that Pavitt on that visit told them, respectively, of the use of cinder bottoms at Irondale, and that very shortly afterwards the defendants made the change from coke to cinder bottoms. They say this change was made in December, 1887. Lynn states that he worked the first heat on the cinder bottom when it was introduced into the defendants' works. In addition to the witnesses just named, the plaintiffs examined 10 other witnesses, who were employes of the defendants at Leechburg, some of them during the whole, and some during part, of the year 1887. We will not undertake to recite their testimony, but content ourselves with saying that, upon the whole evidence, it seems to us clear that the defendants did not begin to use cinder bottoms at their Leechburg works before very late in the month of November, and probably not until December, 1887.

In view of this conclusion, we do not deem it necessary to discuss the evidence touching the alleged anticipations at Apollo and Mansfield, for we find in the brief of the defendants' learned counsel these frank admissions: "It is conceded on all hands that cinder bottoms were used at Leechburg prior to their use at Apollo;" and "nobody questions that they were in at Leechburg before Mansfield." In our judgment, there is no evidence in the case to justify the finding that the plaintiffs' invention was anticipated anywhere.

There is no evidence to rebut the presumption arising from the grant of the patent that the invention was the joint production of the two patentees. Nor is any inference unfavorable to the plaintiffs to be drawn from the fact that they did not take the witness stand. We do not see that there was any occasion for their testifying in their own behalf. Nor do we find in the proofs anything to show that the plaintiffs invited or encouraged the defendants to appropriate their invention, or anything upon which the defendants can rightly base a claim to a license, or which would equitably preclude the plaintiffs from calling upon the defendants for an account. In our opinion, the defendants have failed to establish a defense upon any ground.

Let a decree be drawn in favor of the plaintiffs.

BUFFINGTON, District Judge, concurs.

GEORGE *et al.* v. SMITH *et al.*

(Circuit Court, S. D. New York, November 15, 1892.)

TRADE-MARK.—EXTENT OF APPROPRIATION.—USE FOR ANOTHER PURPOSE.

The first use of the trade-mark "Epicure" by complainants as a brand for packed salmon, and the establishment of a business thereunder, entitled them to protection against the use of it by defendants for salmon, though defendants had previously used it as a trade-mark for canned fruits and vegetables.

In Equity. Bill by George H. George and another against George Waldo Smith and another for infringement of a trade-mark. Injunction granted.

Rowland Cox, for complainants.

Morris S. Wise, for defendants.

COXE, District Judge. The complainants are packers of salmon at Astoria, Oregon. The defendants are wholesale grocers in the city of New York. The controversy relates to the use of the word "Epicure" as a trade-mark for canned salmon. After a careful investigation, which discovered no instance of similar use, the complainants, on the 4th of August, 1885, registered the trade-mark in the patent office. The application was filed July 7, 1885, and stated that the trade-mark had been used in their business since June 20, 1885. For a few years prior to the latter date the defendants, at intervals and to a limited extent, had used the word as a trade-mark for canned tomatoes and canned peaches. The complainants were, therefore, the first to use the word "Epicure" as a trade-mark for canned salmon. The defendants were the first to use it as a trade-mark for canned tomatoes and canned peaches. The simple question, then, is whether the defendants' use of the word as applied to tomatoes and peaches prevented the complainants from selecting it as a trade-mark for salmon. The complainants had built up an extensive business in canned salmon under this name before the defendants asserted their right to apply it to all canned goods sold by them, salmon included. It is stated that the complainants have sold about 3,500,000 packages of "Epicure" salmon. Their business is large and flourishing. It is devoted exclusively to salmon packing. In the summer of 1891 the defendants sold one dozen cans of salmon bearing this brand. It is asserted that this was done for the purpose of testing the question now presented.

The rights of the parties must be ascertained and measured by the situation as it existed in 1885 when complainants entered the field. Had they the right at that time to use the word "Epicure?" If the defendants had then sought to restrain the complainants' use of the word they would, in all probability, have been promptly dismissed from court with the information that their business as dealers in fruit could not be injured by the use of the term "Epicure" in salmon packing. No one who has not permanently parted with his wits could purchase a can of salmon supposing he was getting a can of tomatoes. "Epicure" when

used, in 1885, by the defendants meant fruit; when used by the complainants it meant salmon. If the complainants' use of the word could not have been enjoined in 1885 their right to it should not be destroyed now. If lawful then it should be protected now. The word was free to the complainants. They were engaged in a distinct line of industry. Its use could not possibly have harmed the defendants.

The complainants, unmolested by the defendants or any one else, and molesting no one themselves, have labored during seven years to establish a valuable industry distinctively their own and distinguished the country over by their trade-mark. The word "Epicure" is inseparable from and commensurate with their business. It is the brand which designates the best salmon packed by them. It is their seal of genuineness, their guaranty to purchasers that the goods so labeled are of a superior quality. The advantages of higher prices and larger demand exist because of the established excellence of the goods. These are advantages which belong to the complainants. Whatever value "Epicure" has as a brand for salmon was imparted to it by them. To transfer the good will thus secured by years of arduous and conscientious endeavor to the defendants, or to throw it open as a poaching ground for the general public, would be doing the complainants gross injustice.

It is not pretended that the complainants knew of the defendants' use of the word "Epicure" prior to 1885, but even if they had known it, it is not easy to see how complainants' use of the word violated any principle of business morality. Salmon and tomatoes are both articles of food it is true, but in other respects they differ as a hat differs from a boot,—though both are articles of wearing apparel. A hat dealer having built up a flourishing trade in "Sheridan" hats could not be compelled to relinquish it at the instance of a shoemaker who, before that, had sold "Sheridan" boots. An oyster packer on the Chesapeake who has established a valuable market for "Columbia" oysters ought not to be despoiled of his profits because an orange grower in California had previously sold "Columbia" oranges. A manufacturer who should call his bicycles "Deerfoot," would hardly interfere with "Deerfoot" sausages or "Deerfoot" butter.

There is little similarity between a salmon and a tomato. In a commercial sense the want of resemblance is marked. The business of a fruit packer does not include salmon; the business of a salmon packer does not include tomatoes and peaches. Salmon is not a species of the genus "fruit" or of the genus "vegetables." The contention that the use of the trade-mark on canned fruit in 1885 pre-empted its use for all time in connection with canned goods of every variety, in defiance of the rights of intervening users, cannot be maintained. Such a contention would prohibit its use on salmon not only but on milk, lard, petroleum and even gunpowder. In 1890 the defendants commenced using the term "Epicure" as a brand for cigars, but it is clear that they could not have done so if a cigarmaker had so used it continuously since 1885.

The reasoning of some of the authorities would indicate that the defendants had a right to use the brand in connection with other fruit and

vegetables, analogous to tomatoes and peaches, but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. Beer and nails do not belong to the same class of merchandise because both are sold in kegs. The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food does not avail them, neither would the fact if it existed, that, at the time they adopted the word "Epicure" they intended in the future to embrace these articles. One may conceive a valuable idea, which, if properly carried out and developed, entitles him to a patent and to enjoy the rewards of an inventor, but if the idea continues to remain an idea and some one else first embodies it, the idealogue will presently discover that he has furnished another illustration of the superior value of facts over theories as commercial commodities. So with a trade-mark. It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it. The law deals with acts not intentions.

The equities are with the complainants. Their large and flourishing business will be destroyed or jeopardized if the defendants and others are permitted to share the good will which has been established for the "Epicure" brand of salmon. No corresponding injury can befall the defendants if they desist in the future as in the past from using the word "Epicure" as applied to salmon. If the defendants' statement of the amount of their sales is correct, there can be no occasion for the services of a master. It follows that the complainants are entitled to a decree for an injunction, with costs.

HATCH *et al.* v. FERGUSON *et al.*

(Circuit Court, D. Washington, N. D. November 18, 1892.)

FRAUDULENT DECREE—EQUITABLE RELIEF—JURISDICTION.

An independent suit in equity may be maintained in a federal court between parties of diverse citizenship to vacate a decree of a state court, and have a sale of property made pursuant to that decree annulled, and complainants' title to the property established, when such decree is alleged to have been fraudulently obtained, and has been fully executed, and when complainants have no remedy by motion in the same case because the land has passed into the hands of third persons, who claim to be innocent purchasers, and who must therefore be brought in as new parties. *Arrowsmith v. Gleason*, 9 Sup. Ct. Rep. 237, 129 U. S. 86, applied. *Cowley v. Railroad Co.*, 46 Fed. Rep. 325, distinguished.

In Equity. Suit by Dexter Hatch and others against E. C. Ferguson and others to annul a decree of the state court in a partition suit. On demurrer to bill. Overruled.

James Hamilton Lewis, for plaintiffs.

F. H. Brownell, for defendants.

HANFORD, District Judge, (*orally*.) The complainants, who are minor children of Ezra Hatch, deceased, bring this suit by their mother, as their next friend, asking to have a decree of the superior court of Snohomish county, in this state, in a partition suit, vacated, and a sale of property pursuant to that decree annulled, and their claim of title to the real estate affected by the decree and sale established. The ground alleged is a conspiracy between E. C. Ferguson, who was appointed by their father's will to be their guardian, and the defendant Henry Hewett, Jr., to obtain this property from them for less than its true value, and that those proceedings, by reason of collusion between Mr. Hewett and Ferguson, were hurried through the superior court without a fair investigation and ascertainment of facts, and contrary to the principles of equity. In short, the ground for the proceeding is fraud. They show that the decree which they ask to have vacated has been fully executed. Nothing remains of the case pending in the superior court of Snohomish county. Everything that could be done to completely transfer the title has been done, and since the completion of all the proceedings in the superior court Mr. Hewett, who was the purchaser at the judicial sale, has transferred the property to the defendants the Everett Land Company and Judson La Moure.

In support of this demurrer the defendants claim that this court has no jurisdiction, because the case is still in such a condition in the superior court of Snohomish county that the complainants can go there, and, upon establishing the facts alleged in their bill, have the decree and proceedings vacated by an order of that court. If it appeared to me to be the fact that they could be fully restored to all their rights by a simple motion in the superior court of Snohomish county, I should feel inclined to follow my own decision in the case of *Cowley v. Railroad Co.*, 46 Fed. Rep. 325, and sustain this demurrer. In that case I held that

BUCKNER *et al.* v. HART.

(Circuit Court, E. D. Louisiana. November 18, 1892.)

1. ELECTRIC STREET RAILWAYS—FRANCHISE—POWERS OF COUNCIL.

The charter of the city of New Orleans (Laws La. 1882, No. 20, § 8) provides, *inter alia*, that the common council shall have power to authorize the use of the streets for "horse and steam railroads." *Held*, that the words "horse and steam railroads" were not words of limitation, and that the council was empowered to grant such franchise to electric railways.

2. SAME.

Laws La. 1888, Act No. 185, provides that the council shall not have power to "dispose of any street-railroad franchise except after at least three months' publication of the terms and specifications of said franchise," and after adjudication of same to the highest bidder at public auction, as provided for by section 21 of the city charter. *Held* that, after a regular adjudication to the defendant of a franchise embracing certain streets, the council could not, by simple agreement with defendant, without readvertisement or any new public auction, change the route so as to embrace 16 blocks not included in the original franchise.

3. SAME.

The provision that the sale shall be made to the highest bidder means the highest bidder in money, and the sale of the franchise is invalid where the specifications call for, and the adjudication is made to the highest bidder in, "square yards of gravel pavement."

4. SAME—INJUNCTION—LACHES.

The interval between the sale of the franchise and filing of complainants' bill to enjoin the construction of the railway in front of their premises was one month and eight days. *Held*, that this was not such delay as amounted to an acquiescence in the grant, such as would preclude complainants from asserting their rights.

In Equity. Bill by Newton Buckner and others against Judah Hart to enjoin the construction of an electric trolley railway in front of complainants' premises on Coliseum street, New Orleans. Heard on motion for an injunction *pendente lite*. Granted.

H. H. Hall and W. W. Howe, for complainants.

Farrar, Jonas & Kruttschnitt, for defendant.

BILLINGS, District Judge. This case is before the court upon an application for an injunction *pendente lite*, which has been heard on the bill and amended bill, and upon counter affidavits and exhibits.

The first question presented is as to the power of the common council to grant to the defendant the franchise to lay and operate upon any of the streets of the city of New Orleans a street railroad which shall be propelled by electricity after the trolley method or system. The council have granted such a franchise. Had it the authority to make such a grant? The answer to this question must be found in the present charter of the city of New Orleans, (Act No. 20, 1882.) The provision on that subject is found in the existing charter, (Acts 1882, No. 20, p. 14.) Page 21, § 8, among other things, provides that the common council shall also "have the power to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turntable; to compel them to keep conductors on their cars, and compel all such companies to keep in repair

the street bridges and crossings through or over which their cars run; to open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks."

It has been argued by the solicitors for the complainants that, when the legislature committed to the common council the power to authorize "horse and steam railroads," these words "horse and steam" were words of limitation, and that no power is given with reference to railroads propelled by other motive powers, and it has been urged by the solicitor for the defendant that these words were words of illustration, and that the intention of the legislature was to commit to the city government the authority to authorize street railroads, no matter what was the motive power. It is difficult to see any reason why the legislature should not have committed to the common council the authority to grant in their discretion the use for railroads propelled by any other motive power as well as those propelled by the two specified. It seems to me they granted the discretion as to all street railroads, and mentioned only "horse, and steam" railroads because, according to the then existing state, so to speak, of the art, horses and steam were the only means for the propulsion of street cars in use. Not to adopt this view would be to infer that the legislature meant to exclude all other means of propulsion which the ever-advancing spirit of invention might discover. Such a prohibition would much more naturally have been put in a positive, express form. The public good required that the common council should be at liberty to place at the service of the public street railroads with all the valuable improvements in the means of propulsion which ingenuity and science should from time to time discover, the matter of the public safety and public inconvenience being left to be considered by the common council. It is the duty of courts to interpret statutes in aid of their manifest object. So that, so far as concerns the objections to the nature of the motive power and the method by which it is used, my opinion is that it ought not to be maintained.

2. The second objection arises from the manner in which the franchise was advertised and originally adjudicated. The facts as to this point are that the route advertised and in the first instance adjudicated was from Canal street to Audubon park and back, a distance of 6 miles, which, from St. Mary street to Louisiana avenue, a distance of 16 blocks, lay through Constance street, both going and returning. After this adjudication to the defendant, without any fresh advertisement or any new public auction, but by the simple agreement between the common council and the defendant, the route of the railroad was changed so that the return track was to be laid for that distance, viz., 16 blocks, through Coliseum street; so that there never was any advertisement or public auction of the franchise so far as the road runs through Coliseum street. It is urged by the defendant that the route between the termini had been advertised and publicly sold, and that the change was of such character that authority to make it might fall within the power to perfect a thing already done. The statute which controls this matter is Act No. 135, p. 192, Acts 1888, p. 193, § 4:

"Be it further enacted," etc., "that said council shall not have power to grant, renew, or to sell or to dispose of any street-railroad franchise, except after at least three months' publication of the term and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in section 21 of the city charter."

The indispensable prerequisite of a grant of any street-railroad franchise is "publication for three months of the term and specifications of such franchise," followed by an adjudication at public auction. The object which the legislature had in view was to secure a full price by insuring free competition after complete information as to the thing to be sold by advertisement of "the term and specifications of the franchise." The only franchises dealt with by the legislature were street-railroad franchises. Specifications of such a franchise for the purpose above set forth must include not only the termini and the general route, but also all the streets through which it is to pass. For every street has its own patronage of the cars, and, unless the franchise was confined to the streets enumerated in the advertisement and adjudication at the auction, there might be the acquisition of a franchise, the value of which could not with any accuracy be ascertained from the advertisement. If a change in 16 blocks is permissible, it is difficult to see where the departure from the statute would stop. The embarrassment in which the city found itself by having permitted the two tracks on Constance street cannot be ground for disregarding the law. As it seems to me, the defendant has not acquired a title to the franchise so far as it is to run through the 16 blocks upon Coliseum street.

3. The third objection is to the validity of the entire grant. I think it might well be held that the reference to the specifications on file in the comptroller's office in the advertisement was tantamount to their insertion in the advertisement itself. The specifications thus on file call for, and the adjudication at public auction was made "for, the highest bid in square yards of gravel pavement," and not for the highest bid in money. It seems to me that where a bid is invited in corn or wine or any goods, wares, or merchandise, it necessarily more or less circumscribes the freedom of the competition, for there is more or less difficulty in obtaining any article, even to those who have the money. It is not enough that the city needs the article; the article itself must also be as easily obtainable as money. The substitution of anything for money itself would naturally give an advantage to those who had that article, and who knew how, or where, and upon what terms, it could be purchased, and would make the sale less calculated to absolutely secure the highest price, and thus defeat the object of the statute. Section 4 (Act No. 135 of Acts 1888) above referred to, requires that the sale shall be to the highest bidder by the comptroller as provided in section 21 of the city charter. That section, which is found on page 25 of the Acts of 1882, requires that the sale shall be offered by the comptroller at public auction, and given to the lowest bidder. Now, it seems to me clear that, considering the object the legislature had in placing this prohibition upon the common council, requiring the long

advertisement of three months and sale at auction of railroad franchises, they meant that the sale should be for that which would least restrict the number of purchasers, as well as the amount of the bid, and therefore meant that it should be for money; and that the sale of the entire franchise to the defendant having been for gravel pavement, and not for money, is invalid.

4. There is a remaining point to be considered, as to whether there has been such acquiescence in the grant to the defendant on the part of the complainants, and such a sleeping upon their rights, that they ought to be considered as having in equity no right to urge the objections to the defendant's grant. The final ordinance—that which related to Coliseum street—was passed August 2, 1892, and the grant to the defendant under this ordinance was made on September 9, 1892. The original bill in the state court was filed October 17, 1892. This makes the interval between the passing of the ordinance and the filing of the bill two months and a half, and the interval between the date of the grant and the filing of the bill one month and eight days. I do not think that this delay, under the circumstances as they appear by the bill and affidavits, should be deemed such an acquiescence as would in courts preclude the complainants from asserting whatever rights they may have. The conclusion which I have reached is that upon the second and third grounds mentioned above the injunction should issue.

VAN GUNDEN *et al.* v. VIRGINIA COAL & IRON CO.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 5.

1. EJECTMENT—EVIDENCE—COPY OF UNRECORDED AND LOST DEED.

Plaintiffs in ejectment, under a deed given by the heirs of F. in 1833, claimed a one-third interest in a boundary of land in Virginia patented to F., J., and T. in 1796. Defendant claimed that F. deeded his interest to T. in 1796; that the whole tract was sold to O. in 1834 for delinquent taxes against T.'s heirs, and deeded to O. by the clerk of the county court in 1836; and that O., his heirs, and his and their vendees, continued in actual possession ever since. Defendant showed that the original deed from F. to T. was lost; that after T.'s death it had been proven in a county in Tennessee, and recorded there in 1816; that a certified copy was recorded in 1833, in a county in Virginia where a part of the land conveyed, though no part of that in controversy, was situated; and offered in evidence a copy of the latter record. *Held*, that such copy was properly admitted as secondary evidence in connection with other evidence tending to show an abandonment of F.'s title by his heirs, the jury being cautioned that it could not be considered as constructive notice to one purchasing in good faith for value.

2. TAXATION—FORFEITURES—VIRGINIA STATUTES.

Act Va. March 19, 1832, providing for the release of forfeitures of land for non-payment of taxes, applied only to the years prior thereto, and did not affect the sales directed by the act of March 10, 1832, for failure to pay taxes thereafter accruing.

3. SAME.

Act Va. Feb. 27, 1835, § 2, requiring owners of lands granted by the state, and never entered on the books of the commissioner of revenue of the proper county,

to have them so entered and charged with all taxes and damages in arrear, and pay the same, unless they were such as would have been relinquished by the act of 1882, and providing for the forfeiture thereof, upon default, until after July, 1886, did not apply to lands which had been long on the commissioner's books, and which had been sold for the taxes of 1884, and not redeemed.

4. SAME—STATE DECISIONS.

The decisions of the state supreme court relative to the acts of the Virginia legislature relating to the forfeiture of lands for nonpayment of taxes are controlling in the circuit court of appeals.

5. TRIAL—MODIFICATION OF INSTRUCTIONS.

Plaintiff's requests to charge that the purchaser at the tax sale took T.'s one-third interest only, and thereby became a cotenant with F. and J., and could not hold against them by adverse possession, were properly modified by the court so as to make the proposition applicable only in case the jury found that F.'s interest in the land had not been forfeited to the commonwealth or sold to T.

6. SAME.

It was not error for the court to strike from an instruction the words, "and all the other facts and circumstances of the case," when all the facts and circumstances bearing on the question covered by the instruction were embraced in it.

7. VENDOR AND VENDEE—BONA FIDE PURCHASERS—NOTICE.

The fact that lands at the time of their sale are in the open and notorious possession of others than the vendor, and that the deed from the vendor purports to convey only the land of which the vendor's ancestor died possessed in certain counties, without further description, is sufficient to put the vendee on inquiry, and prevent his protecting himself as an innocent purchaser for value without notice.

8. ADVERSE POSSESSION—COLOR OF TITLE.

The land was listed for taxation in the names of T.'s heirs alone, and was sold for taxes in their name in 1884, and was conveyed to the purchaser by deed, describing it by metes and bounds. *Held*, that the deed gave the purchaser color of title to all the land described in it, so that the purchaser's claim of title to and entry upon all the land, and his uninterrupted possession with payment of taxes for the time prescribed by law, ousted F.'s heirs as tenants in common, and made his possession adverse to such heirs from the time of entry.

9. BOUNDARIES—ADVERSE POSSESSION.

Where a person enters upon land under a deed purporting to convey a certain boundary, and actually occupies a portion of the tract, the law extends his adverse possession to the boundaries, without his fencing or cultivating the whole.

10. ADVERSE POSSESSION—BETWEEN COTENANTS.

A tenant in common will be deemed to have notice of the adverse holding by his cotenant, where the hostile character of the possession is so openly manifested that a man of reasonable diligence would discover it.

11. TRIAL—INSTRUCTIONS—PROVINCE OF COURT.

A judge of a United States court does not invade the province of the jury by expressing his opinion on the facts, when the law is correctly stated, and all matters of fact are submitted to the final determination of the jury.

12. SAME—STATUTES.

An instruction in strict accordance with the statutes of the state, relating to the length of time necessary to bar a right of entry, is proper in an action in ejectment, when there is no evidence before the jury rendering it inapplicable.

In Error to the Circuit Court of the United States for the Western District of Virginia.

Action of ejectment by Christian Van Gunden and others against the Virginia Coal & Iron Company. For opinion delivered on a motion for a rule for security of costs, see 47 Fed. Rep. 264. Verdict and judgment for defendant. Plaintiffs bring error. Affirmed.

D. H. Chamberlain, F. S. Blair, and J. J. A. Powell, for plaintiffs in error.

Richard C. Dale and J. F. Bullitt, for defendant in error.

Before BOND and GOFF, Circuit Judges, and MORRIS, District Judge.

Goff, Circuit Judge. This is an action of ejectment brought by the plaintiffs in error against defendant in error in the circuit court of the United States for the western district of Virginia, held at Abingdon. It was tried at the fall term, 1891, the jury finding a verdict for defendant, upon which the court entered judgment. The case is now before this court on writ of error obtained by the plaintiffs, the assignments of error in the petition being 35 in number, of which 21, those from 2 to 16, inclusive, and 21, 27, 32, 33, 34, and 35 are not referred to in the briefs filed by counsel for plaintiffs in error, and will be treated by the court as abandoned. In fact, counsel in argument of the case conceded that they were not relied upon. Rule 24 of this court provides that "the brief shall contain a specification of the errors relied upon which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged." Most of the remaining errors assigned ignore the rules of the court applicable thereto. As this is a matter of great importance, we call attention to it now. The twenty-fourth rule requires that the specification shall quote the full substance of the evidence admitted or rejected, when the error alleged is to the admission or to the rejection of evidence. This provision of that rule has been ignored by plaintiffs in error, and the requirements of rule 11 have not been observed in the preparation of the petition for a writ of error in this case. The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically. *Hinde v. Longworth*, 11 Wheat. 199; *Camden v. Doremus*, 3 How. 515; *Burton v. Driggs*, 20 Wall. 125. The rule is now well established that only those matters can be assigned for error that were brought to the attention of the court below during the progress of the trial, and passed upon directly or indirectly. *Springer v. U. S.*, 102 U. S. 586; *Wood v. Weimar*, 104 U. S. 786.

The assignments and the bills of exceptions are not in accordance with the rule of practice, requiring that they shall show that there was evidence applicable to the instruction given or refused. The exceptions to the giving of the instructions asked for by defendant are so general as to render them obnoxious to the rules regulating the same. *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. Rep. 500; *Mining Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. Rep. 665; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. Rep. 832. In this last-mentioned case Mr. Justice HARLAN said:

"The general exception to all and each part of the foregoing charge and instructions suggests nothing for our consideration. It was no more than a general exception to the whole charge. The court below was entitled to a distinct specification of the matter, whether of fact or of law, to which objection was made. The charge covered all the facts arising out of the counterclaim, and clearly stated the law which, in the opinion of the court, governed

the case. If its attention had been specifically called at the time to any particular part of the charge that was deemed erroneous, the necessary correction could have been made. An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it. *Harvey v. Tyler*, 2 Wall. 328, 339; *Beckwith v. Bean*, 98 U. S. 266, 284; *Moulton v. American Ins. Co.*, 111 U. S. 335, 337, 4 Sup. Ct. Rep. 466."

In *Deutsch v. Wiggins*, 15 Wall. 539, Mr. Justice STRONG said:

"Most of the assignments of error have been made in total disregard of the twenty-first rule of this court. That rule is necessary to the disposition of the business which presses upon us, and it is our intention hereafter to enforce strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all, and we feel justified in passing without notice the greater number of those which are alleged to appear in this record."

The record in this case, and the brief of counsel for plaintiffs in error, were filed so soon after the organization of and the adoption of rules by this court that it is doubtful if the attention of counsel had been called to the requirements of the regulations alluded to. For this reason it is not the intention of the court to disregard the assignments of error relied on in this case, but they will be considered in connection with the assistance afforded by the oral arguments, and the aid derived from an inspection of the record. It is hoped that this reference to the necessity for a strict adherence to the mode of procedure prescribed by the rules is all that will be required to secure in the future the full co-operation of counsel in their enforcement, as it will be our duty hereafter to require due observance of their requirements. It is proper to say in this connection that they have been departed from in the preparation of a number of cases heretofore submitted to this court.

The declaration filed in this case contains two counts. Plaintiffs in the first seek to recover an undivided one-third interest in a tract of 62,000 acres of land, situated in Wise county, Va. Under the second count, they seek to recover an undivided one-third interest in a tract of about 48,000 acres of land, part of the tract first mentioned. Defendant pleaded not guilty. What is the case as it appears from the record? The state of Virginia by patent dated January 30, 1796, granted to Nathan Fields, John Johnston, and Nathaniel Taylor a certain boundary of land in that state, in Lee county, containing 62,000 acres. Since then the county of Wise has been created, and includes within its boundaries the former territory of Lee county, embracing the land so granted. The plaintiffs claim that on the 30th day of April, 1888, they purchased the interest of the heirs of Nathan Fields in the land mentioned, and that by deed of that date they became tenants in common with the vendees of the other patentees of said land and those claiming under them; that the defendant is in possession of a great part of the land, claiming the fee-simple title thereto; and that they, the plaintiffs,

are entitled to recover a one-third interest thereof, being innocent purchasers of the same for value from the heirs of Nathan Fields, who died in 1820.

Defendant claims that plaintiffs have not shown by proper evidence that their grantors are the heirs of Nathan Fields, the patentee, who, defendant insists, sold and conveyed his interest in the land to his copatentee, Nathaniel Taylor, by deed dated January 1, 1796. Defendant also claims that the title to the entire tract of land was, under the provisions of certain acts of the legislature of Virginia, forfeited to the "Literary Fund" of that state in 1816, and that, consequently, the plaintiffs took no title with the deed to them in 1888, and cannot recover in this action; also that one J. C. Olinger, under whom defendant claims, became the owner of 48,200 acres of the 62,000-acre boundary, by a purchase at a tax sale made by the sheriff of Lee county in 1834, by virtue of the provisions of an act of the legislature of Virginia passed March 10, 1832, the land having been conveyed to him by Alexander W. Mills, clerk of the county court of that county, by deed dated December 7, 1836. Defendant also insists that, if the deed made by Mills to Olinger did not pass to him an absolute title to the entire tract of 48,200 acres,—the sale of the land having been made for delinquency in the name of Taylor's heirs,—still, as by the deed the entire tract of land was conveyed by metes and bounds, the same was color of title thereto; and as Olinger entered into the possession of the land immediately, claiming title to the whole, and exercised acts of ownership over it until his death in 1863, and that as his heirs, and his and their vendees, have continued such possession and such acts of ownership from the death of Olinger down to the institution of this suit,—a period in all of over 50 years,—the plaintiffs, and those under whom they claim, not having been in the actual possession of any part of the land during said time, defendant has acquired a good and perfect title to the land by adverse possession.

The first assignment of error reads as follows:

"That the court should not have admitted to the jury as evidence the copy of a copy of an alleged deed from Nathan Fields to Nathaniel Taylor, dated January 1, 1796, and registered in Carter county, Tenn., in the year 1816, and which said copy had not been recorded in Lee county, Va., where the land in controversy was originally located, nor in the county of Wise, which has since been formed and where the land now lies; because the said deed not having admitted to record in said Lee or Wise counties, according to law, such deed could not be read in evidence as a recorded deed in Virginia, and as between the parties to said suit was void. The deed aforesaid was not properly recorded in Virginia, for the reason that, in order to its proper admission to record here, it was necessary at that time that it should have been either acknowledged by the grantor before the court, proven before the clerk by three witnesses, or acknowledged before two justices; whereas said deed was not proved by any witnesses, but the delivery attested by two witnesses in Carter county, Tenn., and the handwriting proved by a third. Upon this proof alone was the deed registered in Carter county, Tenn., wherein none of the land was situated; and, upon the certificate of the clerk of Carter county,

Tenn., admitted to record in the will book of Scott county, Va., where none of the land in controversy was situated, contrary to the statutes then in force. 1 Rev. Code Va. 1819, c. 99, §§ 2-7."

The court below, when the deed alluded to in this assignment of error was admitted in evidence, stated that it was not to be considered as notice to purchasers for value, and that it was admitted as secondary evidence only. Had the full substance of the evidence bearing on the questions raised by the offering of the deed been quoted in the specification of error as required by the rule, it would have shown, as we find from the record, that defendant laid the foundation for introducing secondary evidence by the testimony of a number of witnesses to the effect that diligent search had been made for the original of the deed, in all places where it was likely to be found, without success; that Nathaniel Taylor's papers, he being the grantee in the deed, were destroyed in 1846, by fire, the presumption being that the original deed was burned at that time; that Taylor's executors, in 1826, by deed which was admitted in evidence, sold and conveyed to John Crabtree 12,800 acres of the 62,000-acre tract, the same being sold as the land of said decedent, and that Crabtree and his vendees have been in undisputed possession thereof ever since, the heirs of Fields never having made claim to any part of the land sold Crabtree; that Nathaniel Taylor died in Carter county, Tenn., in 1816, in which county and year his will was admitted to record, and at the same time the deed from Fields to Taylor was proven and registered; that by the will the executors were authorized to sell as much of the "back lands" as would be sufficient to pay Taylor's debts; that while the land in controversy was not in Scott county, Va., where the copy of the deed was recorded, that part of the land conveyed to Taylor by Fields in the deed mentioned was located in that county; that the will book alluded to in the bill of exceptions was a book used by the clerk for general purposes, such as recording deeds, wills, powers of attorney, settlements, and like papers, the office then not being very well provided with record books.

Under these circumstances, was it proper to permit the copy of the deed from the records of Scott county, Va., to be read in evidence? The deed had been proven in Carter county, Tenn., and duly recorded there, and a certified copy of it recorded in Scott county, where a great portion of the land mentioned in it was situated. Defendant did not claim that the deed was constructive notice as against a purchaser for valuable consideration without notice, as it was not recorded in the proper county nor within the time required, in order to have that effect. The plaintiff's contention is, in effect, that a copy of the deed cannot be used as evidence for any purpose, because it was not acknowledged or proven and recorded in the manner required by law, in order to make it constructive notice to third persons. The deed was proven three quarters of a century before this trial, in a court of competent and extensive jurisdiction, and the presumption of law is that its acts were regular. The certificate, duly attested under the seal of the court, reads as follows:

"MAY SESSION, 1816.

"*State of Tennessee, Carter County.* The within deed was proven in open court and admitted to record. Let it be registered. Given under my hand and the seal of my office this fifteenth day of May, 1816.

"GEORGE WILLIAMS, Clerk.

"*State of Tennessee, Carter County.* The within deed of conveyance, with its certificates, was duly registered in the register's office of said county this fifteenth day of May, 1816.

GODFREY CARRIGER, Reg.

"By His Deputy, WM. R. WATSON.

"A true copy. Teste:

"BENJ. BROWN, Deputy Register for Carter County, E. T.

"Nov. 11th, 1822.

"*State of Tennessee, Carter County.* I, John Williams, chairman of the court of common pleas," etc., "for Carter county, do hereby certify that George Williams, who signed the above certificate as clerk, was then, and still is, the clerk of the court of pleas," etc., "for Carver county, and that *that* full faith and credit is due all his attestations as such.

"Given under my hand and seal this 11th day of November, 1822.

"JOHN WILLIAMS.

"ELIZABETH, Nov. 11, 1822.

"*State of Tennessee, Carter County.* We, John Williams, William Carter, two of the justices of the peace for Carter county, do hereby certify that Godfrey Carriger, whose name appears as register of Carter county to the annexed copy of a deed of conveyance from Nathaniel Fields to Nathaniel Taylor, was at that time, and for a great many years before had been, and still is, register for Carter county; and that William R. Watson, who signed his name as deputy register to said certificate of registration, was at that time deputy register of Carter county; and that Benjamin Brown, who attests the annexed copy as deputy register, was, at the time of making said attestation, and still is, deputy register for Carter county; and that full faith and credit is due all their acts as such.

"Given under our hands and seals the day above written.

"JOHN WILLIAMS. [Seal.]

"W. CARTER. [Seal.]

"*State of Tennessee, Carter County.* I, George Williams, clerk of the court of pleas," etc., "for Carter county, do hereby certify that John Williams and William Carter, who have made the above certificate, was at that time justices of the peace for Carver county, and that full faith and credit is due all their acts as such.

"Given under my hand and seal this 11th day of November, 1822.

"GEORGE WILLIAMS, Clerk.

"*Virginia.* At a court of quarterly session continued and held for Scott county the 18th day of March, 1823. This power of attorney from Nathan Fields to Nathaniel Taylor, certified to have been proven in the court of pleas and quarterly session held in and for Carter county, in the state of Tennessee, is thereupon ordered to be recorded.

"Teste:

JOHN S. MARTIN, D. C.

"*Virginia, Scott County—To wit:* I, C. M. Carter, clerk of the county court of Scott county, Virginia, do certify that the foregoing is a true copy of deed from Nathan Fields to Nathaniel Taylor, as the same is recorded in my office.

"Given under my hand this 13th day of October, 1891.

"C. M. CARTER, Clerk Scott County Court."

The act of the Virginia assembly regulating the proving and recording of deeds, passed in 1792, did not require that they should be proven in the courts of Virginia, but permitted it to be done "before any court of law;" and, when so proven and properly certified, they could be recorded in the county where the land was situated in Virginia, if presented for that purpose within a certain time. This deed, though proven, as the record shows, was not presented for record within the time allowed, nor in the proper county, and consequently cannot be used as evidence tending to prove constructive notice to third persons. It was not admitted in evidence for that purpose, nor as a copy of a recorded deed, in the sense such copies are generally used. Where a deed has been lost or destroyed, its contents may be proven by witnesses, and a copy may be used as secondary evidence, even in the absence of certificates showing the proper execution of the original. The deed from Fields to Taylor was proven and recorded in 1816, and it is shown that, whether authorized by law or not, a duly-certified copy was admitted to record in Scott county, Va., in 1823. During the trial of this action in ejectment, in 1891, the original deed, an ancient document, was shown to have been lost; and a copy of the record, so made in 1816 and 1823, was offered in evidence, in connection with other testimony, including a certified copy of the deed and certificates from Carter county, Tenn., and all the other testimony before mentioned, tending to show the loss of the original deed, as an item of proof to be considered for what it was worth. This was proper, under the circumstances of this case, as then shown by the testimony, especially in connection with the questions raised by defendant's tenth instruction, the giving of which by the court to the jury is assigned as error in the thirtieth specification, yet to be referred to. If there was testimony before the jury from which it could presume an abandonment of the Fields title by his heirs, and if that testimony was such as to justify the presumption that a deed had been made conveying the land to Taylor, then surely it was proper for this copy to go to the jury to sustain that presumption by showing that such an original deed had been recorded in Carter county, Tenn., in 1816, where Taylor resided, and also in Scott county, Va., in 1823, where much of the land conveyed was located. The court did not decide as to the weight this testimony tending to show the existence of such a lost deed was to have; that was left to the jury. The admission or rejection of such evidence is to be determined by common-law principles, and the general rules of evidence applicable in such cases, and not by the provisions of legislative enactments intended to regulate the acknowledgment and recording of deeds. *Ben v. Peete*, 2 Rand. (Va.) 543; *Rouletts v. Daniel*, 4 Munf. 473; *Lee v. Tapscott*, 2 Wash. (Va.) 276; *Baker v. Preston*, Gilmer, 284; *French v. Loyal Co.*, 5 Leigh 680; *Archer v. Saddler*, 2 Hen. & M. 376; *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. Rep. 313; *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. Rep. 667.

The next assignment of error relied upon is No. 17:

"The court erred in refusing to give to the jury the fourth instruction asked for by the plaintiffs, which is in the words and figures following, to wit: 'The court instructs the jury that, although they may believe from the evidence that the land patented to the said Fields, Taylor, and Johnson, or any part thereof embraced in this suit, was forfeited to the literary fund of Virginia, by the nonpayment of the taxes for the year 1834, under the act of assembly of Virginia of 1831, and that the land was sold for taxes for the year 1834 at a sale made on the 21st October, 1834, and that a deed was made by the clerk of Lee county, Va., to said J. C. Olinger for said land in December, 1836, yet the court further instructs the jury that if they shall believe from the evidence that the said land was sold for an assessment of tax not exceeding \$20, to wit, for the sum of \$4.92, and if they shall further believe that the said patent had been granted before the 1st April, 1831, and that the said land was placed or continued on the commissioner's books on or before the 1st July, 1838, then all said lands so returned delinquent for and before 1st July, 1838, was released from all tax and damages that did not exceed \$20 by an act of the general assembly of Virginia of March 19, 1832, and and of February 27, 1835, and said sale and said deed to Olinger passed title to him to only one third of said land. The said tax was remitted by said acts, and the said Field, by said tax sale and deed, was not divested of his title to the said land, or any part thereof.'"

We cannot find in the record that there was any evidence offered tending to show that the land "was forfeited to the literary fund of Virginia for the nonpayment of taxes for the year 1834, under the act of the Virginia assembly of 1831." The evidence offered by defendant on that question tended to show forfeiture for the nonpayment of taxes for years prior to 1831, and that the land was sold for the failure to pay the taxes for the year 1834. The remaining part of the instruction asked for was not warranted by the testimony, and seems to be based upon a misconception of the acts of the legislature of Virginia of March 19, 1832, and February 27, 1835. The release of the forfeiture for the nonpayment of taxes, provided for in the second section of the act of March 19, 1832, applied only to the years prior to 1832, and did not affect the sales directed by the act of March 10, 1832, for failure to pay taxes thereafter accruing. The act of February 27, 1835, by its first section extended the time until July 1, 1836, for the redemption of all land and lots "heretofore" returned delinquent for the nonpayment of taxes, and provided how the redemption might be effected. The second section of that act referred to the fact that many large tracts of land lying west of the Alleghany mountains, granted by the commonwealth before the 1st day of April, 1831, were not then, and had not been for many years, entered on the books of the commissioner of the revenue where they respectively were situated, by reason whereof no forfeiture for the nonpayment of taxes had occurred, or could occur, under then existing laws; and then provided that the owner of such land should, on or before the 1st day of July, 1836, enter or cause them to be entered on the books of the commissioner of the revenue of the county where such land was located, and have them charged with all the taxes and damages in arrear, and

pay the same, unless they were such as would have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832; and then proceeded to provide for the forfeiture of such lands, after the 1st day of July, 1836, should the owners thereof have failed so to enter them, and to have paid the taxes so due thereon. The evidence before the jury was uncontroverted that the land in dispute had been upon the land books for many years prior to the passage of the act of February 27, 1835, and that it had been returned as delinquent for a number of such years. The fact that the land was on the commissioner's books after it was sold in the year 1834, and before the 1st day of July, 1836, and that it had been returned delinquent before the last-mentioned date, the taxes not exceeding the sum of \$20, did not make applicable to the same the provisions releasing the taxes due, contained in the acts of March 19, 1832, and February 27, 1835. The first of said mentioned acts provided for the release of the forfeiture for the nonpayment of taxes for the years prior to 1832, and did not affect the taxes thereafter accruing. The act of February 27, 1835, did not apply to the case as presented to the jury, as the land was not redeemed, and the provisions relative to entering it on the books of the commissioner of the revenue were not applicable to the land in question, and, as a matter of fact, it had been sold before that act passed. The instruction, as asked for, was uncertain and misleading, mingling together the provisions of the acts of the Virginia assembly alluded to in it, under a misconception of their meaning and intent, and we think the court did right in refusing to give it to the jury.

Assignment of error No. 18 reads as follows:

"The court erred in modifying the plaintiff's instruction number two, said instruction as tendered to the court being in the words and figures following, to wit: 'The court further instructs the jury that, if they shall believe from the evidence that by said patent the said Fields and Taylor and Johnson became seised of the land in controversy, or any part thereof, as set forth in instruction No. 1, and that the said land, or any part thereof, was sold under the delinquent tax law of the state of Virginia for the year 1834; that said sale took place on the 24th October, 1834; that at said sale John C. Olinger became the purchaser, and the clerk of Lee county, in 1836, made a deed to the said Olinger for same; that the land advertised for sale was sold as and for the land of the said Taylor's heirs alone, and for the said Taylor's heirs' delinquency alone,—then the court instructs the jury that the said tax sale was only a sale of the said Taylor's one-third interest; that the said Olinger thus became a tenant in common with Fields and Johnson, the other two patentees.' But the court, instead of giving said instruction as tendered, added the words, 'and that said land had not been forfeited to the commonwealth, nor the interest of Fields therein sold to Taylor,' after the words 'No. 1,' and gave said instruction as thus modified."

Assignment No. 19 is similar in character, and may, with propriety, be considered with the one just read. It is as follows:

"The court erred in modifying the plaintiffs' instruction number three, said instruction as tendered to the court being in the words and figures following,

to wit: The court instructs the jury that if they shall believe from the evidence that the said Olinger became the purchaser of the said Taylor interest at said tax sale, and received a deed from the clerk conveying him all of the land in controversy, yet the said Olinger being a tenant in common with the said Fields and Johnson, if the said Olinger took possession of said land, or any part thereof, such possession was the joint possession of himself and his cotenants, as the mere possession of one tenant in common will not be taken to be adverse to the title and possession of the others; and if the said Olinger, or those claiming under him, would rely upon an adversary possession, they must not only show an entry, but they must prove an actual ouster of their cotenants, the said Fields and Johnson, or such other notorious act or acts amounting to a total denial of the rights of said cotenants, and must prove that said cotenants had knowledge and notice of this adverse claim of exclusive ownership on the part of the said Olinger, or those claiming under him; and such adverse possession of the said land must have been continuously, actually, and uninterruptedly by said Olinger, and those claiming under him, under such circumstances, under color of title for the length of time prescribed by law, before said possession will ripen into a good and sufficient title to enable the defendants in their suit to defeat the plaintiffs' right to recover.' But the court, instead of giving said instruction as tendered, inserted the words, 'and that Fields' interest in said land had not been forfeited to the commonwealth, nor sold to Taylor,' after the words 'tax sale,' in the third line of said instruction, and gave said instruction as thus modified."

Plaintiffs in error insist that the insertion by the court of the words indicated, in the instructions mentioned, raised questions which were foreign to the propositions of law intended to be propounded by them, confusing in their tendencies, and that it was error so to modify the instructions. We fail to see that the changes made by the court produce the result claimed, and we do not think that the instructions as given are subject to the criticism made. The instructions as tendered evidently did not fairly present the law applicable to the case as it was presented to the jury by the testimony before it. They would have tended to confuse the minds of the jurors had they been given without the changes made by the court. The matter of the forfeiture of the title to the commonwealth, as well as that relating to the alleged sale of Fields' interest to Taylor, were properly called to the attention and submitted to the determination of the jury, in connection with the question of cotenancy. If the title to the land had been vested in the "Literary Fund" by forfeiture, then Olinger, by his purchase, under the act of 1832, if the sale was properly made thereunder, acquired the entire tract of land, subject to the payment of taxes in arrear. If Fields had sold his interest in the land to Taylor in 1796, as claimed by the defendant, and the tax sale was for the delinquency of Taylor's heirs, then (independently of the question of forfeiture) Olinger, by virtue of his purchase, secured the interest of Fields as well as of Taylor.

The twentieth assignment is as follows:

"The court erred in modifying the plaintiffs' instruction number five, said instruction, as tendered to the court, being in the words and figures following, to wit: 'The court instructs the jury that the forfeiture of the land in controversy to the commonwealth of Virginia is a question for the jury to

determine, and, in arriving at their determination, they will take into consideration the certificates of the auditor of public accounts along with the certified extracts from the land books from the county of Lee, and the certified record from the circuit superior court of law and chancery for the county of Lee, *and all the other facts and circumstances of the case*; and they will determine, in the first place, whether the said lands, to the extent of said Fields' interest, was forfeited to the commonwealth at the date of the institution of this suit, and, if so forfeited at any time, they will then ascertain whether said forfeiture was remitted or otherwise relinquished by said commonwealth; and the court instructs the jury that a forfeiture is never favored or implied; and in ascertaining the said question of forfeiture the court instructs the jury that the burden of proof is upon the defendants to prove said forfeiture.' But the court, instead of giving said instruction as tendered, struck out the words, '*and all the other facts and circumstances of the case,*' and gave said instruction as thus modified."

After a careful examination of the record, we are unable to find therein any facts and circumstances of the case pertinent to the question of forfeiture, other than those mentioned in the instruction given by the court. As a matter of course, the "facts and circumstances" alluded to in the instruction, as presented to the court, must have been those bearing on the question covered by it, and as they were all embraced in the instruction, as given, the words were properly stricken out. Had there been any "other facts and circumstances" proper for the consideration of the jury, on the question of forfeiture, counsel for plaintiffs in error would have been able, either in specification, brief, or argument, to have directed our attention to them. The trial judge should not confuse or mislead the jury by referring in his instructions to "facts and circumstances," of which in fact no competent evidence has been offered.

The twenty-second error assigned reads:

"The court erred in giving to the jury defendant's instruction number two, said instruction being in the words and figures following, to wit: 'The court instructs the jury that if they believe from the evidence that Nathan Fields sold the land in controversy to Nathaniel Taylor in 1796, they must find for the defendant, unless they believe from the evidence that the said plaintiffs are purchasers for value, without notice of said sale; and the court further instructs the jury that a man cannot, under the law, protect himself as an innocent purchaser, if at the time he made the purchase the land was in the open and notorious possession of others than his vendors; and the court further instructs the jury that the form of the deed from J. Wyman Fields to the plaintiff purports only to convey such land as Nathan Fields died possessed of, and left indefinite the subject-matter of the deed, and this should have put them upon their inquiry as to the possession and condition thereof in regard to adverse occupancy and claim; and, if the jury further believe that reasonably diligent inquiry on their part would have shown them that the defendant was in possession of the land under a claim of right, they cannot find that plaintiffs are purchasers for value without notice.'"

If at the date of the deed purporting to convey the interest of the heirs of Nathan Fields in the land in controversy to the plaintiffs, April 30, 1888, other persons than those who conveyed to the plaintiffs were in the open and notorious possession of the land, that of itself was sufficient

to put the plaintiffs upon inquiry, and it was their duty to ascertain the character of the title of those who so held the possession. The plaintiffs will be considered as fully informed of those matters which they could have discovered had they discharged that duty. This rule is stated in *Minor's Institutes* (volume 2, pp. 889, 890) in these words:

"The instances of constructive notice are referable to several classes, all depending on the general consideration that sound public policy requires the presumption that he was aware, or, at least, that he should be treated as if he were aware, of the existence of the prior conveyance or charge. They are as follows: (4) Where the adverse claimant is in the actual adverse possession and occupancy of the land when the subsequent purchaser buys."

The supreme court of the United States, in *Lea v. Copper Co.*, 21 How. 493, 498, says:

"But it is insisted that the deed from Lea to Davis was not registered, and fraudulently concealed from the complainant, so that he could not proceed to assert his rights. Davis had possession of the land when he took William Park Lea's deed, claiming for himself, and adversely to all others; and he so continued in possession till he sold the land, in December, 1852. This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain. *Landis v. Brant*, 10 How. 375."

The same court, in *Hughes v. U. S.*, 4 Wall. 232, said:

"The patentee cannot complain of the proceeding, for the open, notorious, and exclusive possession of the premises by the parties claiming under Goodloe, when the patentee made his entry and received the patent, was sufficient to put him upon inquiry as to the interests, legal or equitable, held by them; and, if he neglected to make the inquiry, he is not entitled to any greater consideration than if he had made it, and ascertained the actual facts of the case."

On this question, see *Cordova v. Hood*, 17 Wall. 1; *Long v. Weller's Ex'r*, 29 Grat. 347; *Wood v. Krebbs*, 30 Grat. 708; *Iron Co. v. Trout*, 83 Va. 419, 2 S. E. Rep. 713.

With great force should this principle apply in this case, not only for the general reasons as mentioned, but also because of the language used in the deed to plaintiffs. The deed says:

"Whereas, Nathan Fields, at the time of his death, was seised and possessed of large bodies and tracts of land in the counties of Lee and Scott, in the state of Virginia, being the same which was granted by the commonwealth: * * * Now, therefore, this deed witnesseth * * * that * * * do grant unto the said parties of the second part all of the said lands to which they, the said parties of the first part, are entitled in law or equity."

The land was not described with the usual particularity, and the general terms used were sufficient of themselves to have put the plaintiffs on inquiry. The instruction, in connection with the evidence before the jury, was proper.

Assignment No. 23, on the question of forfeiture, is, in effect, disposed of with No. 20, before alluded to. The matter was left to the jury for its finding. The 3334th section of the Code of Virginia expressly provides that the auditor's certificates shall be *prima facie* proof of the facts stated

in them. This was not as clearly stated in the instruction as it might have been, but that was not to the prejudice of the plaintiffs, and they will not be permitted to complain of it now.

Plaintiffs in error insist that the state of Virginia had not the right to forfeit to its own use the lands situated within that state, and owned by citizens of that and other states, and that the state of Virginia could not vest title to such lands in itself, without some antecedent procedure which would be equivalent to a judicial ascertainment of the facts which are made the occasion of the forfeiture. The supreme court of Virginia has, in a number of cases, virtually disposed of this question, and the decisions of that court relative to the "forfeiture acts," passed by the legislature of that state, will be accepted as conclusive of that point by this court. See the cases of *Wild's Lessees v. Serpell*, 10 Grat. 405; *Staats v. Board*, Id. 400; *Hale v. Branscum*, Id. 418.

The questions raised by assignments of error numbered 24, 26, and 29 may properly be considered together. The specifications are as follows:

"*Twenty-Four.* The court erred in giving to the jury defendant's instruction number four, the said instruction being in the words and figures following, to wit: 'The court instructs the jury that although Fields, Taylor, and Johnson, the patentees of the 62,000-acre tract of land, or their heirs, may have been the owners of the same in 1834, as joint tenants or tenants in common, yet if they believe that said tract of land was listed upon the land books of Lee county for the purpose of taxation in that year in the name of Taylor's heirs, and was sold for the nonpayment of the taxes thereon, and purchased by said Olinger at such sale, and conveyed to him by metes and bounds by the clerk of the county court of Lee county, said Olinger's deed gave a color of title and of possession thereunder by said Olinger, the purchaser, claiming title to the whole premises, it amounted to an actual ouster and disseisin of the said Fields and Johnson, or their heirs, and such possession was adverse; and if the said Olinger, and those who claim under him, continued in such possession uninterruptedly for the length of time prescribed by law prior to the bringing of this suit, it will bar the plaintiffs' right to recover, and the jury should find for the defendant.'"

"*Twenty-Sixth.* The court erred in giving to the jury defendant's instruction number six, said instruction being in the words and figures following, to wit: 'The court instructs the jury that if they believe from the evidence that John C. Olinger purchased at a tax sale a 48,200-acre tract of land, which is the land in controversy, listed on the land books of Lee county in the name of Taylor's heirs for taxation, and sold for the nonpayment of taxes; that he received a deed therefor, by metes and bounds, from Alexander W. Mills, the clerk of the county court of said county; that he recorded the said deed in the clerk's office of said county; that he entered into possession thereof under said conveyance; that he placed the same upon the land books of said county in his own name, for the purpose of taxation; that he, and those who hold under him, have paid the taxes regularly thereon from the time of the said conveyance; that he, and those who hold under him, have made improvements thereon and profits therefrom, without offering to account to the plaintiffs or those under whom they claim; that he, and those who hold under him, have made leases of portions of said land, in his own or their names, and placed the lessees in the possession of the leased premises; that he, and

those who hold under him, have sold and conveyed portions of said land, and placed the purchasers thereof in possession, and appropriated the proceeds of such leases and sales to his own or their own use, without accounting to the plaintiffs, or those under whom they claim, for any part thereof,—then the jury have the right to presume, although the said John C. Olinger only purchased the interest of the Taylor's heirs in said 62,000-acre tract of land, that there was an ouster of the cotenants of Taylor's heirs, and that his possession, and the possession of those under him, was adversary; and that, if such adversary possession was continuous and uninterrupted for more than the length of time prescribed by law prior to the bringing of this suit, then the plaintiffs have no right to recover in this action, and the jury must find for the defendant."

"Twenty-Ninth. The court erred in giving to the jury defendant's instruction number nine, said instruction being in the words and figures following, to wit: 'The court instructs the jury that if they believe from the evidence that John C. Olinger, after the date of the deed from Mills, clerk, to him, took actual possession of any part of the land embraced in the said deed, claiming the whole of said land as his own, and excluded the Fields heirs therefrom, such act was an ouster of the Fields heirs as tenants in common, and such possession by said Olinger was adverse to said Fields heirs from the time of such entry.'"

The plaintiffs in error insist that the deed made to Olinger, under the circumstances detailed in assignment 24, did not constitute color of title under which he could claim the entire tract of land described in said deed, and that his possession under it could not be adverse to Fields' heirs. They claim that Fields had not sold his interest to Taylor, and that only the interest of Taylor's heirs was sold at the tax sale, and that only that interest should have been conveyed by Mills, the clerk, to Olinger, and that, if more was conveyed, only title to that interest passed to Olinger. The defendant, relying upon the alleged deed of 1796, claims that Fields had sold his interest in the land to Taylor, and that at the date of the tax sale Taylor's heirs owned the Fields interest. It must be admitted that, by the act of March 10, 1832, under which it is claimed that the land was sold in the name of Taylor's heirs, Olinger, by the deed made to him by Mills, acquired a legal title to such interest only as Taylor's heirs had in the land at the time of the sale. It was for the jury to find what that interest was. Was it the interest held by Taylor, as one of the patentees, or did it also include the Fields interest, as claimed by the defendant? This was one of the principal questions of fact to be found by the jury, and it was proper that the law applicable to either finding should be given to them. Again, if the deed to Olinger conveyed to him all the land that was on the books in the name of Taylor's heirs, and that was all of the tract originally patented to Fields, Taylor, and Johnson, not theretofore sold, and if it was in the deed described by metes and bounds, and Olinger entered into the possession thereof claiming title to all, and exercised acts of ownership over it in the manner set forth in the instructions, then the deed was color of title; and if he had possession under it, and claimed adversely to all others continuously for the period of time prescribed by law, then the plaintiffs in this suit could not recover.

What is color of title? It is matter of law, and, when the facts are shown, it is for the court to determine whether they amount to color of title. In the case of *Wright v. Mattison*, 18 How. 56, the supreme court, through Mr. Justice DANIEL, said:

"The courts have concurred, it is believed without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title."

In *Veal v. Robinson*, 70 Ga. 809, it said:

"Color of title is anything in writing purporting to convey title to the land which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title."

In *Hutchinson's Land Titles* (page 215, § 390) it is defined as follows.

"It embraces not only a claim of title, but presents the appearance of a real deduction of title from some source, however insufficient or irregular; and the value to the disseisor, entering upon land under color of title, of the paper purporting to pass the title, is that, while he may not have the actual occupancy of more than a small parcel of the tract or lot of land, in construction of law he is, by virtue of his paper giving color of title, entitled to claim to be in the adverse possession, not only of the parcel actually occupied, cultivated, or inclosed, but of the whole area included in the description of his title. *Hamilton v. Wright*, 30 Iowa, 480; *Taylor v. Buckner*, 2 A. K. Marsh. 18," 12 Amer. Dec. 354.

We think it is clear that the deed to Olinger gave him color of title to all the land described in it. The court properly so advised the jury, and submitted to it all questions of fact relating to his possession under his color of title. Fields' heirs and Taylor's heirs might have been tenants in common of the land at the date of the tax sale in 1834, and Olinger only have purchased the interest of Taylor's heirs; yet if he entered into the possession thereof under the deed, claiming title to all, as set forth in the instructions, it was proper for the jury to determine whether such possession was adverse to his cotenants, and an ouster of all others, and in this particular the instructions fairly state the law. *Buchanan v. King*, 22 Grat. 422; *Town v. Needham*, 3 Paige, 545, 24 Amer. Dec. 248; *Culler v. Motzer*, 13 Serg. & R. 356, 15 Amer. Dec. 604; *Bradstreet v. Huntington*, 5 Pet. 444; 1 Washb. Real Prop. (4th Ed.) 657.

Next in order is the twenty-fifth assignment, in the following words:

"The court erred in giving to the jury defendant's instruction number five, said instruction being as follows, to wit: 'The court instructs the jury that it is not necessary, when a man enters upon the land under a deed purporting to convey to him a certain boundary, that he should fence or cultivate the entire tract in order to give him adverse possession. It is enough, in such case, if he actually occupies a portion of the tract; the law extends his adverse possession to the boundaries.'"

It is claimed that the court erred in giving this instruction, the plaintiffs in error insisting that in cases like this, where the land in controversy is of that class known as "wild lands," that the rule set forth in the instruction does not apply, and that the possession of the occupant

is restricted to his actual improvement. We think that there is a misconception of the authorities relied upon by plaintiffs in error, as well as a misuse of the words referred to. The words "wild land," as used in the authorities cited, refer to large tracts of unoccupied lands, as to which no one has been or is in the actual possession of, or of any part thereof. The moment any one, under claim or color of title, takes actual possession of any part of such land, it ceases to be "wild land," as described in the cases to which our attention has been called. As was appropriately said by counsel for defendant in error, "to say that the possession of 'wild lands' is confined to 'actual occupancy' is a contradiction in terms." The plaintiffs cite *Taylor's Devises v. Burnside*, 1 Gratt. 165, but, as we understand that case, it does not support their position. True, the court (page 198) said:

"It follows from what has been said that wild and uncultivated lands cannot be made the subjects of adversary possession while they remain completely in a state of nature."

We must read the entire opinion to fully understand the meaning of this sentence, and it is then apparent that, by "completely in a state of nature," the court alluded to land upon which no one resided, where there was no improvement upon any part, and no cultivation of any portion of it. In that case the court also said:

"A change in their condition, to some extent, is therefore essential, and the acts by which it is effected are often the strongest evidence of actual possession. Without such change accomplished or in progress there can be no residence, cultivation, or improvement; no occupation, use, or employment. Evidence short of this may prove an adversary claim, but, in the nature of things, cannot establish an adversary possession. * * * In controversies concerning wild and uncultivated lands, the usual marks of actual possession are concurrent improvement, cultivation, and residence; the two former, of course, at least in the earlier stages of the prescriptive period, to a very limited extent. But the degree is immaterial if the acts be real and *bona fide*, more or less is unimportant, if there be enough to indicate apparent ownership; and the actual possession thus gained, if exclusive, extends throughout the borders of the colorable title, whether those be large or small."

In *Ellicott v. Pearl*, 10 Pet. 432, Mr. Justice STORY, delivering the opinion of the court, said:

"The argument in support of the instruction as prayed assumes that there can be no possession to defeat an adverse title except in one or other of these ways, that is, by an actual residence or an actual inclosure,—a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evidence of such an intention of asserting such ownership and possession; such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, etc., under color of title. An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession. Although

there may be no fence or inclosure round the ambit of the tract, and an actual residence only on a part of it, to constitute actual possession, it is not necessary that there should be any fence or inclosure of the land. If authority were necessary for so plain a proposition, it will be found in the case of *Moss v. Scott*, 2 Dana, 275, where the court say that 'it is well settled that there may be a possession in fact of land not actually inclosed by the possessor.' * * * In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed, although his actual settlement and improvements were on a small parcel only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be coextensive with the grant to the party, upon the ground that it is his clear intention to assert such possession."

The law applicable to the facts which defendant's testimony tended to establish was properly set forth in this instruction. We cannot find in all the record any testimony tending to show that the plaintiffs, or those under whom they claim, were at any time after the date of the deed to Olinger in 1836, and before the institution of this suit in 1890, in the actual possession of any part of the land. Had there been any such testimony plaintiffs would have cited it, and would have asked the court below to instruct the jury as to the effect of any fact to be found from it. We are of the opinion that the instruction was properly given.

Assignment of error No. 28 reads:

"The court erred in giving to the jury defendant's instruction number eight, to wit: 'The court further instructs the jury that, in order to bring notice of the adverse holding of one tenant in common to his cotenant, it is not necessary to give him actual notice; but if the hostile character of the possession is so openly manifested that his observation as a man reasonably careful of his interest would be sufficient to discover it he would be deemed to have notice.'"

We find no error in this instruction. It is sustained by principle, and by the authorities we have hereinbefore alluded to, and has been disposed of with specification No. 19.

Assignment No. 30 is as follows:

"The court erred in giving to the jury defendant's instruction number ten, to wit: 'The court instructs the jury that there is evidence in the case from which the jury may find that Nathan Fields did sell his interest in the lands in suit to Nathaniel Taylor. There is testimony tending to show the execution of a deed, dated January 1, 1796, from Fields to Taylor, the subsequent listing of the land in the name of Nathaniel Taylor or his heirs, sales of considerable portions of these lands by Taylor and his heirs, and the unchallenged possession by their vendees. These facts, with the failure of those claiming under Nathan Fields, for nearly a century, to assert title, justify the jury in finding that Nathan Fields parted with his interest in these lands in his lifetime.'"

The plaintiffs in error filed in the court below the affidavits of two members of the jury, with their motion for a new trial, the object of which was to prove that the jury was misled by this instruction. Such evidence is not proper for the purpose of impeaching the verdict of the jury, and in this case, after the trial judge had overruled the motion, the affidavits were not made part of the bill of exceptions taken by

plaintiffs, and are not, therefore, before us, although counsel have alluded to them during the argument. The main contention, so far as this instruction is concerned, is that the court, by giving it, invaded the province of the jury. We do not think so, for no rule of law applicable to the courts of the United States is violated by it. The law is correctly stated, and all matters of fact were submitted to the final determination of the jury. In *Rucker v. Wheeler*, 127 U. S. 85, 8 Sup. Ct. Rep. 1142, the supreme court, Mr. Justice HARLAN delivering the opinion, said:

"It is no longer an open question that a judge of a court of the United States, in submitting a case to a jury, may, in his discretion, express his opinion upon the facts; and that when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expressions of opinion are not reviewable on writs of error." *Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. Rep. 1; *Railroad Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. Rep. 1216; *U. S. v. Railroad Co.*, 123 U. S. 113, 8 Sup. Ct. Rep. 77.

In *Fletcher v. Fuller*, 120 U. S. 534-550, 7 Sup. Ct. Rep. 667, in which case the questions involved in this instruction relating to the legal presumptions as to the execution of deeds to be drawn from the actual, open, and exclusive possession of land for the period prescribed by the statute of limitations were fully considered, Mr. Justice FIELD, speaking for the court, said:

"When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. * * * We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession."

There was evidence before the jury which tended to prove that Fields sold his interest in the land in controversy in 1796, and there was no evidence that he was ever in possession of any part of the land since that year, or that he ever paid any of the taxes on it. There was evidence tending to prove that the party to whom Fields is said to have sold his interest exercised acts of ownership over the land, and that his executors sold part of it in 1826, their vendee taking and retaining exclusive and continued possession. There was evidence tending to prove—indeed, there was no contradictory evidence—that Olinger, since he purchased the land in 1834, (and defendant claims under him,) and his vendees, have paid all taxes due on the land from that date to the institution of this suit; and that they have been in the actual, adverse possession of the land continuously from 1836 to the time of the trial, under color of title. With this evidence before the jury, together with

much other of similar import, as appears by the record, it would have been gross error for the court to have refused to give this instruction.

The next and last error assigned, not abandoned, is the thirty-first, to wit:

"The court erred in giving to the jury defendant's instruction number eleven, to wit: 'The court instructs the jury that the length of time necessary to bar a right of entry on an action for land between the year 1834 and the year 1850 was twenty-five years; that from the year 1850 to the year 1861 the length of time necessary was fifteen years; and that since the year 1861 the length of time necessary has been ten years, from which last period, however, the time of any possession existing between the 17th day of April, 1861, and the 1st day of January, 1869, must be excluded.'"

We think this instruction in strict accordance with the statutes of Virginia relating to this question. There was no evidence before the jury rendering it inapplicable, as claimed by plaintiffs in error, and the court very properly gave it.

We have now considered and passed upon all the specifications of error not abandoned by the plaintiffs in error, and we find no error in the record; therefore the judgment is affirmed, with costs.

SHIRK v. CITY OF LA FAYETTE.

(Circuit Court, D. Indiana. October 24, 1892.)

No. 8,783.

1. CONSTITUTIONAL LAW—TRUSTEES.

Rev. St. Ind. § 2988, which provides that it shall be unlawful for any person, association, or corporation to appoint a nonresident a "trustee in a deed, mortgage, or other instrument in writing, except wills, for any purpose whatever," is in conflict with Const. U. S. art. 4, § 2, which provides that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

2. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

Where a citizen of Illinois is appointed trustee by an Indiana court of property situated in the latter state, the citizenship of such person for the purpose of jurisdiction is not affected by such appointment, and he may maintain an action in a federal court for Indiana in his trust capacity for damages to such property.

At Law. Action by Elbert W. Shirk, trustee, against the city of La Fayette. On motion to dismiss the complaint for want of jurisdiction. Overruled.

A. C. Harris, for plaintiff.

John F. McHugh, for defendant.

BAKER, District Judge. Action by the plaintiff, as trustee, against the defendant, to recover damages for the diversion and use of water. The complaint alleges that the plaintiff is a citizen of the state of Illinois, and that the defendant is a citizen of the state of Indiana. It further alleges that the plaintiff was duly appointed trustee of property situated

in this state by the circuit court of Miami county, Ind. The defendant moves to dismiss for want of jurisdiction on the ground that the plaintiff, though actually residing in Illinois, is to be deemed a citizen of this state, because he was appointed trustee by an Indiana court, and sues in his trust capacity for damage to trust property situated in this state. Assuming, without deciding, that the jurisdiction of the court may be challenged by motion, as well as by plea or answer, (but see *McDonald v. Flour-Mills Co.*, 31 Fed. Rep. 577; *Sharon v. Hill*, 23 Fed. Rep. 353,) I will proceed to dispose of the question of jurisdiction on its merits. Section 2988, Rev. St. Ind., which provides that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing except wills, for any purpose whatever, who shall not be at the time a *bona fide* resident of the state, to act as such trustee," is in conflict with Const. U. S. art. 4, § 2, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *Bryant v. Richardson*, 126 Ind. 145, 25 N. E. Rep. 807; *Robey v. Smith*, (Ind. Sup.) 30 N. E. Rep. 1093; *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. Rep. 146.

The statute of this state which sought to make it unlawful for a citizen of another state to act as trustee in this state being unconstitutional and void, the question of jurisdiction must be settled by determining whether the citizenship of the plaintiff for the purposes of jurisdiction is affected by the fact of his appointment as trustee by an Indiana court for property situated in this state. In *Rice v. Houston*, 13 Wall. 66, it is held that one appointed administrator may become a citizen of another state, and, after such change of citizenship, he may sue in the federal court. So, in *New Orleans v. Whitney*, 138 U. S. 595, on page 606, and 11 Sup. Ct. Rep. 428, on page 431, the court says: "We have repeatedly held that representatives may stand upon their own citizenship in the federal courts, irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers," etc. To the same effect is the case of *Harper v. Railroad Co.*, 36 Fed. Rep. 102. Text writers on practice in the federal courts state the rule of law in the same way. Fost. Fed. Pr. § 19; Story, Fed. Pr. § 19. The motion is groundless, and must be overruled. It is so ordered.

BLACK v. ELKHORN MIN. Co., Limited.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1892.)

No. 44.

DOWER IN MINING CLAIMS.

The mere possessory right given by Rev. St. § 2322, to the locator of a mining claim is not such an estate as that dower can be predicated thereon by state legislation as against the United States or its grantees. 49 Fed. Rep. 549, disapproved.

In Error to the Circuit Court of the United States for the District of Montana.

At Law. Action by Mary A. Black against the Elkhorn Mining Company, Limited, to recover dower in a mining lode. A demurrer to the complaint was overruled. 47 Fed. Rep. 600. So, also, was a demurrer to new matter in the answer. 49 Fed. Rep. 549. Judgment for defendant. Plaintiff brings error. Affirmed.

Word, Smith & Word, for plaintiff in error.

W. E. Cullen, (*Geo. F. Shelton*, on the brief,) for defendant in error.

Before McKENNA, Circuit Judge, and ROSS and MORROW, District Judges.

ROSS, District Judge. The plaintiff in error is the widow of L. M. Black, who, during his lifetime, and while plaintiff in error was his wife, owned an undivided two fifths of a certain mining claim, situate in the then territory of Montana, called the "A. M. Holter Quartz Lode." Black, on the 7th of March, 1879, sold and conveyed his interest in the claim to one Burton, his wife, the plaintiff in error, not joining in the conveyance. In July, 1881, Black died intestate. The interest so conveyed to Burton subsequently passed by various mesne conveyances to the defendant in error. On the 29th of October, 1883, an application was made to the proper United States land office by the immediate predecessor in interest of the defendant in error to enter the claim, and such proceedings were had in the matter of the application that on the 19th of November, 1889, a patent therefor was issued by the United States to the applicant. No protest, adverse claim, or objection of any character was made by the plaintiff in error at any stage of the proceedings in the land department. A statute of Montana, passed in 1876, provides as follows:

"A widow shall be endowed of the third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. Equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband during his lifetime, the title to which may be completed after his death." Section 1, Laws Mont. 1876, (9th Sess.) p. 63.

This statute the supreme court of Montana decided, in the case of *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. Rep. 729, continues in force. Under and by virtue of its provisions the plaintiff in error, on the 20th

of January, 1891, commenced the present suit to establish her alleged right to dower in the property.

The principal question presented and argued by counsel is whether a mere mining claim, an undivided interest in which is confessedly all that the husband of the plaintiff in error owned at the time of his sale and conveyance to Burton, and all that the vendee owned at the time of Black's death, is a sufficient estate upon which to predicate a right of dower.

Congress, by statute, conferred, with certain limitations not here necessary to be stated, on all locators of mining claims, their heirs and assigns, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title—

"The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." Rev. St. § 2322.

It is apparent that the possessory right thus conferred upon the locator may be, and often is, of great value, and it has been many times decided, and is well and thoroughly settled, that such claims may be sold, transferred, mortgaged, and inherited. But the thing so granted or inherited can only be the thing the grantor or decedent, as the case may be, owned; that is to say, the right to explore the mine and extract the minerals therefrom under the existing laws and regulations upon the subject. Congress has also provided that the locators of such claims may purchase the property, and has prescribed the terms and conditions upon which the government title may be thus acquired. Rev. St. §§ 2325-2340. But the locator is not compelled to buy. He may never do so. A notable instance of this sort is shown in the case of *Forbes v. Grisey*, 94 U. S. 762, where it is said by the supreme court that the Consolidated Virginia Mining Company, for the purpose of evading a state tax upon the mine it was possessed of and working, permitted its investment in the mine, said to be worth from \$50,000,000 to \$100,000,000, to rest on such a bare claim, "this mere possessory right, when it could at a ridiculously small sum compared to the value of the mine obtain the government's title to the entire land, soil, mineral and all." As the right given to possess, explore, and extract the minerals from the located claim is not made dependent upon an application to purchase it, in many instances there is never even an application to purchase made by the locator or his successor in interest. In the case under consideration no such application was made prior to the death of the husband of the plaintiff in error. The government's offer to sell this mining claim had not been accepted, and no step of any nature looking to the acquisition of the title of the United States thereto had been taken by the locators, or their successors in interest, up to and

for a long time after that event. The title of the United States was therefore then absolutely free and unincumbered. No legal reason existed why congress could not then have withdrawn the property from sale, or made any other disposition of it. That the government, in its wisdom and generosity, continued to permit the locators to enjoy the fruits of its property by extracting the minerals therefrom, and that a right thus conferred upon and enjoyed by locators constitutes property, and property often of great value, which is treated by the courts and legislatures of various states as realty in dealing with the rights of claimants thereto as between themselves and third parties, in no respect affect the true title to the property, which all the time remained in the United States free and unincumbered, because its offer to sell had not been accepted, and it had done nothing to part with its title. To hold that the title thus held by the government can be in any way affected or incumbered by any state legislation would be to restrict, to such extent, the absolute and undoubted right of congress to dispose of the public property of the United States as it deems best. While the possessory right to which reference has been made constituted in the locator, owning and enjoying it, property of value, which could be sold, transferred, mortgaged, and inherited, and, we may add, forfeited by abandonment, it constituted, and could constitute, no legal interest or estate in the property as against the United States or its grantee, whose title could not be burdened by the right of dower, or otherwise, by virtue of any state legislation. At any time prior to contracting to purchase the property the locator may abandon the claim. Is the government to be held bound to convey the claim while the locator is at liberty to abandon it? Such abandonment often occurs from one cause or another; sometimes because the claim proves to be worthless; in many instances after the locator has enjoyed all of the substantial fruits of the property by the extraction of all of the paying ore. This the government permits to be done in pursuance of the eminently wise policy of encouraging the discovery, exploration, and production of the precious metals; but it cannot properly be said to be legally bound to do so. Nor would it seem that any equitable principle would be violated should congress see proper to terminate the possessory right conferred by it where the locator, or his successor in interest, as in the case before the court in *Forbes v. Gracey*, *supra*, persistently declines, while reaping the fruits by extracting the substance of the property, to accept its offer to part with the title for a mere pittance compared to its value?

It is the established doctrine in respect to a pre-emptor entering upon the public land of the United States, under the provisions of the late pre-emption law, that his settlement, "even when accompanied by an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon congress by the constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of

the price of the land, had been performed by the settler," and that, until all of these requirements had been complied with, the settler had only the privilege to purchase in preference to others in case the government should sell. *Shepley v. Cowan*, 91 U. S. 330, and authorities there cited. In the case of the pre-emptor the statute required the application to purchase the land to be made within a designated time, while in the case of a locator of a mining claim there is no such limitation; and the pre-emptor was denied the privilege of conveying his interest prior to purchase from the government, while the locator of a mining claim is accorded that privilege. But it is not perceived that these differences make inapplicable here the principle governing the ruling in respect to the rights of pre-emptors upon the public lands after settlement, accompanied by improvement of the property, but before its entry.

For the reasons stated, we think it very clear that a mere locator of a mining claim, owning only the possessory right conferred by the statute, has no such estate in the property, as against the United States or its grantee, as that the rights of dower can be predicated thereon by virtue of any state legislation.

It is equally clear that, if the common law could be resorted to, no such right would exist. The interest of a locator of a mining claim is, in some respects, not unlike that of a copyholder at common law. Both had their origin in local custom, and in each the custom crystallized into law. The copyholder held his land by the custom of the manor, and, while the fee remained in the lord, the right to the possession and enjoyment of the premises was in him. He might alien his lands at will, and on his death they descended to his heirs. His estate might be taken in execution for the payment of his debts, and, if he became bankrupt, it passed to his trustee. But, unlike the locator of a mining claim, the copyholder held upon no condition. He did not have to comply with rules and regulations established by the law of the manor, nor could the conditions under which he held be changed at the will of the lord. He was not required to perform labor or make improvements upon the land annually, or at all. The copyholder was practically a freeholder, and yet, because the fee was in the lord, the common law, which favored dower, denied it to the widow. 1 *Scrib. Dower*, p. 363; *Duncan v. Phosphate Co.*, 137 U. S. 652, 11 *Sup. Ct. Rep.* 242.

As the views above expressed go to the root of the case of the plaintiff in error, the judgment of the court below, which was against her, though based on other grounds, must be affirmed, without reference to other questions presented and argued by counsel. The judgment is accordingly affirmed.

PACIFIC CABLE RY. CO. v. BUTTE CITY ST. RY. CO.

(Circuit Court, D. Montana. November 21, 1892.)

No. 18.

1. PATENTS FOR INVENTIONS—ANTICIPATION—PRIORITY OF INVENTION—PRESUMPTIONS.

Letters patent No. 804,863, to Henry Root, for a track brake for railway cars, was not anticipated by the prior patent issued to Patterson September 25, 1883, for the Root patent was issued after a hearing on an interference therewith in the patent office; and in such cases, if the two patents cover the same invention, the issuance of the last one is *prima facie* evidence that the patentee thereof was the first inventor.

2. SAME—INVENTION—AGGREGATION—CAR BRAKES.

The Root patent is not void as being a mere aggregation of old elements, for the brake consists of two toggle levers, one operating upon the other, which is attached to the shoe, thus achieving a new and useful result, sufficient, when aided by the presumption of novelty and utility arising from the issuance of the patent, to sustain the same.

3. SAME—INFRINGEMENT—COLORABLE DIFFERENCE.

The patent is infringed by a car brake which is the same in construction and operation, excepting that in the patent the first toggle lever is connected directly with the rock shaft, while in defendant's device it is connected therewith by an intermediate rod or link.

In Equity. Bill by the Pacific Cable Railway Company against the Butte City Street Railway Company for infringement of a patent. Decree for complainant.

Wm. F. Booth and Dixon & Drennen, for complainant.

Geo. H. Knight, F. T. McBride, and Geo. Haldorn, for defendant.

KNOWLES, District Judge. Plaintiff is the assignee of patent No. 304,863, issued by the United States to one Henry Root for a track brake for railway cars. Plaintiff sues defendant in this action for an infringement of these letters patent. The suit is one in equity, asking for an accounting from defendant for the profits it may have derived by the use of said brake, and to restrain defendant from any further use of said brake device, and for other relief. The defendant makes several defenses to this action of plaintiff. They are: *First*, noninfringement of said letters patent; *second*, anticipation of the device named in the patent; and, *third*, that the claim of plaintiff is for an aggregation of elements, and not patentable.

Considering the first defense, it appears to the court from the evidence that the two brakes of plaintiff and defendant respectively are substantially the same. They are used in the same way, and intended to accomplish the same end. There is no pretense on the part of defendant but all the mechanical contrivances in the one are the same as those in the other, save as to one feature. This feature is the manner in which the knee toggle levers in each brake are connected to a rock shaft. Each device has what is called a rock or rocking shaft, and each has knee or toggle levers

attached to a block or shoe which presses upon the railway track. In complainant's device the toggle lever, Q, to which are attached the other toggle levers, which are attached to the shoes, is connected directly with the rock shaft of its device, while in the device of defendant the toggle lever, Q, is attached to a rod, which is attached to the rock shaft. I cannot see that in the operation of the brake this rod acts in any other way than as a means of connection with the rock shaft. It is, then, a means of making an indirect connection between said toggle lever and said rock shaft, instead of a direct one. The witness for the complainant, William H. Smyth, said in his evidence:

"Comparing the defendant's construction, as illustrated in the drawing, Exhibit D, with this description of the patent, I find essentially the same construction as described in the patent, a slight modification, however, being introduced, to conform to the requirements of the particular car track to which the brake mechanism is attached. * * * The modification which I have described in no wise changes the principle of the brake mechanism, or its method of operating, from that described in the patent, Exhibit A."

In the evidence of Jesse M. Smith, witness for defendant, the only thing which he claims as connected with defendant's device that makes it different from plaintiff's device is that in the brake as constructed by defendant the brake might be separated from the rock shaft, and operated by another appliance, or one could be separated and one operated. It is not pretended, however, that defendant's brake was operated by any other means than the rock shaft; only that it might be otherwise operated,—how, does not fully appear. It would appear to me, then, that, as operated, the two devices are substantially the same. The connecting the toggle lever, Q, with the rock shaft by means of a rod or "link," as it is sometimes called, is only a colorable variation from the device of plaintiff, and does not prevent the device or mechanical structure of defendant from being substantially the same as that of plaintiff, and an infringement thereof. *Ives v. Hamilton's Ex'r*, 92 U. S. 426; *Machine Co. v. Murphy*, 97 U. S. 120.

I do not think there is any device which fully anticipates plaintiff's, unless it be that of the patent of Patterson. That toggle joints were used before is abundantly established. They were used in printing, and hay, and perhaps other, presses. But it does not appear that they were ever used in the manner as here used by plaintiff, in a car brake, unless they were so used in the Patterson device. They were never used to produce the result achieved in these brakes, and no device is shown that had the form of this. There may be a patentable invention discovered when old elements are so combined as to produce a new and useful result. *Loom Co. v. Higgins*, 105 U. S. 591. This, I think, occurred in these car brakes. Did the Patterson brake anticipate that of plaintiff? That car brake is very similar in some respects, if not in all, to that of plaintiff. The witness Jesse M. Smith in his cross-examination says "that it is his opinion that the form of connection in the Patterson brake is not strictly an equivalent for that in the patent of plaintiff." I am not pre-

pared to say that the two brakes are not substantially the same. Both perform the same functions in about the same way. I am not, however, forced to decide as to the substantial identity in mechanism of these two brakes. There is another point more satisfactory to me upon which I can rest my decision. The evidence is uncontradicted that Henry Root, the patentee of plaintiff's patent, had as early as 1882 prepared a model of his brake, and in 1883, early in the spring, had put his invention into practical use upon some of the street cars in San Francisco. Patterson made his application for his patent on February 10, 1883, and the patent bears date of September 25th of the same year. There is no evidence of any connection between Root and Patterson. The first lived and made his model in San Francisco, Cal., and the latter in Philadelphia, Pa. We have here presented the question of priority. Which one of these must be considered the first inventor? "The settled rule of law is that whoever first perfects a machine is entitled to a patent, and is the real inventor." *Reed v. Cutter*, 1 Story, 600; *Agawam Co. v. Jordan*, 7 Wall. 602; *Loom Co. v. Higgins*, 105 U. S. 580; *Whitely v. Swayne*, 7 Wall. 685. "There is but one issue of fact in an interference suit. That issue relates to the dates wherein the interfering matter was respectively invented by the interfering inventors. If the complainant's invention is the older, the defendant's claim is void for want of novelty." Walk. Pat. § 317. There is no evidence as to when Patterson perfected his machine or invented the same. The granting of letters patent by the commissioner of patents, when lawfully exercised, is *prima facie* evidence that the patentee is the first inventor of that which is described and claimed in them. *Seymour v. Osborne*, 11 Wall. 516-538. Where there is an interference claimed before the commissioner of the patent office, "the decision of the commissioner is *prima facie* evidence in favor of the patent last granted, because, it is said, he would not have granted it if he had not decided it to be entitled to priority in point of date of invention." Walk. Pat. § 318; *Sewing Machine Co. v. Stevenson*, 11 Fed. Rep. 155; *Folding Box Co. v. Rogers*, 32 Fed. Rep. 695. It would seem that there were two hearings between Root and Patterson as to interference of their inventions. At the first, Root's application was rejected; in the second, this ruling was reconsidered, and a patent awarded him. Under these circumstances, it would appear that, if there is any interference between the two patents, the commissioner must have decided in favor of Root. The commissioner of patents does issue at times two patents for the same invention, to different persons. In so doing he must, in effect, decide that the person who obtains the last patent was the first inventor. The evidence of the date at which Root made his model and put his invention into practical use is not disputed. Under these circumstances, I hold that Root was the first inventor of the car brake in evidence.

I do not think that the point is well taken that this brake is only an aggregation of elements, and hence not a patentable combination. In the case of *Seymour v. Osborne*, *supra*, the supreme court said:

"Particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not been, and could not be, applied without these changes; and under these circumstances, if the machine as changed and modified produces a new and useful result, it may be patented, and the patent will be upheld under existing laws."

It seems to me that this was what was done in this particular patent. It is in evidence that in San Francisco there had been a brake constructed somewhat like this, but having only one pair of toggle levers to one shoe. In this there are two pairs of such levers, and a new and useful result is reached. It is not the case of an aggregation of elements or parts. An aggregation not patentable is one where each part performs its own function independently of the other parts, and no new result is produced. *Hailes v. Van Wormer*, 20 Wall. 353; *Reckendorfer v. Faber*, 92 U. S. 347. While in this case the parts are old, a new and useful result, I think, is reached by their combined action. I am strengthened in this view by the fact that the commissioner issued the patent to Root. This makes the patent *prima facie* evidence of both utility and novelty. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970; *Lehnbeuter v. Holthaus*, 105 U. S. 94. And so strong is this presumption that it can be overcome only by evidence which establishes this want of novelty or utility beyond a reasonable doubt. I therefore find that plaintiff is the owner of letters patent numbered 304,863, bearing date September 9, 1884, as assignee of Henry Root, to whom the same were issued; that Henry Root was the original and first inventor of the car brake described in said letters; that the defendant has infringed said letters patent by the use of said car brake without the consent of plaintiff; that said car brake was not anticipated by that of the Patterson car brake; that the claim of defendant is not a nonpatentable aggregation of well-known elements; that plaintiff is entitled to the injunction prayed for in its bill.

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all. The said added is a new and useful result, and it is not a
which is not a new and useful result, and it is not a new and useful result.

UNION SWITCH & SIGNAL CO. v. JOHNSON RAILROAD SIGNAL CO.

(Circuit Court, D. New Jersey. November 16, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—LICENSE.

Under letters patent No. 284,716, issued September 11, 1883, to George W. Blodgett and George R. Hardy, for "improvements in railroad signals," a license was granted to a certain railroad company to "make and use" the patented article. A manufacturer, learning that the company intended to erect such signals at a certain junction, submitted a proposal to furnish them complete at a certain price. This proposal was accepted, and the signals were made and erected accordingly. *Held*, that the transaction was that of manufacture and sale on the one side and of purchase on the other, and that the manufacturer was guilty of infringement, and could not excuse himself on the ground that in making the signals he was the mere servant or employe of the licensee.

2. SAME—NECESSARY PARTIES.

A licensee to "make and use" a patented article is not a necessary party complainant in a bill brought by the owner of the patent for infringement.

In Equity. Bill by the Union Switch & Signal Company against the Johnson Railroad Signal Company for infringement of a patent. Decree for complainant.

J. Snowden Bell, for complainant.

George W. Miller, for defendant.

GREEN, District Judge. The bill of complaint in this cause charges the infringement by the defendant of letters patent No. 284,716, granted September 11, 1883, to George W. Blodgett and George R. Hardy, for "improvements in railroad signals," and by them assigned to the complainant. The defendant, in its answer, practically admits the infringement as charged, but seeks to avoid any responsibility therefor, upon the ground that the Boston & Albany Railroad Company, for whom the infringing signals had been manufactured by the defendant, had, previously to the assignment of the letters patent to the complainant, been duly and lawfully licensed by the patentees to make and use the said "improved railroad signals" protected by said letters patent upon all lines owned or operated by that company to the full end of the term of said letters patent, and that in the manufacture of the infringing signals the defendant was acting solely as a servant or employe of that company, and strictly under and in accordance with the terms of the license. The important allegations in the answer are as follows:

"And this defendant, further answering, admits that the said Blodgett and Hardy executed to the complainant a writing purporting to be a transfer of a certain interest in said alleged patent, but denies that the same granted to the complainant exclusive rights or privileges, but charges and insists that said right so transferred was not an exclusive right or interest in said alleged letters patent, and does not purport to be such, but that they expressly reserved to the Boston & Albany Railroad Company, its servants, agents, assigns, or representatives, the right, license, and privilege to make and use the said improvements covered by said alleged letters patent upon all lines owned or operated by the said Boston & Albany Railroad Company, to the full end of the term of the said patent; and this defendant denies that said complainant is, or ever has been, in full and exclusive possession and enjoyment of the privileges

secured, or claimed to be secured, under and by virtue of said alleged letters patent, but charges the truth to be that the Boston & Albany Railroad Company, in pursuance of their right, and by virtue of the certain license made, executed, and delivered to them by the said Blodgett and Hardy, under seal, prior to the assignment to said complainant, have and now are exercising the privileges of making and using said improvement in railroad signals upon the lines owned or operated by it, and that it has the right so to do. And this defendant denies that it is now constructing, selling, and using railroad signals in material parts thereof substantially the same in construction and operation as in said letters patent mentioned, within the state of New Jersey or elsewhere in the United States, or that it has ever constructed, sold, or used said railroad signal in material parts substantially the same in construction and operation as in said alleged letters patent mentioned, except, as the agent, servant, and employe of the said Boston & Albany Railroad Company, it did construct certain appliances in material parts similar in construction and operation to those mentioned in said letters patent, but that the same were ordered by and for the exclusive use of, and used upon the railroads owned and operated by, the Boston & Albany Railroad Company; and this defendant claims that it has the right so to do by reason of said reservation mentioned in the assignment to the complainant."

The license to the Boston & Albany Railroad Company, referred to by the defendant in its answer, is as follows:

"Whereas, letters patent of the United States No. 284,716 were granted September 11, 1883, to George W. Blodgett and George R. Hardy for an improvement in railroad signals; and whereas, the Boston and Albany Railroad Company are desirous of purchasing the right and license to make and use the same on and for their own lines: Now these presents witness that, in consideration of one dollar to us paid by said company, and for other good and valuable considerations, the receipt of all of which is hereby acknowledged, we, the said George W. Blodgett and George R. Hardy, have sold, granted, and transferred, and by these presents do sell, grant, and transfer, to the said Boston and Albany Railroad Company, its successors and assigns, the right, license, and privilege to make and use the said improvement in railroad signals upon all the lines owned or operated by them to the full end of the term of said patent."

This is clearly a license to the Boston & Albany Railroad Company to manufacture, and to use after manufacture, upon all lines owned or operated by them, the railroad signals protected by the letters patent referred to. Whether the license is a mere naked limited license, not capable of assignment by the Boston & Albany Railroad Company, as was argued by the counsel for the complainant, or whether it should receive a broader construction, as the defendant insists, become immaterial questions in the view taken by the court of the matters in issue. Admitting that the word "assigns" in the license demands a construction of the greatest liberality, and would authorize the assignment by the railroad company of all rights and privileges secured thereby to any person or corporation whom it might choose to make its assignee, yet such construction would in no wise aid the defendant in its attempt to relieve itself from responsibility for its admitted infringing acts. There is not a *scintilla* of evidence tending to show that the defendant was either an assignee or a licensee of the Boston & Albany Railroad Company. No pretense of such assignment or of such license is made in the answer of

the defendant. The defendant puts its defense upon entirely different grounds. It assumes to be an employe or an agent of the Boston & Albany Railroad Company, and, as such, it claims that in the manufacture of the railroad signals in question it was directly working under the license, and hence its action is not amenable to the law. A defense of this character, if well founded, would have great weight. But, unfortunately for the defendant, the testimony wholly fails to justify the assumption. No evidence has been offered tending to show an agency between the defendant and the railroad company, or a contract of employment, in the legal sense of those terms. What the testimony does clearly show without any contradiction is this: The defendant, being informed that the railroad company intended to erect at a station upon one of its lines known as "Athol Junction" the signals in question, submitted a proposal to furnish them complete at and for a certain price. This proposal was, after consideration, accepted by the railroad company, and the signals were consequently erected by the defendant. This is the whole transaction. The defendant was manufacturer and seller. The railroad company was buyer. No other or different relationship existed between the parties to this transaction. To assert that the defendant was the agent or employe or servant of the railroad company, in the sense in which it uses those descriptive terms in its answer, is simply to pervert their distinctive and legal meaning. The defendant was neither, in such sense as would enable it to find any justification for its infringing act in the license to the railroad company. Besides, the license was "to make" and "to use" in a limited way only. The defendant "made" and "sold" to others to use. It can hardly be contended that the most liberal construction of the license would authorize the licensee to sell the signals to others. The rights "to make," "to use," and "to sell" a patented article are severable and distinct. Each right is subject to conveyance, in exclusion of the others. The license to do the one does not include, except, perhaps, under special circumstances which have no existence here, the right to do the other.

It was urged upon the argument that the bill of complaint was demurrable for want of necessary parties, it being insisted that the Boston & Albany Railroad Company, because of the interest vested in it by the license, should have been made a party complainant. It is only necessary to say that the rule is otherwise. Notwithstanding the license, the legal right in the monopoly created by the letters patent remains in the patentee, and he alone can maintain an action against a third party, who commits an infringement upon it. *Gayler v. Wilder*, 10 How. 495. There must be a decree for complainant in accordance with the prayer of the bill.

SYRACUSE CHILLED PLOW CO. v. STRAIT *et al.*

(Circuit Court, N. D. New York. November 28, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY—SIDE-HILL PLOWS.

Claim 3 of letters patent No. 220,453, issued October 7, 1879, to Wiard & Bullock, for an improvement in side-hill plows, consisting of a "reversible double moldboard jointer, in combination with a reversible moldboard plow," discloses patentable novelty, and is valid.

2. SAME—INFRINGEMENT.

A double moldboard, one part forming the land side and the other the furrow side, is an essential element of the claim, and a plow having a jointer lacking this feature does not infringe, although the words "double moldboard" were inserted, by requirement of the patent office, without sufficient reason.

In Equity. Suit by the Syracuse Chilled Plow Company against Strait and others for infringement of a patent. Bill dismissed.

Geo. W. Hey, for complainant.

Geo. B. Selden, for defendant.

WALLACE, Circuit Judge. Infringement is alleged of the third claim of letters patent No. 220,453, granted to Wiard & Bullock October 7, 1879, for an improvement in side-hill plows. The claim reads as follows: "(3) The reversible double moldboard jointer, in combination with a reversible moldboard plow, constructed and arranged substantially as and for the purposes specified." A reversible jointer is of no value except on a side-hill plow. Such plows contain a reversible moldboard. The invention of the claim resides in combining the double moldboard jointer, placed in the beam of the plow, and capable of being reversed when the main moldboard is shifted, with a reversible main moldboard. The function of a jointer is to turn a small furrow in advance of the furrow made by the main moldboard. A reversible jointer is capable of adjustment, like the reversible main moldboard of the plow, so as to turn a furrow to the right or left hand, at the will of the operator. The expert for the defendants concedes that there is not found in any prior patent or publication exhibiting the prior state of the art a plow having a reversible jointer combined with a reversible moldboard. I have no reason to doubt that such a combination involved patentable novelty, and produced a new and useful result; nor that the limitation inserted in the claim, whereby a double moldboard is made an element, was an unnecessary one, and was required by the patent office without sufficient reasons.

I am constrained to hold, however, that the defendants have not infringed the claim in controversy, and that their plows do not have the double moldboard jointer of the claim. The file wrapper of the application for the patent shows that the patentees' original claim was as follows: "The reversible jointer, in combination with the reversible moldboard plow, constructed and arranged substantially as and for the purposes specified." The applicants were required by the patent office to

amend the claim by adding before the word "jointer" the words "double moldboard." Accordingly they amended the claim so as to read as it now stands. Referring to the specification, the only description of the moldboard jointer is as follows:

"This moldboard is so shaped as to present a land side in proper line on the one side, and a moldboard on the other, when turned in one direction, and the reverse when turned the other way."

Unless the double moldboard is composed of two parts, of which one forms a land side and the other a furrow side, it is not the jointer of the patent. In none of the alleged infringing plows is there such a moldboard.

It may be true, and probably is, that a land side does not perform any important function in the moldboard of a jointer. The land side in the main moldboard of the plow bears against the land side of the furrow, and thus resists the lateral strain caused by the pressure of the earth on the furrow side; but the lateral pressure exerted on the moldboard of the jointer is insignificant, because the resistance of the land side of the main moldboard prevents lateral displacement, and holds the beam in place. Nevertheless, the patentees have seen fit, by their description of the jointer moldboard as so shaped as to present a land side in proper line on one side and a moldboard on the other, to specify it as one capable of performing the functions incident to that form of moldboard. Having made this feature essential by their specification, it cannot be eliminated. The double moldboard jointer of the claim must be regarded as a moldboard having this feature.

The bill must be dismissed.

HOHNER v. GRATZ.

(*Circuit Court, S. D. New York. November 29, 1892.*)

TRADE NAME—INFRINGEMENT.

Mathias Hohner is a well-known maker of harmonicas in Wurtemberg, most of which are sold under his name in this country. He makes no particular style, but his workmanship is good. Ernest Leiterd made harmonicas in Saxony, and put upon them his own name, partly in monogram, with the word "*nach*" and the words "Improved Hohner" in larger and plainer letters, and sold them in this country through an agent. *Held*, that Hohner's right to the use of his own name was infringed, and he was entitled to an injunction and accounting.

In Equity. Bill by Mathias Hohner against William R. Gratz for infringement of a trade name. On final hearing. A motion for leave to file a supplemental answer setting up a foreign judgment was heretofore denied. See 50 Fed. Rep. 369. Decree for complainant.

Louis C. Raegener, for orator.

Benno Loewy, for defendant.

WHEELER, District Judge. The orator is a well-known maker of harmonicas in Wurtemberg, most of which are sold under his name in this country. Ernest Leiterd is a maker of harmonicas in Saxony, for whom, in the sale of which, the defendant is agent in this country. Leiterd has made harmonicas, and put upon them the word "nach" with the words "Improved Hohner" in larger letters, prominently, besides his own name, partly in monogram, and less plain, which have been and are being sold through the defendant in this country. This bill is brought to restrain such use of the orator's name, and for other relief. The orator does not appear to have made or sold any particular style of these instruments to which his name has been applied, but his workmanship appears to have been good, and his name has generally been used upon those of his own manufacture. He has made no improvements but in quality, and the words "Improved Hohner" would signify his make of better quality.

The defendant Leiterd has no occasion to use the orator's name to distinguish any form of instrument, or for any purpose but to express his workmanship. The use of the word "nach" would not show that the instruments were not his make; neither would the name of Leiterd show that they were of his make. This use of the orator's name tends directly to show that Leiterd's instruments are of the orator's make. Many cases justify the use of others' names to show kinds and styles, but none of them go so far as this. *Fairbanks v. Jacobus*, 14 Blatchf. 337; *Wilcox Machine Co. v. Frame*, 17 Fed. Rep. 623; *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276; *Goodyear's India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 166. The orator has the right to use his own name on his own wares. The defendant has shown no right to use the orator's name on Leiterd's wares. Let there be a decree for an injunction against this use of the orator's name, and for an account, with costs.

THE VENEZUELA.

INSURANCE CO. OF NORTH AMERICA *v.* THE VENEZUELA *et al.*MERRITT *et al.* *v.* THE VENEZUELA *et al.*

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

Nos. 64, 68.

ADMIRALTY APPEALS—NEW EVIDENCE—RULES OF COURT.

Rule 7 of the admiralty rules promulgated by the circuit court of appeals for the second circuit, to take effect July 2, 1892, authorizes the taking of new proofs only on sufficient causes shown to the court or a judge thereof pursuant to an application made within 15 days after the filing of the apostles, and upon 4 days' notice to the adverse party. *Held*, that this rule will not be enforced as against a party whose case was tried in the district court prior thereto, in reliance upon the right to introduce such new testimony on an appeal as was permissible under the then existing rules and practice of the circuit; and in such a case the court will, as under the old practice, receive new material evidence which was not intentionally withheld in the district court. The new rule is not an innovation in admiralty practice.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Separate libels filed by the Insurance Company of North America and the Atlantic & Gulf Wrecking Company, on the one hand, and by Israel J. Merritt and Israel J. Merritt, Jr., on the other, against the steamship Venezuela, her tackle, etc., and her cargo, (John Dallett and others, constituting the firm of Bailton, Bliss & Dallett, being claimants,) to recover for salvage services. The cases were heard together in the district court, which awarded \$6,500 to the first-named libelants and \$33,500 to the Merritt Wrecking Company. See 50 Fed. Rep. 607. An appeal was taken by the first-named libelants in the one case and by the claimants in the other, the appeals being numbered 64 and 68, respectively, on the docket of this court. The case is now heard on the motion of the appellees to suppress certain depositions filed in this court by the appellants, and containing new evidence not offered below.

Robert D. Benedict, for the motion.

George A. Black, opposed.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We think the facts stated in the opposing affidavits should excuse the appellant for not making the application for leave to take new proofs required by rule 7, Appeal Rules in Admiralty, promulgated by this court May 20, 1892, to take effect July 1, 1892. It would be unjust to a party whose case has been tried in the district court in reliance upon the right to introduce such new testimony upon an appeal as was permissible under existing rules to preclude him

from doing so because of limitations imposed by rules of court subsequently made. The language of the rule does not require a retroactive effect to be given to it, and we are disposed to treat the motion to suppress the depositions taken by the appellant as though the appellee were showing cause, pursuant to the old rule, (No. 130,) why the appellant should not offer new proofs. Prior to the adoption of the new rule, it was not the practice in this circuit to allow parties upon an appeal in an admiralty cause from the district court to introduce as new evidence that which was available at the hearing in the district court, and had been deliberately withheld. *The Saunders*, 23 Fed. Rep. 303; *The William H. Payne*, 25 Fed. Rep. 621; *Singlehurst v. La Compagnie*, decided in this court January 18, 1892, (1 U. S. App. 126, 1 C. C. A. 487, 50 Fed. Rep. 104.) It had not been definitely decided, however, that the introduction of evidence should be precluded merely because it had been negligently omitted at the hearing in the district court; and, by the general acquiescence of practitioners, and perhaps of the judges, it had come to be implied that any new evidence might be offered which was material, and had not been intentionally withheld at the trial below. The purpose of the new rule is to reform what had become a mischievous practice in this circuit, and to require the exercise of a sound discretion by the judges of this court in refusing to allow parties to offer testimony which ought to have been produced, but was not produced, in the court of original jurisdiction.

The rule is not a new departure from the recognized practice of courts of admiralty generally, but conforms to it. In *The Generous*, 2 L. R. Adm. & Ecc. 57, 64, Sir ROBERT PHILLIMORE said:

"The court will require good reason to be shown why evidence not produced before the court below should be introduced in this court, and will exercise a discretion, according to the circumstances of the case, on this subject; entertaining a strong opinion, upon general principles, which are too obvious to require to be stated, that such discretion should be exercised with great reserve and caution."

In *The Mooresley*, 1 Asp. 471, decided in 1872, the same judge refused the application to examine two witnesses who had not been examined in the court below, because it did not appear that there was any surprise owing to the absence of the witnesses. In *The William*, 7 Ir. Jur. 354, the reporter's note is as follows:

"This court will admit additional evidence upon appeal, if it appears by affidavit that it was impossible for the party or parties in the court below to tender it at the original hearing; the witnesses being nautical men, whose attendance is not always available."

The earliest reported case upon the subject in this country is *Rose v. Himely*, Bee, 313, decided by Mr. Justice JOHNSON in the supreme court at circuit in 1805. The decision was that the question whether new evidence could be adduced on appeal must depend upon the nature of the evidence proposed to be adduced, and the sufficiency of the reasons given to show that the inability of the claimant to produce such evi-

dence at the time of the trial in the district court was not attributable to his own laches. The next case was *Coffin v. Jenkins*, 3 Story, 108, 120, which arose on the question of amendment of an answer involving new proofs to support it. In refusing to allow the amendment, Judge STORY said:

"The matter of defense must have been well known when the cause was in the court below, and ought then, if ever, to have been insisted on, as, if well founded, it disposed of the whole suit. This court ought in all cases to be very cautious in admitting any new matters, either of allegation or of defense, to be introduced here, when the facts on which they rest are not new or newly discovered, but were perfectly known at or before the hearing in the district court. We should otherwise constantly have appeals here entertained upon matters never brought to the notice of the district court, and might virtually exercise an entirely original jurisdiction, instead of an appellate jurisdiction."

In *The Schooner Boston*, 1 Sum. 331, the same learned judge used the following language:

"It being clearly established that a knowledge of the circumstances had not been brought home to the claimants until after the decree of the district court, this court had no difficulty, at a former hearing, in allowing the claimants to file a supplementary answer and defense on this point."

Upon the general proposition that, although appellate courts in admiralty treat an appeal as a new trial, and exercise much liberality in permitting new proofs and new pleadings in furtherance of justice, they are not constrained by any arbitrary rules to receive testimony which ought to have been produced, but was not produced, in the court of original jurisdiction, the following judgments may be cited: *The Osiris*, 1 Hagg. Adm. 135; *The General Palmer*, Id. 323; *The Glenmanna*, 2 Lush. 122; *The Flying Fish*, Brown. & L. 436; *The Samuel*, 1 Wheat. 9; *The Mary*, 8 Cranch, 388; *The Grey Jacket*, 5 Wall. 342; *The Mabey*, 10 Wall. 419; *The Western Metropolis*, 12 Wall. 389; *The Juniata*, 91 U. S. 366. The present case illustrates very well the necessity of adhering to the restrictions provided by the new rule. The new depositions taken by the appellant are all of them of witnesses whose testimony might have been procured readily by the exercise of reasonable diligence. The controversy is one as to the value of salvage services rendered to the steamship *Venezuela* by the steamer *North America* and the tug *Buckley*. The appellant now offers the depositions of Chambers, who was master of the *Venezuela* at the time of the salvage, and of Hopkins, a former master of the *Venezuela*, who was on board her at the time of the salvage service; of Skillings, mate of the *Venezuela*, on board her at the time; of McEllwie, master of the tug *Buckley*, on board at the time of the service; and of Dallas, a witness for the appellant who was examined at the trial in the district court. If these witnesses had been produced, as they might have been, and examined, in the district court, very likely the controversy would have ended there, and the delay and expense of this appeal been dispensed with; but, in any event, this court would have had the benefit of the judgment of the district court upon

the value of their testimony. Nevertheless we cannot find that the testimony of the new witnesses was intentionally withheld, or that the failure to examine them was attributable to gross laches, and, adhering to the prevailing practice at the time the cause was tried and the appeal was taken, the only deposition which we feel justified in suppressing is that of the witness Dallas.

THE MATTANO.

MARINE RAILROAD, SHIPBUILDING & COAL CO. v. THE MATTANO *et al.*

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 15.

1. **CIRCUIT COURT OF APPEALS—JURISDICTION IN PENDING CASES.**

In an admiralty case, in which an appeal to a circuit court was taken prior to July 1, 1891, its decrees are reviewable, under Act March 3, 1891, § 6, in the circuit court of appeals, whose jurisdiction was not suspended or limited in any way by the joint resolution of the same date, which merely preserved the right of the circuit courts to hear appeals in cases then pending, and in proceedings to review such pending cases taken out before July 1, 1891.

2. **CONTRACT—ACTION—BURDEN OF PROOF.**

On a libel *in rem* for money due on a contract for repairs, where it is admitted that the labor and materials set forth in the bill of particulars were furnished, and that the job was well done, the agent of the owner having signed certificates as to the correctness of each day's statement, and its conformity with the contract, the burden of proof is on the owner to show any errors in the bill of particulars.

3. **SAME—REPAIRING VESSEL—DELAY—EVIDENCE.**

On a libel *in rem* for repairs to a vessel a reduction of charge for expenses incurred by the owner because of unreasonable delay should not be allowed, when he has not betrayed any marked impatience during the work, and his agent has each day certified to the daily statement of the work done without making any complaint therein, although the owner did grumble a little, to hurry the libelants up.

4. **SAME—DAMAGES FOR DELAY—PROFITS PREVENTED—EVIDENCE.**

A claim for reduction in the charges for profits which the owner might have made but for unnecessary delay should not be allowed, when it rests upon mere conjecture by the master and owner, it being in their power to give certain testimony by reference to the books of the vessel.

5. **SAME—FALSE REPRESENTATIONS—KNOWLEDGE BY BOTH PARTIES.**

An assertion by the agents of the libelants that the shipyard was as well prepared as any they knew of to do the work, as far as machinery was concerned, even if an exaggeration, in view of the fact that they had no band saws, was not such a warranty as would authorize a reduction of charges for waste of lumber in cutting by hand, when the owner was in the shipyard, and might have seen whether they used band saws.

6. **SAME—OVERCHARGES.**

The owner offered to furnish the lumber, but the libellant replied that it was not necessary, and that the prices therefor should be made satisfactory. The owner's agent objected to the charge for lumber in the first daily abstracts, but, on being told that the price would be made satisfactory in the settlement, signed them. *Held*, that the owner was misled by the statements of the libellant, and was entitled to a reduction of charges under this head.

7. **SAME—EVIDENCE.**

A claim of overcharge for lumber used in scaffolding, not supported by any evidence as to how much was so used, should be disallowed.

8. SAME.

The contract did not specify the kind of lumber to be used, and the libelant used pine, with the knowledge of the owner and his agent, although the vessel was planked with oak. *Held*, that a claim of overcharge for ironing rendered necessary by the use of the pine should be disallowed.

9. SAME.

A claim for reduction of charge for loss of time in sending skilled workmen to cull lumber should be disallowed, when that plan secured the best pieces of lumber, and prevented probable loss of time, which would have resulted from the selection of the lumber by an unskilled person.

10. SAME.

A claim for reduction of charge for lumber spoiled and time lost in taking out and doing over again work improperly done should not be allowed, unless the act was willful, or so careless as to amount to willfulness.

11. SAME.

The libelant paid a carpenter, who was furnished by the owner, and employed at his request, \$2.75 per day, and charged the owner \$3.25 per day therefor. *Held*, that a claim of overcharge should be allowed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Admiralty. Libel *in rem* against the steamboat Mattano and George L. Sheriff, her owner, by the Marine Railroad, Shipbuilding & Coal Company, to recover for repairs made on the vessel. Decree for libelant as to a small part of its claim, which decree was affirmed in the circuit court. Libelant appeals. A motion to dismiss the case for want of jurisdiction was heretofore overruled. *Reversed*.

James R. Cutton, for appellant.

C. C. Cole, for appellees.

Before GOFF, Circuit Judge, and SIMONTON, District Judge.

SIMONTON, District Judge. This is a libel *in rem*. The cause of action is a balance due for work and labor, time and money, expended in and about the care of and repairs to the steamboat Mattano, of which George L. Sheriff is owner. The account is filed with the libel, showing the sum of \$5,086.70 charged, with a credit of \$3,250 paid, leaving the balance, \$1,836.70, still due. The answer sets up as a defense overcharges in labor, time, and materials, as well as loss of service and expense incurred from unnecessary delay. It admits \$198.19 to be due. At the hearing the district court sustained the defense, and gave libelant a decree for \$198.19. This decree was affirmed by the circuit court. The case comes here on exception by libelant to this action on the part of the circuit court. On the first day of the term a motion was made by appellees to dismiss the case, as not within the jurisdiction of this court. The cause was heard in the district court, and decree rendered 6th August, 1890; appeal made 3d October, 1890; appeal heard by the circuit court, 29th January, 1892. The joint resolution of March 3, 1891, contemporaneous with the act establishing this court, provides that nothing in said act contained shall be held or construed in any wise to impair the jurisdiction of the supreme court or any circuit court in any case pending before it, or in respect to any case whatever

wherein the writ of error or appeal shall have been sued out or taken to any of the said courts prior to 1st July, 1891. The appellees contend that this joint resolution preserved the right of the circuit court to hear and determine finally the appeal from the decree of the district court in this case; and that, if this court entertains an appeal from the circuit court, it will impair the jurisdiction of that court. The act of March 3, 1891, gave to this court power to review decrees of the circuit courts in certain cases, among which are cases in admiralty. Section 6; 1 C. C. A. vi. This power was not suspended or limited in any way by the joint resolution of the same date. *Railroad Co. v. Amato*, (2d Circuit,) 1 U. S. App. 113, 1 C. C. A. 468, 49 Fed. Rep. 881, following *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. Rep. 735. All that this joint resolution did was to preserve the right of the circuit court to hear appeals from the district court under section 631 of the Revised Statutes in cases then pending, and in proceedings to review such pending cases, taken out before July 1, 1891. When the circuit court has heard and decided such excepted cases its decrees come under the operation of the act of March 3, 1891, and are reviewable here. The motion was overruled.

We have heard the case on its merits. There is a mass of testimony in the brief. The witnesses are generally consistent with those on the same side with themselves. They differ materially with those on the opposite side. The libelant is in control of a shipyard at Alexandria, which it has been running for some six years. The respondent claimant lives in Washington, and has been at this yard several times. His vessel, being in need of repair, was evidently in such a condition as made a voyage to Baltimore dangerous, if not impracticable; so he went to the libelant, and made arrangements for repairing and refitting her. A close examination of the testimony fails to disclose any other contract made between these parties than that the steamboat should be put in complete order with dispatch. Nothing was said as to time, or as to the prices to be paid. Nothing definite was said as to the kind of lumber to be used. As the steamer was planked with oak, the claimant assumed that oak was to be used; and supposed that libelant so understood it. He did offer to furnish his own lumber, but was induced not to do so, upon the assurance that this would be made satisfactory. When the first arrangements were made, neither party seemed to have any idea of the extent or character of the repairs needed; and the dilapidated condition which the steamboat was discovered to be in surprised every one. No written agreement was entered into. After a general sort of conversation the steamboat was sent to the yard, put on the railway hauled up, and work begun. The master of the steamboat was about the yard constantly, and an agent of the owner, specially thereto appointed, had supervision of the work. A daily abstract was made to him, showing in detail the labor, work done, and material used that day, and was examined by him. In every instance he signed his name to a certificate in this abstract "that the above is in accordance

with agreement, and satisfactory." The work was completed. The owner admits that it is a first-class job, and this seems to be the one thing in which all the witnesses concur. The reasons for the refusal of the respondent to pay the balance claimed upon the bill are formulated in his brief:

For additional expenses incurred by respondent by the unreasonable delay in doing the work	\$600 00
For profits which the respondent might have made with his boat during the time it was unnecessarily delayed upon the railways	200 00
For waste of lumber in cutting by hand instead of by saw	75 00
For overcharge in price of lumber used in the boat	441 96
For overcharge of lumber used in scaffolding	52 00
For overcharge for ironing rendering necessary by using pine instead of oak, according to contract	174 65
For loss of time in sending skilled workman to cull lumber	75 00
For quantity of lumber spoiled, and time lost in taking it out and doing over a second and third time work improperly done	50 00
For overcharge of services of carpenter Berry	20 00
Making an aggregate of	\$1,698 61

It is not denied that the work, labor, and materials set forth in the bill of particulars were furnished. It is admitted that the repairs to the steamboat was a good job. The libelant presents the certificate of the special agent of the owner as to the correctness of each day's statement, and its accordance with contract. The burden of proof, then, is on the claimant.

His first item charges unreasonable delay in doing the work, and the additional expense thereby incurred. To this point the owner and the master of the steamboat and Guest, the special agent of the master, speak. The owner complains of delay in putting the boat on the railway and beginning work. He also complains of delay occasioned by want of oak lumber. He says that because of these "she was there near about a month longer than she should have been, or about three weeks at any rate." In his cross-examination he calls this a "rough guess." The master attributes the delay to want of lumber, an insufficient supply of hands, and replacing bad work. He estimates the time lost for the lumber at three or four weeks, and that lost for the hands ten or twelve days. Guest speaks of delay in hewing out the logs. The owner represents his expenses at \$100 per day. At this rate he charges six days in this item, \$600. On the other hand, the witnesses for libelant—Dean, Cooper, Savelle, A. H. Agnew, Day, Tole, Hayden—deny that there was any unnecessary delay, indeed, any delay, but from weather. The record does not show that the owner betrayed any indignation or any great impatience during the work because of delay. He did grumble now and then, to hurry them up. But this is always the case. His special agent, Guest, each day made certificates on the daily abstract, and no sort of complaint appears there. Weighing this evi-

dence, there being nothing to impeach the credibility of the witnesses, the preponderance is clearly with libelant. At all events, the burden on defendant is not overcome. This item is disallowed.

The next item is for the profits which the respondent might have made with his boat during the unnecessary delay,—\$200. Even were we at liberty to go into this item after our conclusion above stated, the evidence upon it is bare conjecture. The owner swears that he would have expected in the neighborhood of \$400 for the time lost. The master says that when in business she made on the round trip, which consumed two days, from \$261 to \$70, an average of \$130 gross. He does not know what the expenses are. One or both of these men had access to the books of the boat. They would have given certain testimony, not conclusive, of course, but a guide, perhaps. This loose conjecture is not testimony. The next item is for waste of lumber in cutting by hand instead of by saw,—\$75. The agents for the libelant asserted that the yard was as well prepared as any they knew of to do the work, as far as machinery was concerned. They, in their testimony, say that it was so prepared. The respondent says that this was false, as they had no band saws. Dean, the superintendent of libelant, says that band saws are not invariably used in shipyards; indeed, their use is unusual. The respondent insists on this item as if the statement was a warranty. He was in the yard; saw, or could see, for himself, what was in it; could certainly see if they had band saws. Even supposing the statement was an exaggeration, this item cannot be allowed. *Slaughter v. Gerson*, 13 Wall. 379. "Where the means of information are at hand, and equally open to both parties, and no concealment is made or attempted, the language of the cases is that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself in such cases of the means of information, whether attributable to his indolence or credulity, takes from him all just claim to release."

The next item is overcharge in price of lumber used. When the owner went to make his arrangements about his steamboat, he offered to furnish his own lumber. This he states, and it is nowhere denied. They replied that this was not necessary, and that the prices of lumber would be made satisfactory. This also is not distinctly denied. Guest called attention to the charge for lumber in the first abstracts, and his and Sheriff's objection to it, and was told "that, while he had started signing the abstracts at that price, to continue along, and in the settlement he would make the price of the lumber perfectly satisfactory." This being so, the full price of \$40 per M. cannot be charged. Respondent was misled by the action and words of agents of libelant. This item is sustained.

The next item is not sustained,—overcharge in lumber for scaffolding,—\$52. The evidence upon it is too vague and uncertain. In fact there is no evidence at all of how much lumber was used for scaffolding.

The next charge,—overcharge for ironing rendered necessary by using pine instead of oak, according to contract. As we have seen, there was no contract that oak only was to be used. The pine was used with the knowledge of Sheriff and Guest. The weight of the evidence is that no serious objection was made. The item is not allowed.

The next item is for loss of time in sending skilled workmen to cull lumber. This item is based on the idea that when lumber was wanted a skilled hand went out and selected it, and so lost time. The work should have been done by a common hand. We see no force in this. The plan adopted secured the best pieces of lumber, and prevented loss of time in the rejection of the lumber,—a probable result if selected by an unskilled person. Item disallowed.

The next item is for quantity of lumber spoiled, and time lost in taking it out and doing over a second and third time work improperly done,—\$50. Sheriff testifies that this was worth \$25. This is explained by Dean, and in no event could be allowed, unless the act was willful, or so careless as to amount to willfulness.

The last item is for overcharge for the services of carpenter Berry,—\$20. It seems that the libelant paid Berry, who was a hand furnished by respondent, employed by it at his request, and borne on their roll, \$2.75 per day, and charged respondent \$3.25. This item should be allowed.

As the result, we allow of these items \$461.69, and disallow the rest. The judgment of the circuit court is reversed. Let the case be remanded to that court with instructions to enter a decree for the libelant in the sum of \$1,374.74 and costs.

The steamer Orion, towing three large ocean barges, astern, attached by hawsers, each of about 150 fathoms,—covering a distance of two thirds of a mile, or more—and proceeding on a westerly course, ran so near the libelant, as to bring the second barge, the Oakland, into collision with her, carrying away her bowsprit, jib boom, and headgear generally. When the libelant's light was seen by the steamer, which was not until she was close at hand, the latter turned off southward, and passed 100 to 200 yards away, carrying the barge next her safely by. Very soon, however, she turned northwestward and resumed her original course, and the Oakland was carried against the libelant, as stated. The rear barge, on seeing the collision, cut her hawser, and ran with the tide under the libelant's stern. The steamer, in ignorance of the accident, or the loss of the barge, continued her course.

The defense set up is that the schooner's light was hidden by the sails, and was consequently not seen until so near that the collision was inevitable; and that the libelant is blamable for leaving her sails up without displaying an additional light where it could not be obscured. This defense is not, in my judgment, sustained by the proofs. The libelant took all precautions usual to the circumstances, or required by a proper regard for the safety of herself and others. The weight of evidence in this respect is clearly with her. The failure to see her light earlier was, in my judgment, the result of negligence. The witnesses from the steamer testify that a vigilant lookout was maintained, and that no light could be seen until the schooner was close at hand, and her sails were visible. I cannot however believe this in view of other testimony, and of well-established facts which seem to prove the contrary. These witnesses are interested, swearing to exculpate themselves. I have yet to meet with an instance of collision where witnesses from the vessel in fault did not testify to a faithful discharge of their duties, and to the faultlessness of the vessel. I attach no importance to what is said by the witnesses from the barges, in this respect. These vessels seem to have been allowed to take care of themselves, having no proper lookout and being permitted to float with the tide, at the end of a long hawser, and at great distance from the steamer.

That the steamer's conduct was negligent, generally, seems to be demonstrated by the fact that she did not know anything of the collision, or the loss of a barge, until an hour and a half later, and then discovered it only through another accident. It was her duty to maintain a lookout rearward, as well as forward, under the circumstances; and yet, notwithstanding what her witnesses say, it is manifest that this duty was entirely neglected. Furthermore she turned back to resume her original course while two thirds of her long string of boats was on the other side of the schooner. This last statement is, I believe, fully justified by the proofs. Her officer in charge says she turned northwestward soon after her sheer to the southward; when neither he, nor any one else on board, knew whether the barges had passed or not, for they were not observing these vessels; and, as we have seen, were unaware of the colli-

sion or the loss, of one of them. The testimony of the Oakland's master and the schooner's anchor watch is, substantially, that the steamer's turn northwestward was before the Oakland had passed. It is admitted the schooner's light was burning brightly. If hidden by the standing sails from anybody it must have been from one approaching from her rear, or well over in that direction. But, with the light air then astir, (it could hardly be called a wind) the "bellying" of the sails must necessarily have been slight and unsteady, so that if hidden to one approaching from this direction, it would be but momentarily. I am not unmindful of what the respondents' witnesses say about the wind, but the fact that the schooner was at anchor for want of wind, of itself outweighs this testimony.

The statement of Holm, who was on the rear barge, the Merryman, that he saw the schooner's sails filled and swelling out, as he sheered under her stern, is unworthy of belief. It is incredible that he should have been so observant of a fact that did not then interest him, at a time when his undivided attention was required to save himself and his vessel. The master of the Merryman was also asked about this, but, while evidently disposed to support Holm, he is unable to do it. His examination and answers were as follows:

"Question. Could you see the sails of the schooner as she passed you? Answer. Yes, sir. Q. Were they full or shaking? A. I could not tell exactly, but I think, they were a little mite full. I could not tell exactly. She was pretty near head to the wind, they might have been a little mite out, but was very trifling. I did not take particular notice of that."

But, as we have seen, the steamer did not approach from the rear, or anywhere near that direction. We cannot with entire exactness know how the schooner headed, but it is admitted to have been southward. With the steamer's course westward, or a little south, as she states it, the schooner's sails could not hide her light. Furthermore it seems clear that the steamer saw the light in time to pass her tow safely, and would have done so if she had turned further southward, and held this course. The testimony of her officer in charge sustains this view. He did not go further south because, as he says, he believed the sheer made sufficient for safety. It carried him and the first barge past; and had he not returned to his original course when he did, it is probable the collision would have been avoided. There was nothing in the way, however, of his going further south. He did not because he deemed it unnecessary. This was a fault of judgment, for which his vessel is responsible. He says he was unaware of the state of the tide, which tended to carry the barge upward. This was inexcusable ignorance, for which also his vessel must answer.

The faults of the Orion were numerous, the principal of them being: First, in taking such a tow across the bay—a tow more than twice its proper length, and consequently unwieldy and dangerous—but for which it might probably, even with the other faults committed, have passed safely, as the first barge did. That such tows may be proper in the

open sea does not tend to excuse their existence in the bay, where vessels are encountered, in motion and at anchor, continually. *Second*, in failing to see the schooner's light earlier, and keeping further off. *Third*, in failing to turn further southward when she did see it. *Fourth*, in turning back to her original course while two of the barges were on the other side of the schooner.

The liability of the Oakland is equally clear. She might indeed be condemned on the steamer's testimony alone. As before stated, she was without a proper lookout, and was allowed to drift with the current. With her great length of hawser she could by proper vigilance have so controlled her course as to pass without colliding, notwithstanding the steamer's faults. The testimony from the steamer justifies this view. As, however, the steamer and this barge, I am informed, belong to the same owners, the result must be the same whether one or both be condemned. I have said sufficient to indicate my reasons for the decree about to be entered, and will not therefore pursue the subject further.

THE LOUISE.

BALTIMORE STEAM PACKET CO. v. THE LOUISE.

SAME v. TOLCHESTER STEAMBOAT CO. *et al.*

TOLCHESTER STEAMBOAT CO. v. BALTIMORE STEAM PACKET CO. *et al.*

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 10.

1. COLLISION BETWEEN STEAMERS—SIGNALS—FAILURE TO REVERSE.

A collision happened in the nighttime at the junction of the Ft. McHenry and Brewerton channels of the Patapsco river, between two sidewheel passenger steamers, the Virginia and the Louise. The Louise, the incoming steamer, at a proper distance, signaled to the Virginia by two blasts that she desired to take the southerly side of the channel, being the side which was on her port. The signal was answered by a steam tug, which was between her and the Virginia. Without getting any reply from the Virginia, the Louise put her helm to starboard, and continued, at her full speed of 11 miles an hour, until she was about a quarter of a mile from the Virginia, when she again gave a signal of two blasts. The Virginia, being then over on the southerly edge of the channel with her wheel to starboard, and the channel being obstructed by a schooner, was unable to avoid the Louise, and they collided just at the bend of the channel. *Held*, that the Louise was in fault (1) in putting her helm to starboard, and taking the side of the channel which was on her port, without getting an assenting signal from the Virginia; (2) in not obeying the rule which required her, having the Virginia on her starboard side, to keep out of the Virginia's way; (3) because, when the risk of collision was apparent, the Louise did not stop and reverse her engines, but merely slowed. 49 Fed. Rep. 84, affirmed.

2. SAME—RATE OF SPEED—SIGNALS—MUTUAL FAULT.

The Virginia heard the signal of two blasts given by the Louise, and, when the tug answered, supposed it was intended for the tug. She continued at full speed,

but neither made out the side lights of the Louise nor signaled until the Louise came from behind the schooner and signaled, when the steamers were less than half a mile apart. Then the Virginia blew danger signals, reversed, and did all she could to avoid a collision. Held, that the Virginia was in fault in continuing at full speed in a place of danger in violation of rule 21, and in failing to have a distinct understanding with the Louise by interchange of signals as required by inspectors' rule 8. 49 Fed. Rep. 84, affirmed.

Appeal from the Circuit Court of the United States for the District of Maryland.

In Admiralty. Cross libels for damages by collision between steamers. Judgment in the district court (49 Fed. Rep. 84) that both steamers were in fault. Affirmed by circuit court. All appeal. Affirmed.

Robert H. Smith and Thomas G. Hayes, for petitioners.

John H. Thomas, for Baltimore Steam Packet Company.

H. V. D. Johns, for Tolchester Steamboat Company.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and SIMONTON, District Judge.

SIMONTON, District Judge. These cases grew out of a collision in Patapsco river, not far from the city of Baltimore, on 28th July, 1890, between the excursion steamer Louise, of the Tolchester Steamboat Company, and the steamer Virginia, of the Baltimore Steam Packet Company. The Louise had on board a large number of passengers, of whom some were killed and others more or less injured. Suits were instituted against the owners of both steamers in the state court of Maryland to recover damages for these injuries, and libels were filed in the district court seeking limitation of liability upon the part of these owners. Libels were also filed against each steamer. All the cases were consolidated. Voluminous testimony was taken. The cause was heard in the district court. Both steamers were declared in fault, the damages were divided between them, and the gross amount of their appraised values were apportioned among the parties entitled to bring action for the injuries sustained. The case was carried into the circuit court, and the decision of the district judge was affirmed in every respect. It comes before us on appeal from this decree.

The place of the collision was the Patapsco river. This river has in it dredged channels. Of these the Brewerton channel runs from Chesapeake bay N. W. by W. & W. until it meets the Ft. McHenry channel. This Ft. McHenry channel runs from its junction with the Brewerton channel N. W. by N. to the entrance of the harbor of Baltimore. Where the two channels unite is a bend. Although for vessels of the draft of these we are discussing there is plenty of water in the river on each side of these channels, still the channels are generally used by steamers, who, as a rule, keep on that side of the channel to the starboard. On the day of collision, which occurred about 8:11 P. M., the Virginia was coming from Baltimore down the Ft. McHenry channel, at her usual speed of 14 miles an hour, a little, but very little, behind time. She was nearing the bend. Approaching her in the Brewerton channel, beyond

the bend, was the three-mast schooner Yale, proceeding under her own sails towards Baltimore. She was in mid-channel. Still further down the river, and in the Brewerton channel, was the steamer Louise, on her way from Tolchester to Baltimore, with a large excursion party aboard, on time, proceeding at a rate of 11 or 12 miles an hour. Outside of the channel, to the northward and eastward and off the starboard bow of the Yale, was the tug Mamie, apparently going towards the Yale, seeking a tow. All these vessels had the proper lights set. The steamers were on their own sides of the channel. When about a mile and three quarters from the Virginia, the Louise, seeing her lights across the bend, the headlight, and her red light, blew two whistles, intended for the Virginia. This signal was answered by the Mamie, and assented to. No answer whatever came from the Virginia. Without waiting for any reply, the Louise starboarded her wheel, and, when the tug answered, starboarded a little more, and proceeded on her course in the direction of the Yale, porting her helm a little. Her movements were obscured from the Virginia by the interposition of the Yale. Her direction carried her across the wake of the Yale; and getting out behind the port quarter of the schooner, she saw the Virginia coming towards her with both red and green lights showing. The Louise again blew two blasts of her whistle. Her witnesses say that these were answered by the Virginia. This is denied by the witnesses for the Virginia. At all events, immediately after the two whistles from the Louise, the Virginia blew danger signals, and began at once to reverse. In an almost incalculable time the two steamers collided, the Virginia having made only two revolutions of her wheel backward. Five revolutions would reverse her course. The Virginia struck the Louise on her starboard quarter about 20 to 25 feet from her stern. Just before the collision the Louise slackened her speed a little. At the collision, she stopped her engines.

The reasons assigned by the district judge for holding the Louise in fault are so clear and conclusive (49 Fed. Rep. 84) that they need not be repeated. They command our concurrence. We experience, however, as he did also, great difficulty with the question as to the Virginia. She was well appointed, had proper lights and lookout, and every one on duty upon her was at his post, and vigilant. When the first signal of the Louise was heard on the Virginia, she was seen distinctly. But her signal lights were not seen. At that time she was passing behind the Yale, and only her saloon lights could be observed. The master of the Virginia, noting this, and observing the distance opened between her and the Yale, conjectured that it was the intention of the Louise to pass between the Mamie and the Yale to the starboard of the schooner. The reply signal of the Mamie seemed to confirm him in this conjecture, and he paid no special attention to the Louise or her signal, directing all his observation to the schooner, and keeping out of her way. The hull and the sails of the Yale obscured the Louise, and nothing certain was known of her movements, when she appeared unexpectedly from behind the stern of the Yale off her port quarter. Her second signal was heard, recognized, and answered by the Virginia, as her master insists, by the

danger signal. Instantly he reversed, but too late for the collision, which came almost immediately. Up to the second blast of the *Louise* the *Virginia* had proceeded at full speed, not anticipating any danger from her. After he heard this blast, her master did all that the exigency required.

When the *Virginia* heard the first blast of the *Louise* they were about a mile and three quarters apart, in converging channels, with a vessel under sail between them, and approaching each other at an aggregate speed of 25 or 26 miles an hour,—a very little more than four minutes apart. They all were in a place full of danger, and where there was great liability of collision. *The Kate Irving*, 2 Fed. Rep. 919. This blast of the *Louise* gave notice to every one hearing it that she was leaving her customary side of the channel, and was coming over to that side of it on which was the *Virginia*. Her master saw the *Louise* in the act of this maneuver, that her signal light had disappeared behind the *Yale*, and that her saloon lights were disappearing in the same way. He knew that the *Louise* in fact had got behind the *Yale*, and that her future movements, if not entirely unknown, were at least uncertain. Yet the *Virginia* was kept at full speed, no precaution whatever being taken for any action on the part of the *Louise*, the master of the *Virginia* relying entirely upon the theory that she would pass to the starboard of the *Yale*. The rules laid down for preventing collisions of vessels, (Rev. St. § 4238,) and the regulations prescribed by the board of supervising inspectors, and given the force of the law under section 4405, provide for every probable contingency. These leave but little room for mere conjecture in controlling the action of the master and pilot. Each of them has in his power the means of ascertaining with approximate certainty the intention and course of an approaching steamer. He must use them. Notwithstanding this, errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision. Rule 24; *The Maria Martin*, 12 Wall. 47; *The Scotia*, 14 Wall. 181. If there be any uncertainty as to the intentions of the approaching vessel, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel with reference to her movements, and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only a collision, but the risk of such a catastrophe. *The Manitoba*, 122 U. S. 108, 7 Sup. Ct. Rep. 1158. In the language of Mr. Justice CLIFFORD in *The America*, 92 U. S. 432:

"The rules of navigation were ordained to prevent collisions, and to preserve life and property embarked in a perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do in that direction without becoming responsible for its consequences in case it occurs."

When the *Louise* disappeared behind the *Yale* under a starboard wheel, as her blasts declared, coming in the direction of the *Virginia*,

the master of the Virginia could and should have ascertained her intention; and while doing so he should have diminished his speed. Rule 21.¹ The collision occurred almost immediately after the appearance of the Louise from behind the port quarter of the Yale. Their aggregate speed was at least 25 miles an hour, at which rate a half mile would be traversed in 1 minute and 12 seconds. She then was certainly less than a half mile from the Virginia,—a fact not known to the latter vessel, but which could have been known to her. This want of knowledge caused the nonobservance of rule 3 of the board of supervising inspectors for lakes and seaboard, (page 25,) to which the treasury department had called special attention by circular, 25th February, 1878.² The sailing vessel interposed between these steamers increased the responsibility of each. Both of them had special duties as to her. Her action might have at any time compelled either of them to a sudden movement to keep out of her way. It was a situation demanding the greatest vigilance. The full speed of the Virginia, as the event showed, prevented her from adopting such measures as would have avoided collision. If she had not been going at this rate of speed, her course could have been checked, and the Louise would have cleared her. This speed contributed to the collision, and was a fault. The decree of the circuit court is affirmed, with interest; the costs of the appeal to be paid by the appellants.

¹"Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, and, if necessary, stop and reverse. * * *"

²Rule 3. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and, if the vessels shall have approached within a half mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

THE EXPRESS.**THE N. B. STARBUCK.****THE CHARM.****THE NIAGARA.**

NEW YORK & CUBA MAIL STEAMSHIP CO. v. THE EXPRESS, THE N. B. STARBUCK, and THE CHARM.

NEW ENGLAND TERMINAL CO. v. THE NIAGARA, THE N. B. STARBUCK, and THE CHARM.

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

Nos. 38, 39.

1. COLLISION—STEAMER WITH SHIP AND TUGS—PROXIMATE CAUSE.

In a suit for collision occurring in New York harbor between a steamer and a steamship in charge of two tugs, the latter three at no time moving more than two knots an hour, exclusive of the current, it appeared that the steamer might have so shaped her course when half a mile away as to easily avoid danger of collision, but the district court found that the vessels would have safely passed starboard to starboard had not one of the tugs, owing to inattention to the steamer's movements, hauled off strongly to starboard and been followed by the ship; that there was no proper lookout on either of the tugs or the ship; and that those in charge were inattentive to the signals of the steamer. *Held*, that on the facts found the steamer must be acquitted of fault, for, if negligent in the beginning, her negligence was not a proximate cause of the collision.

2. SAME—SHIP PARTICIPATING IN TUG'S FAULT.

A steamship was taken in tow by two tugs under an agreement that the tugs should have practical command of her, and the master of one tug stood upon the ship's deck beside the ship's master and delivered orders, which were communicated by the latter to the ship's crew. A fault was committed by the other tug, wherein it was followed by the ship through orders thus delivered, resulting in a collision with a steamer. *Held*, that while the tug was not the mere agent of the ship so as to render the latter liable under the rule of *respondent superior*, yet the ship was a participant in the fault, and on that ground was liable with the tugs. *The Doris Eckhoff*, 1 C. C. A. 484, 50 Fed. Rep. 134, 1 U. S. App. 129, distinguished.

3. SAME.

Both tugs were liable because they were engaged in a joint undertaking and belonged to the same person, and the collision was caused by the concurring negligence of the masters of both.

4. SAME—APPORTIONMENT OF DAMAGES.

Under these circumstances, the decree properly apportioned the damages of the steamer between the ship and the two tugs, and divided the damages received by the ship between herself and the tugs.

5. SAME—APPEAL—REVIEW—CONCLUSIONS OF FACT.

In a collision case the district court's conclusions of fact will not be disturbed when they involve doubtful questions of fact depending upon testimony which is quite conflicting, and upon the credibility of the witnesses examined in the presence of the court.

Appeals from the District Court of the United States for the Southern District of New York. Affirmed.

For opinions delivered by the court below, see 44 Fed. Rep. 392, and 46 Fed. Rep. 860, where the facts are fully stated.

F. Bronson Winthrop and *Lewis Cass Ledyard*, for the Niagara.

Harrington Putnam, for the Express.
Franklin A. Wilcox, for the Charm.
Edward L. Owen, for the Starbuck.
Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. These causes arise out of a collision which took place December 2, 1889, in the East river, just above Corlear's Hook, between the steamer Express and the steamship Niagara, the latter being at the time in tow of two steam tugs, the Charm and Starbuck. A libel was filed by the owners of the Niagara against the Express, and on the petition of the owner of the Express the two tugs were also brought in as respondents. A libel was also filed by the owner of the Express against the Niagara and the two tugs. The district court dismissed the libel against the Express, and decreed in favor of her owner against the Niagara and the two tugs, and in favor of the owner of the Niagara for half her damages against the two tugs, adjudging that the Niagara and both tugs were in fault for the collision, and that the Express was not in fault. The owner of the Niagara and the owners of the tugs have appealed.

There is much in the record to suggest that the Express was culpable, as well as the other vessels, for the collision, and we have reached a contrary conclusion with considerable hesitation. During the operation of turning the Niagara around, she and the two tugs were practically a stationary object, and from that time until the collision their speed was not more than two knots an hour, exclusive of the current, which was about a mile an hour. The Express was a fast and powerful steamer, equipped with twin screws to facilitate her movements; she was unincumbered, being on an excursion trip merely to test her speed and qualities; the weather was clear; she saw the other vessels half a mile away, and there was ample sea room on either side of them to avoid them, and no intervening obstacle; and although they did not answer her signals, and were inattentive to her movements, and supinely acted on the assumption that she would keep out of their way, she could have shaped her course sufficiently far on either side of them, when sufficiently far away, to obviate any risk of collision, and perhaps ought to have done so when she slowed her speed after her last signals were not answered. Nevertheless, the learned district judge before whom the cause was tried in the court below found in substance, as appears by his opinion, that the collision would not have taken place, and the vessels would have safely passed each other starboard to starboard, had not the Starbuck, owing to inattention to the movements of the Express, hauled off strongly to the starboard, and been followed in that movement by the Niagara, when the vessels were so near together that the Express could not avoid collision, notwithstanding she immediately reversed her engines. The proofs fully sustain the findings, stated in his opinion, that there was no lookout proper on either of the tugs or on the Niagara, and that those in charge of the Charm and the Niagara were inattentive to the signals and movements of the Express. His conclusions in these

particulars cannot safely be disturbed by this court, as they involve doubtful questions of fact, upon which the testimony is quite conflicting, and depending upon the credibility of the witnesses who were examined in his presence. *Cooper v. The Saratoga*, 40 Fed. Rep. 509; *The Thomas Melville*, 37 Fed. Rep. 271; *The Francis T. Nicholls*, 44 Fed. Rep. 302. Accepting these conclusions of fact as correct, the Express must be acquitted of any fault contributing to the collision. If she was culpable in any other respects, her fault was innocuous, because not a proximate cause.

The Niagara was condemned in the court below for several faults, among them for following the Starbuck, when the latter made the fatal movement to starboard which brought about the collision. The proofs indicate that the arrangement for the performance of the towage service contemplated that the officers and men of the Niagara should participate with the tugs in her navigation, and that the master of the Niagara should allow the tugs to have practically command of her. From the time the tugs took the Niagara in tow, the captain of the Charm stood upon the Niagara's bridge by the side of the master of the Niagara, and gave such instructions as he thought proper to the master of the Niagara, and the latter communicated the instructions to the officers and men. The order by which she was starboarded, to follow the final movement of the Starbuck, was communicated by the master of the Niagara to her quartermaster, who was at the wheel and executed the order.

It is settled law in this country that a tug, under the ordinary towage contract, is not the agent or servant of the tow in performing the service, but is an independent contractor; and consequently that the tow is not liable, upon the rule *respondet superior*, for any loss occasioned by the faulty navigation of the tug. But none of the adjudged cases decide that a tow is not responsible for the consequences of a collision between herself and another vessel, when, by the conduct of her own agents or servants, she has been guilty herself, whether alone or by participation with the tug, of the wrong or negligence causing the collision. She is not responsible for the misconduct of the tug, but is for her own misconduct. The circumstance that her officers and crew are aboard of her at the time, and assisting in her navigation, does not make her liable for the consequences of a collision. But if through their fault, either of omission or commission, she collides with another vessel, she is answerable, and cannot escape liability because at the time she was in tow of a tug. This is so, because all those who participate in a wrongful act, either of malfeasance or misfeasance, whether they are principals or are merely agents or servants, are jointly and severally liable for the consequences.

The earliest reported decision in this country in which these questions were considered is *Sproul v. Hemmingway*, 14 Pick. 1. In that case, a brig towed astern by a steamboat upon the Mississippi river was brought in collision with a schooner lying at anchor. There was evidence tending to show that, in consequence of the negligence and bad management of

those who had the care and conduct of the steamboat, the vessel in tow, without any culpable negligence or unskillfulness of those who had charge of her, was thrown out of the track of the steamboat, and so caused the collision. The jury were instructed in the court below that if the collision took place through the negligence, unskillfulness, or misconduct of those who had charge of the steamboat, the owner of the brig was not liable. The appellate court, Chief Justice SHAW delivering the opinion, applying the rule of *respondent superior*, sustained the correctness of these instructions. In the course of the opinion he pointed out some differences between the case of a vessel towed astern and one lashed to the tug, using the following language:

"On board the ship towed astern by means of a cable, something may and ought to be done by the master and crew in steering, keeping watch, observing the obeying orders and signs, and if there be any want of care and skillfulness in the performance of those duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it. * * * Then, supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side ship, which is wholly passive, and the ship astern, which is partially so."

In the case of *The John Fraser*, the first adjudged case in which the questions were considered by the supreme court, (21 How. 184,) the collision was between a vessel in tow by a steam tug and a vessel at anchor; in which both the tug and the vessel were in fault. The court exonerated the tow, because it appeared that she had not been guilty herself of any fault or negligence; but the opinion implies that she would not have been exonerated if she had not adopted active measures herself to prevent collision. The court said:

"It is indeed said by some of the witnesses that if she had put her helm to the larboard, instead of to the starboard, as soon as she was cast off, she might have passed in safety on the other side of the James Gray, but the weight of the proof is clearly to the contrary, and we are convinced that she adopted the only chance for safety by putting her helm to starboard, and endeavoring to pass on the same side that the steam tug had passed."

The case of *Sturgis v. Boyer*, 24 How. 110, in which the collision was between a ship in tow of a steam tug to which she was lashed and a lighter, contains a discussion of the general doctrine, and the opinion cites and follows *Sproul v. Hemmingway* and *The John Fraser*. In *The Virginia Ehrman*, 97 U. S. 309, the collision was between a ship in tow of a tug and a dredge lying at anchor. Both the tug and ship were held to be in fault, the tug because she unnecessarily took the ship into too close proximity to the dredge, and the ship because she ought to have observed the dredge and avoided her by porting her helm. Some expressions in the opinion in the case of *The Doris Eckhoff*, recently decided by this court, (1 U. S. App. 129, 1 C. C. A. 494, 50 Fed. Rep. 134,) may be taken to imply that the tow is not liable for the consequences of a collision between herself and another vessel, when her only

fault has been that of passive acquiescence in following the movements of the tug. These expressions were addressed to the case in hand, and ought not to be misconceived. In that case the tug, instead of observing a local law which required vessels to be navigated along the middle of the river, had taken the tow on one side of the channel. The cause of the collision, however, was a rank sheer, culpably made by the tug just as she brought the tow nearly opposite another vessel proceeding in a contrary direction. The tow ported her helm, and did all in her power to counteract the fault of the tug, but without avail; and in the opinion, this circumstance is commented on as controlling. What the judgment really decides is that the tow was not responsible, wholly or in part, for the consequences of a remote fault, committed by steering after the tug outside the midchannel of the river.

The officers and crew of the Niagara were none the less the agents and servants of that vessel, because in performing their duties in navigating her they took their orders from the master of the Charm. Consequently, the Niagara, because of their participation in the fault by which the Express was injured, is jointly liable with the tugs for the injuries done to the Express. Both tugs are liable, because they were engaged in a joint undertaking, were the property of the same owner, and the collision was caused by the concurrent negligence of the master of each.

The decrees below properly apportioned the damages for the injuries of the Express between the Niagara and the tugs, and divided the damages sustained by the Niagara between that vessel and the two tugs. The decrees are affirmed, with the costs of this court to the owner of the Express. As between the other parties, no costs in this court are allowed.

THE ICE KING.

McCaldin et al. v. THE ICE KING.

In re KNICKERBOCKER STEAM TOWAGE Co.

(District Court, S. D. New York. December 1, 1892.)

COLLISION — STEAM VESSELS MEETING — INSPECTORS' RULES — NECESSITY FOR TIMELY SIGNALING.

The steam tug McCaldin Brothers, going up the Hudson without a tow, met nearly head and head the steam tug Ice King, with a tow on a hawser, just below Anthony's Nose. It was flood tide, on which tide it is the custom for boats going up in that neighborhood to take the middle of the river. The captain and pilot of the McCaldin Brothers were under the influence of liquor, and that boat sheered to the east side of the river, on which side the Ice King was coming down. Neither of the boats blew whistles, in accordance with the inspectors' rules, though each was visible to the other when half a mile away. The McCaldin Brothers was struck on her port bow, and sunk. *Held*, that the chief fault for the collision lay with the McCaldin Brothers; but that, as it was impossible to find that the giving of a timely signal by the Ice King might not have been of use in preventing the collision, *held*, that both vessels were liable.

In Admiralty. Libel by James McCaldin and another against the steam tug Ice King to recover damages suffered by the steam tug McCaldin Brothers in a collision between the two boats. The Knickerbocker Steam Towage Company, as owner of the Ice King, filed a petition for limitation of liability. Limitation allowed, and decree for libellant for one half the damages.

Carpenter & Mosher, for libellant.

McCarthy & Berier, for claimants and petitioners.

BROWN, District Judge. A little after 11 o'clock on the night of October 6, 1891, the steam tug Ice King, having a barge in tow on a hawser of about 80 fathoms, in coming down the North river, after rounding Anthony's Nose, where the river is not over 600 yards wide, came in collision with the steam tug McCaldin Brothers, which was going up the North river and was looking for a boat which she was to take out of a tow coming down. The stem of the Ice King, pointing nearly straight down river, struck the port bow of the McCaldin Brothers, which was heading probably some three or four points towards the east shore, from the effects of which the McCaldin Brothers sank before she was able to reach the western shore of the river, and two of the crew were drowned. The first above libel was filed to recover the damages to the tug, and the owners of the Ice King subsequently filed their petition for limitation of liability, and at the same time denied that the collision was by any negligence of their tug.

Upon the conflicting testimony, I find the following facts: (1) That the tide at the time of collision was running at least two hours flood; (2) that by the understood practice of boatmen, the proper course for the McCaldin Brothers on the flood tide was near the middle of the river, leaving the easterly shore for the benefit of tugs, with tows, coming down around Anthony's Nose; (3) that the place of collision was not more than 300 feet from the easterly shore, and not more than an eighth of a mile below Anthony's Nose, as must be inferred not merely from the direct testimony, but from the place where the wreck was sunk on crossing the river, to wit, considerably above Anthony's Nose; (4) that no signals were given by either boat to the other until they were within 200 or 250 yards of each other; (5) that the McCaldin's captain and pilot were under the influence of liquor; (6) that both tugs were in a position to show each other their colored lights when over a half mile distant from each other, the McCaldin Brothers being then towards the westerly side of mid river, but working over gradually towards the easterly shore, along which the Ice King was proceeding; (7) that the McCaldin Brothers showed her green light to the red light of the Ice King, before the Ice King had got around Anthony's Nose, but afterwards showed her green light to the green light of the Ice King, until the McCaldin Brothers, by working over to starboard and porting, showed her red light, when near the Ice King; (8) that the McCaldin Brothers was in fault for going over to the east side of the river on the flood tide, so as to interfere with the usual course of the Ice King; she

probably went there to see if the boat she was in search of was in tow of the Ice King, and she was also in fault for not signaling at a proper distance; (9) that at no time when the boats were within a quarter of a mile of each other, and probably upwards of a quarter of a mile, was the green light of the McCaldin Brothers as much as a point on the starboard bow of the Ice King, as is apparent from consulting a chart of the channel of the river; and the omission of any timely signal by the McCaldin Brothers was also a violation of the inspectors' rules.

Considering that the McCaldin Brothers is chiefly to blame for this collision, I have hesitated much in determining whether the nonobservance of the inspectors' rules ought to be deemed a proximate cause of the collision in the present case. But I find it impossible to hold that the giving of the required signal by the Ice King would not probably have been of any use; still less, to say that it could not possibly have been of use. *The Pennsylvania*, 19 Wall. 125, 136; *The Dentz*, 29 Fed. Rep. 528.

It is clear from the testimony that the pilot of the McCaldin Brothers was navigating under a misapprehension as to the state of the tide; and that he was going over to the east shore, conceiving the tide to be ebb, where he says he would not have gone had he known the tide to be flood. A timely whistle from the Ice King, whether of one blast, or of two blasts, would have made known her intention to the McCaldin Brothers, and would naturally have tended to correct her pilot's mistake. It cannot be said that the rules as to giving signals are not designed to correct gross mistakes, or even stupid blunders. They are prescribed for the very purpose of coming to a common understanding and of preventing mistakes, whether slight or gross. *The Connecticut*, 103 U. S. 710, 713; *The Clara* and *The Reliance*, 49 Fed. Rep. 765, 767, 768; *The T. B. Van Houten*, 50 Fed. Rep. 590; *The Amos C. Barstow*, Id. 623. The course of the two boats was so nearly head and head that they cannot be exempted from the operation of the rules. Even the pilot of the Ice King estimates that the distance they would have passed and cleared each other, had not the McCaldin Brothers made her sheer to starboard, as he alleges she did, would only have been some 75 to 100 feet. For some time, therefore, they must have been very nearly head and head, and the obligation to give timely signals was equally obligatory on each. I do not find that any of the cases cited by the claimants would excuse the Ice King's omission of the signal.

I am obliged, therefore, to hold both vessels responsible, and to allow the McCaldin Brothers to recover one half her damages, not exceeding, however, the stipulated value of the Ice King and her freight in limitation of her liability, to which I find the owners entitled, or if other claims appear, her pro rata of such value.

ROCK ISLAND NAT. BANK v. J. S. KEATOR LUMBER CO. *et al.**(Circuit Court N. D. Illinois, S. D. October 31, 1892.)***REMOVAL OF CAUSES—TIME OF APPLICATION.**

Under Act. Cong. Aug. 13, 1888, § 8, (25 St. at Large, p. 433,) which provides that a defendant may remove a cause at the time or before he is required by the state law or rule of court to plead or answer, a petition for removal filed after the statutory period for answering has expired comes too late, even though filed within the time allowed for answering by order of court, where such order is based on a stipulation entered into after expiration of the statutory period.

In Equity. On motion to remand. Motion granted.

Sweeney & Walker, for complainant.

W. H. Moore, for the J. S. Keator Lumber Company.

Miller & Starr, for Thompson & Root.

BLODGETT, District Judge. This cause was originally commenced in the circuit court of Rock Island county, in this state, and removed to this court on the petition of the defendants Thompson & Root. A motion is now made to remand the same upon two grounds: *First*, that the petition for removal was not filed in apt time; *second*, that no separable controversy is shown in the case which justifies the removal of the case in behalf of the defendants Thompson & Root. The record shows that the defendants Thompson & Root were brought into the court as nonresidents by publication of notice under the laws of the state of Illinois in regard to chancery practice; that, by the published notice, these defendants were required to appear in the case on the first day of the then next September term of said court, which was on the 5th day of September, 1892; that said notice was published in time to require the defendants to make answer at the time mentioned; that no appearance was entered by said defendants, or answer or plea filed, at the time required by the notice, and under the statute, but that, on the 13th day of September, a stipulation in writing was made and filed in the cause between the complainant and these defendants, by which these defendants were given 10 days' further time in which to plead in the cause; and the court, in pursuance of such stipulation, entered an order extending the time for the defendants to plead 10 days from the date of such stipulation; and that, on the 22d day of September, the said defendants filed their petition and bond for the removal of the cause to this court.

Section 3 of the act of August 13, 1888, determining the jurisdiction of the circuit courts of the United States, and regulating the removal of cases from the state courts, (25 St. at Large, p. 433,) provides that a defendant desiring to remove a cause from a state court to the federal court may do so "at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." Section 16, c. 22, Rev. St. Ill., governing the practice in courts

of chancery, provides that "every defendant who shall be summoned, served with a copy of the bill or petition, or notified as required in this act, shall be held to except, demur, plead, or answer on the return day of the summons; * * * or in case of service by copy of the bill, or by notice, at the expiration of the time required to be given, or within such further time as may be granted by the court; or, in default thereof, the bill may be taken as confessed." It is, therefore, clear from the statutes of Illinois that these defendants were required to plead; and by the federal statutes in regard to the removal of cases they were required to file their application for removal on the 5th day of September. But it is insisted that, inasmuch as the time for these defendants to plead was extended by an order of court, and application for removal was made before the expiration of that extension, therefore the application for removal was made in apt time. I do not concur in this view. The statute requiring the application for removal to be made at or before the time the defendant is required to plead has been held to be imperative. *Austin v. Gagan*, 39 Fed. Rep. 626; *Velie v. Indemnity Co.*, 40 Fed. Rep. 545; *Rogers v. Van Nortwick*, 45 Fed. Rep. 513. These defendants, then, were in default, and had lost their right of removal on the 13th day of September, when the rule extending the time to plead was entered in pursuance of the stipulation of the complainant; and I cannot see how this stipulation, or the order of court made in pursuance thereof, can be construed to restore to the defendants the right of removal which they had lost. The complainant may have been entirely willing that these defendants should have the right to put in any defense which they might have in the state court, but a mere agreement to that effect is not and cannot, in justice, be held to waive or restore to the defendants the right of removal which they had lost. For these reasons the motion to remand is sustained, without considering or passing upon the question whether or not the case presents a separable cause of action which would entitle these defendants to remove the case.

O'KEEFE *et al.* v. CANNON *et al.*

(Circuit Court, D. Montana. November 14, 1892.)

1. **QUIETING TITLE—MINING CLAIM—PLEADING—ALLEGATIONS OF FACT AND LAW.**
In a suit to quiet the title to certain mining lands, an allegation in the answer that the lands do not contain known minerals in lode deposits, of sufficient value to pay for working them, is a statement of fact, not a conclusion of law.
2. **SAME.**
An allegation that respondents are owners of said land by virtue of a certain conveyance is a conclusion of fact, and not of law.
3. **SAME—DATE OF APPLICATION FOR A PATENT.**
An allegation that the respondents' application for a patent to the premises as placer ground was made before the location of a lode alleged to exist therein is sufficient, without alleging the date of such application.
4. **SAME—LANDS WITHIN CITY LIMITS.**
An allegation that the lands are within the corporate limits of a city, and that the respondents are the owners and occupiers of the surface, without any claim

that the city has acquired title to them or taken any steps to do so, or that they have been usually occupied as a place of business, is impertinent, for it does not show that the lands may not be taken as a mining claim if valuable for the minerals therein contained.

In Equity. Bill by Will O'Keefe and John D. Brayman against Charles W. Cannon, Theodore H. Kleinschmidt, and Edward W. Knight, Sr., to quiet the complainants' title to certain mining lands. On objections to the answer. Sustained in part.

J. A. Carter, for plaintiffs.

Toole & Wallace, for defendants.

KNOWLES, District Judge. Plaintiffs filed their bill of complaint against defendants, which presents a suit for the quieting of their title to certain mining ground described in the bill. Defendants filed their answer to said bill, and to this answer plaintiffs have filed certain objections. The first objection is that the following allegations in the answer constitute nothing but the statement of conclusions of law, namely:

"Defendants, further answering, allege that said lands never contained, and do not now contain, known minerals in lode deposits of any value sufficient to justify expense of exploitation or expenditure in the effort to extract the same, and that these defendants are the owners and possessed of the said N. $\frac{1}{2}$ of N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of sec. 31, under and by virtue of a grant and conveyance thereof from the Northern Pacific Railroad Company, and by reason thereof are the owners of, and the whole thereof."

These allegations are not legal conclusions, but allegations of fact. The allegation that it does not contain known minerals in lode deposits of any value sufficient to justify expense of exploitation or expenditure, in the effort to extract the same, is but one mode of alleging that the ground is nonmineral. It has been held by the supreme court that ground of this kind is nonmineral. The allegation that the defendants are the owners of said land by virtue of a conveyance from the Northern Pacific Railroad Company is certainly not a legal conclusion, but one of fact. The allegation of ownership, without stating how the ownership was acquired, is the allegation of a fact. It was not necessary to state the date of the conveyance by said company. That is not the point presented, but as to whether it became the owner by such conveyance.

The objection that defendants do not state in their answer the date of their application for a patent to the premises as placer ground is not material. It is stated that it was prior to the location of the Banker's Daughter lode. This was sufficient. The patent obtained subsequently from the government would relate to this date, and it might be determined at that date as to whether the said lode was then known to exist. If it was, it would be excluded from the grant made by the patent; if not, it would pass with the placer patent. All that it was necessary to allege was that the application was made prior to the location of said lode.

The third objection is that the following allegations are impertinent:

"And for a further and additional separate answer these defendants allege that all of the premises described in complainants' bill were, prior to the pre-

tended location of the alleged Banker's Daughter lode, ever since have been, and now are, part and portion of the city of Helena, county of Lewis and Clarke, and state of Montana, the same being an incorporated city; and said premises, and the whole thereof, then did, and ever since have been, and now do, lie within the corporate limits of the said city; and that these defendants were at the date last aforesaid, ever since have been, and now are, the owners and actual occupants of the surface ground of said premises, and the whole thereof, and have actually had the possession thereof during all the period last aforesaid."

There is no claim in these allegations that the city has acquired any title to said premises, or taken any steps to acquire the same through its officers. It is not claimed that the same has been reserved by any order of the president of the United States. There is no claim that it has been usually occupied as a place of business, or in fact any allegation in the above that would show that it might not be taken as a mining claim if valuable for the minerals therein contained. This objection is therefore good, and this allegation should be stricken from the answer.

MILLER v. CLARK *et al.*

(Circuit Court, D. Connecticut. August 8, 1892.)

No. 619.

1. APPEAL—DISMISSAL—PROCEEDINGS BELOW—JURISDICTION OF CIRCUIT COURT.

One of six legatees entitled under the will to equal shares in the residuary estate filed a bill against her colegatees to compel them to pay to the executor \$5,377.83, which they claimed by gift *inter vivos* from the testatrix. The circuit court dismissed the bill on the merits, and plaintiff having appealed, the supreme court dismissed the appeal, holding that the interest of plaintiff was only one sixth of that sum, and insufficient to give that court jurisdiction. *Held*, that this decision was also decisive against the jurisdiction of the circuit court, and on a bill of review the original decree should be reversed, and the bill dismissed for want of jurisdiction, without prejudice; but plaintiff is not entitled to have the proceedings erased from the docket.

2. SAME—COSTS.

In thus reversing its decree and dismissing the bill, the circuit court had no power to order restitution of the costs of the appeal, the same having been paid by plaintiff in pursuance of the mandate of the supreme court.

3. SAME.

Nor, under the circumstances, would the circuit court order restitution of costs paid by plaintiff under its original decree dismissing the bill on the merits, for plaintiff was in fault in invoking a jurisdiction to which she had no right to resort; and for the same reason the costs of the bill of review should not be taxed in her favor.

In Equity. On motion for judgment on a bill of review.

The original proceeding was a suit brought by Martha A. Miller, as legatee under the will of Mrs. Irene Clark, against five other legatees, who were entitled with her to equal shares in the residuary estate. The purpose of the bill was to compel defendants to pay to the executor \$5,377.83, which they claimed by gift *inter vivos* from the testatrix. The court ren-

dered a decree dismissing the cause on the merits. 40 Fed. Rep. 15. Complainant appealed to the supreme court, which dismissed the appeal, holding that, as plaintiff's interest in the sum in litigation was only one sixth thereof, or \$896.30½, the amount was insufficient to confer jurisdiction. 138 U. S. 225, 11 Sup. Ct. Rep. 300. The mandate of the supreme court required complainant to pay the costs of appeal. Thereafter complainant brought this bill of review, praying that the decree of the circuit court should be set aside, and a decree entered dismissing the cause for want of jurisdiction. Defendants specially demurred to this bill, on the ground that it did not show that the costs had been paid in pursuance of the mandate, or give any excuse for their nonpayment. The court (SHIPMAN, J.) overruled the demurrer, but held that the costs must be paid before complainant was entitled to a hearing on the bill of review. 47 Fed. Rep. 850. No order was made or asked fixing a time within which the costs must be paid, but they were paid and accepted by defendant's counsel over two months thereafter, and the court subsequently held that this was not such delay as would debar complainant from filing a supplemental bill alleging such payment. 49 Fed. Rep. 695. The hearing is now on a motion for judgment on the bill of review, complainant also asking that the costs of the original suit paid by her in this court and in the supreme court be ordered to be refunded to her, and that the costs of the bill of review be taxed in her favor.

Simeon E. Baldwin, for plaintiff.

W. B. Stoddard, for defendants.

TOWNSEND, District Judge. This is a motion for judgment on complainant's bill of review, praying for a reversal of the decree in the original cause, and that said decree be declared void, and all proceedings therein taken from the files of this court, and for other relief. Defendants demurred to the bill of review, and the demurrer was overruled. The original case is reported in *Miller v. Clark*, 40 Fed. Rep. 15. Defendants object to a reversal of the decree. They claim that the circuit court has jurisdiction of the cause, and they therefore ask that the bill of review be dismissed. It seems to me that the opinion of the supreme court of the United States, dismissing the appeal in the original cause on the ground that it had no jurisdiction of the appeal, is decisive as to the jurisdiction of this court. The court there finds that the interest of the plaintiff in the amount in dispute is only \$896.30½. *Miller v. Clark*, 138 U. S. 225, 11 Sup. Ct. Rep. 300. Furthermore, all the questions, with perhaps a single exception, discussed upon this motion, appear to have been raised on the hearing of the demurrer to the bill of review. The decision of Judge SHIPMAN overruling said demurrer holds that the reasoning of the supreme court, deciding that it had no jurisdiction, is applicable to this case, and is conclusive on that point.

Complainant also asks that defendants be ordered to refund to her the costs of the original action paid by her in this court, and in the supreme court of the United States, and that the costs of the bill of review be taxed in her favor. To award restitution of the costs in the supreme

court would be a practical reversal of the judgment of that court, and a nullification of its mandate. See *Miller v. Clark*, 47 Fed. Rep. 851.

In claiming restitution of the costs paid under the former decree in this court, complainant has more show of authority. It may now be considered as settled that a circuit court has the power, in a proper case, to order a restitution of money paid under a decree which it had not the jurisdiction to make. *Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523. When cases brought originally to the circuit court are dismissed for want of jurisdiction in such court, no costs are allowed in the circuit court. *Hornthall v. Collector*, 9 Wall. 560; *Pentlarge v. Kirby*, 20 Fed. Rep. 898. With the light now afforded by the decision of the supreme court dismissing the appeal, it is seen that this case should never have been brought to the circuit court, and should have been dismissed at the outset for want of jurisdiction, and therefore without costs to either party. It was, in fact, tried and dismissed on the merits, and costs were awarded the defendants; and, except for the want of jurisdiction, that decision was presumably and apparently correct. Before having that decision reviewed and set aside, complainant was obliged to pay the costs so awarded, as well as the costs in the supreme court. *Miller v. Clark*, 47 Fed. Rep. 850. It seems just that defendants should retain these costs. The supreme court gives the defendants costs in such cases wherever it thinks it has the power to do so. *Winchester v. Jackson*, 3 Cranch, 514; *Assessor v. Osbornes*, 9 Wall. 567; *Montalet v. Murray*, 4 Cranch, 46; *Railroad Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510. The latter case was one of an improper removal from a state court to a circuit court. By a special statute the circuit court is directed, in such cases, to make such order as to costs as shall be just. The defendant obtained the removal of the case to the circuit court, and, after being defeated on a trial of the merits, obtained by writ of error a reversal of judgment on the ground that the circuit court had no jurisdiction. The court say:

"It is clear that the plaintiffs in error, having wrongfully caused the removal of the case from the state court, ought to pay the costs incurred in the circuit court. Although in a formal and nominal sense the plaintiffs in error prevail in obtaining a reversal of the judgment against them, the cause of that reversal is their own fault in invoking a jurisdiction to which they had no right to resort, and its effect is to defeat the entire proceeding which they originated and have prosecuted. In a true and proper sense, the plaintiffs in error are the losing, and not the prevailing, party."

In the present case the complainant selected this court as the tribunal to determine the question of her right to this fund. The defendants were forced to come into this court against their objection, raised by a demurrer, and to contest the claims of the complainant before this court. Now, complainant, having been defeated in the tribunal of her choice, seeks to have these proceedings set aside, and to prosecute her claims before another tribunal. The underlying principle by which the question of costs is to be determined is that they shall be taxed in favor of the prevailing party. In the cases of restitution which have been cited

there appears to have always been an erroneous judgment for a substantial sum. This court ought not to order the costs returned unless it is absolutely compelled to do so by strict law, and I think it is not. The same reasons apply to the claim for costs of the bill of review.

Complainant claims that the original cause should be erased from the docket. Defendants claim that this court cannot erase the cause from the docket, because of the mandate of the supreme court directing execution for costs, and cite the case of *Bridge Co. v. Stewart*, 3 How. 413, in support of this claim. In *Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. Rep. 1010, the circuit court had rendered a decree dismissing the bill on its merits. The supreme court, on appeal, held that the circuit court had no jurisdiction, and awarded costs in the supreme court. The circumstances, so far as regards the case in the circuit court, seem to have been substantially the same as in the present case, and the judgment ordered in that case appears to be proper here.

The motion for writ of restitution and for costs is denied. The decree of this court in the original action brought by this complainant against these defendants is reversed, and the bill in that action is dismissed for want of jurisdiction, and without prejudice.

EELLS v. ST. LOUIS, K. & N. W. RY. CO., (KELLY, Intervener.)

(Circuit Court, S. D. Iowa, E. D.)

1. CARRIERS OF FREIGHT—LIABILITY FOR NEGLIGENCE—LIMITATION BY CONTRACT—VALUATION.

The shipper, by rail, of a horse worth \$1,500, signed a live-stock contract providing that "the liability of the company for valuable live stock shall not exceed \$100 for each animal." Held, that this was not merely an agreed valuation of the animal, but an attempt to limit the carrier's responsibility for negligence, and was therefore void. *Hart v. Railroad Co.*, 5 Sup. Ct. Rep. 151, 112 U. S. 351, distinguished. *Railroad Co. v. Lockwood*, 17 Wall. 357, followed.

2. SAME—FOLLOWING STATE DECISIONS.

The question whether a carrier can stipulate for exemption for liability for its own negligence is a matter of general law, upon which the federal courts will exercise their own judgment, independent of state decisions, although jurisdiction attaches merely by virtue of the citizenship of the parties, and the contract was made and to be performed within the state.

In Equity. Bill by Dan P. Eells, trustee, etc., against the St. Louis, Keokuk & Northwestern Railway Company. Intervening petition by Isaac Kelly against the receiver, W. W. Baldwin, to recover the value of a horse alleged to have been killed by the receiver's negligence while in course of transportation. Heard on exceptions to the master's report. Overruled.

W. J. Roberts, for intervener.

H. H. Trimble and Palmer Trimble, for receiver.

WOOLSON, District Judge. Pending the proceedings in the original action, Isaac Kelly, by leave of the court, filed his petition of inter-

vention against W. W. Baldwin, as receiver of the defendant railway company. His cause of action is, in substance, that about August 6, 1887, and while said Baldwin, as receiver, was operating said line of railway, intervener was the owner of a valuable horse, of the value of \$1,500, which intervener delivered to said receiver for transportation over said railway; and that, while being so transported, said horse, by the carelessness and negligence of said receiver, was injured and damaged in the sum of \$1,200, for which intervener demands judgment. An order of reference to the master was entered. Defendant receiver's answer (so far as affecting the question now under consideration) alleges that said horse was shipped as a common horse, and not as a valuable horse, and at the usual tariff for common horses; and that the shipper signed a "live-stock contract," which contains the provision: "It is also agreed that the liability of the company for damage to valuable live stock shall not exceed one hundred dollars for each animal, except by special agreement;" and thereby the liability, in case said horse was damaged, was limited to \$100; and that said shipper understood that he was shipping said horse on a valuation of \$100, and that if he shipped said horse at a greater valuation he would have to pay a greater rate than the rate he did pay. To so much of said answer as sets up that the shipper "understood" the shipping to be at the valuation of \$100, and that the shipping at a higher valuation would compel the payment of a higher rate than that paid, the intervener filed exceptions, on the ground that the writing set up was conclusive; and to the contract limitation set up he excepts on the ground that the receiver cannot thus limit his liability for negligence. The master heard counsel upon these exceptions to answer, and has filed his report sustaining them. To this report the receiver has filed exceptions. The only matter now to be decided is raised by the exceptions to the master's report.

Counsel do not disagree that under the authority of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, a public carrier may agree with the shipper as to the valuation of the property carried; and that such valuation, forming the basis of the charges by the carrier, and in a contract fairly made and agreed to by the shipper before the shipment is entered upon, is binding on the shipper, and limits the extent of his recovery, even as against the negligence of the shipper. The receiver contends that the contract above quoted is within the rule announced in the *Hart Case*. The master's finding is adverse to this contention, and holds this contract provision is, in effect, an attempt to stipulate against the consequences of the carrier's negligence, and not an agreement as to valuation. Counsel for receiver do not in their brief combat the proposition that a public carrier may not by contract stipulation exempt himself from the consequences of his negligence. But they contend that the contract in question, taken in connection with the averments of the answer, makes an agreed valuation of the property, and therefore conforms to the *Hart Case*, *supra*.

The averments of the answer cannot be permitted to enlarge the contract provision. The answer contains no allegations entitling the receiver

to a reforming of the contract. All previous and contemporaneous verbal negotiations and agreements are merged in the contract, and the contract cannot be varied or enlarged by parol testimony. It must stand or fall by its own plain terms. 1 Greenl. Ev. § 305; Ang. Carr. (4th Ed.) § 229; *Delaware v. Iron Co.*, 14 Wall. 579; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151; *Gilbert v. Plow Co.*, 119 U. S. 491, 7 Sup. Ct. Rep. 305.

In determining the question presented, with reference to the contract provision attempting to exempt the carrier from the consequences of his own negligence, regard must be had to the pleadings herein and the issues thereby presented. This action does not grow out of any liability of the receiver other than that of negligence. The petition of intervention counts on negligence of the receiver, and on negligence alone. And, however greatly the intervener may have been damaged, yet, if the damage was occasioned from any other cause than negligence, the intervener cannot recover herein. Whatever might, therefore, be the effect of the contract provision in any case not founded on the carrier's negligence is foreign to the question under consideration. The only question to be determined is whether this contract provision is valid and enforceable against the intervener when the property shipped has been damaged through the receiver's negligence.

The contract of shipment was made and shipment wholly performed within the state of Missouri, and counsel for the receiver have cited certain cases decided by the supreme courts of Missouri and Illinois, which are claimed to be decisive in favor of the receiver's position herein. However highly we may regard the decisions of those courts, and the learning manifested in their decisions, it is unnecessary to examine these cases; for the supreme court of the United States, by an unbroken line of decisions extending through many years, and in cases wherein was involved the liability of a common carrier, has established the rule that the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from liability for his own negligence, is not a local question, upon which the decision of a state court must control; but that such question is a matter of general law, upon which the courts of the United States will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. Rep. 425; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974. And see *Liverpool & G. W. Steam Co. v. Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, and cases cited therein.

Scruggs v. Railroad Co., 18 Fed. Rep. 318, was an action tried in the eastern district of Missouri to recover full value of goods lost by fire through the carrier's negligence, while being carried over the line of the defendant. The bill of lading provided that, unless the shipper had the values of his packages inserted in the bill of lading given him, the car-

rier would not be liable or responsible for an amount exceeding \$500 on each package. No values were inserted in the bill of lading for the shipment in suit. Judgment for \$4,077. In this decision Judge TREAT, in deciding against the carrier's contention that the shipper should be limited in his recovery to \$50 per package, says:

"The evidence disclosed that the loss was caused by the negligence of the defendant. * * * The loss having occurred through the negligence of the defendant, plaintiffs are entitled to recover the full value of the goods forwarded, with interest."

The judgment just cited finds abundant support in *Hart v. Railroad Co.*, *supra*. Previous to the decision of the *Hart Case* there had existed much disagreement among the courts of last resort in several states, in their holdings in this question; and there yet obtains in a few states a different doctrine from that announced in the *Hart Case*. But the well-considered and elaborately argued opinion in the *Hart Case*, receiving, as it did, the unanimous concurrence of all the justices of that eminent court, has done much towards bringing American law to the general acceptance of the doctrine therein announced. In the *Hart Case* the live-stock contract, which constituted the bill of lading, was signed by the shipper, and provided, among other provisions, that the rate of freight therein named was paid, "on condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding \$200 each; if cattle or cows, not exceeding \$75 each," etc. The live stock shipped, for whose injury damage was claimed in that action, were valuable horses and other property. Plaintiff, Hart, claimed as damages \$15,000 for one horse killed, and \$3,500 for the other four horses injured. The case was tried below in the eastern district of Missouri, and the ruling of Judges McCrary and Treat, upon the validity of this contract provision, and sustaining it, is found in 7 Fed. Rep. 630. In delivering the ruling (page 632) the circuit court say: "The only question here is whether a man who delivers live stock to railroad company, to be transported upon cars, has a right to stipulate with the company concerning the value of the property." And testing the contract by the rule laid down in *Railroad Co. v. Lockwood*, *supra*, that the limitation must be reasonable in the eye of the law, the circuit court, speaking through Judge McCrary, say that "I do not see anything in it contrary to equity and fair dealing;" and thereupon the ruling is made "that the recovery must be limited by the amounts fixed in the contract," and the charge to the jury is made accordingly, and a verdict directed in accordance with the charge. In the supreme court no question is raised by counsel save that pertaining to the validity of the contract provision and the correctness of the charge below, (112 U. S. 331, 5 Sup. Ct. Rep. 151;) that is, the right of the carrier to limit, through the provision in question, its liability for damages caused by its negligence as a common carrier. The previous decisions of that court had left no doubt as to the general doctrine obtaining in the United States courts that while a common carrier might, by special contract, limit other common-law liability, he could not stipulate for exemption

from the consequences of his negligence. *York Co. v. Central R. Co.*, 3 Wall. 107; *Railroad Co. v. Lockwood*, *supra*; *Bank v. Express Co.*, 93 U. S. 174; *Railroad Co. v. Stevens*, 95 U. S. 655.

And in the later cases the doctrine of the *Lockwood Case*, *supra*, (and which Judge McCrory recognized in the *Hart Case*, below,) had been approved and followed, that no exemption from responsibility could be made by the carrier except such as was just and reasonable in the eye of the law; and that it was not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself and his servants. In complete harmony with this doctrine, the supreme court, in the *Hart Case*, *supra*, recognized the rule that where the shipper, by imposition and fraud, misrepresented the nature or the value of the article shipped, he destroyed his claim to indemnity; he had thus attempted to deprive the carrier of the right to be compensated proportionately to the value of the article and the risk thereby assured, and had lessened the vigilance which, it may be properly assumed, the carrier would otherwise have exercised. Therefore it is but reasonable to permit the carrier to urge a corresponding qualification of the liability which, otherwise, the law would fasten upon him. And with reference to the contract provision in the *Hart Case*, the supreme court, speaking through Justice BLATCHFORD, say:

"It is but just to hold the shipper to his agreement, fairly made as to value, even when the loss or injury has occurred through the negligence of the carrier. * * * The agreement as to value, in this case, stands as if the carrier had asked the value of the horse, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability from negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. * * * The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of transportation between the parties to the contract. * * * It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy."

These extracts from the opinion in the *Hart Case* may be properly taken as a basis upon which is reached the decision by the court announced (112 U. S. 331, 5 Sup. Ct. Rep. 151) in the following words:

"The distinct ground of our decision in the case at bar is that where a contract, of the kind signed by the shipper, is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In the case at bar, the contract provision neither states nor attempts an agreed valuation of the animal shipped. Whether the animal is of \$100, \$1,000, \$10,000, or other value, the contract is silent. But the contract expressly provides for a limitation of liability to \$100, without

reference to the valuation of the animal shipped; and for the negligent killing of a horse of the value of \$10,000, at time of shipment, there could be recovered, if the contract provision be upheld, no greater damages than for a horse of but \$100 in value. Such a contract cannot be said to be, in the eye of the law, just and reasonable, in its attempt to limit the responsibility for the negligence of the carrier. When tested by the extracts above given from the *Hart Case*, the failure of the contract in case at bar to meet that test becomes strikingly manifest. "The agreement as to value in this [Hart] case stands as if the carrier had asked the value of the horse, and had been told by the shipper the sum inserted in the contract." The exceptions to the master's report are therefore overruled.

CENTRAL TRUST CO. OF NEW YORK *et al. v. WABASH, St. L. & P. Ry. Co.,* (St. Louis, K. & N. W. Ry. Co., Intervener.)

(Circuit Court, S. D. Iowa, E. D.)

RAILROAD COMPANIES—RECEIVERS—LIABILITY ON CONTRACTS.

The W., St. L. & P. Ry., as assignee of the M., I. & N. Ry., held a half interest in a certain bridge and piece of track, the maintenance and repair of which was provided for in a general contract with the other joint tenant. Receivers of the W., St. L. & P., including its leased lines, among them the M., I. & N., were appointed, and made a special contract for specific repairs, which were made by the joint tenant in accordance therewith. Thereafter a special receiver for the M., I. & N. was appointed. *Held*, that the receivers of the W., St. L. & P. were liable as such for the repairs, though as against the M., I. & N. they might have had a good claim therefor.

In Equity. Petition of intervention by the St. Louis, Keokuk & Northwestern Railway Company, to assert a claim against Solon Humphrey and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company. Order for payment of claims.

H. H. Trimble and *Palmer Trimble*, for intervener.

James C. Davis and *Frank Hagerman*, for receivers.

WOOLSON, District Judge. The material facts involved in the hearing of this intervention are not in dispute. In April, 1882, the St. Louis, Keokuk & Northwestern Railway Company, the intervener herein, (and who is hereinafter spoken of as the St. Louis Company,) owned a line of track extending southward from the city of Keokuk, Iowa. The Wabash, St. Louis & Pacific Railway Company, (hereinafter spoken of as the Wabash Company,) was at that date operating its railway south from Keokuk, and was the assignee and lessee of the Missouri, Iowa & Nebraska Railway Company, (hereinafter spoken of as the Missouri Company.) Said Wabash Company (as such assignee and lessee of said Missouri Company) and said St. Louis Company were the joint owners of a bridge over the Des Moines river; and said line of

track, owned, as above stated, by the said St. Louis Company, led to said bridge at its north, and also at its south, end. In April, 1882, said Wabash Company and said St. Louis Company were both using said line of track—or about seven miles thereof—and said bridge; and at that date entered into an agreement whereby said Wabash Company agreed to pay a certain rental for use of said track, and said two companies, the St. Louis and Wabash, therein agreed upon certain terms for the maintenance and repair, among other matters, of said bridge so jointly owned and used by them. In May, 1884, Solon Humphrey and Thomas E. Tutt having been appointed receivers of said Wabash Company, including its leased lines, an ancillary order to same effect was entered in this court. Among the leased lines operated by the said Wabash Company, and which passed into the control of said receivers, was the line of said Missouri Company. And said receivers continued to use the seven miles of track and bridge which, prior to their said appointment, said Wabash Company, as assignee and lessee of said Missouri Company, had been using jointly with said St. Louis Company. In December, 1884, it became necessary to repair said bridge. An agreement in writing was entered into between said St. Louis Company and said receivers, whereby said St. Louis Company was to make the necessary repairs, (which had been specifically agreed upon,) and one half the cost thereof was to be borne by the St. Louis Company and the other half was to be paid by said receivers. The repairs were begun in December, 1884, and concluded in June, 1885, amounting to \$533.59, being \$266.79 to each of said contracting parties. On July 2, 1885, and pursuant to due order of court, said receivers, Humphrey and Tutt, turned over to Thomas Thatcher, who was on that day duly appointed receiver of the property of said Missouri Company, all the property of said Missouri Company which said receivers of the Wabash Company then had in their possession, and which included said half interest in said bridge. Thereafter said Thatcher, as receiver of said Missouri Company, operated the road of his company—including said bridge—until his discharge as receiver, which occurred some months thereafter. The St. Louis Company presented to said Receiver Thatcher a bill of one half of said repairs to said bridge. He refused to pay same, claiming that the Missouri Company had never agreed to pay any part of it; and, Receivers Humphrey and Tutt refusing to pay any part of said repairs, claiming that the repairs were a charge upon the property of the Missouri Company, the St. Louis Company, by leave of court, has intervened in this action, and the question now presented is whether, under the facts above recited, the St. Louis Company is entitled to recover from Receivers Humphrey and Tutt one half of said repairs.

The necessity for the repairs is conceded. Before the repairs were commenced, the St. Louis Company and the receivers of the Wabash Company agreed on the specific repairs to be made, and in writing each party agreed to pay one half of the cost thereof. The correctness of the bill is not disputed. The sole question is whether Receivers Humphrey and Tutt are liable therefor. Counsel for the receivers argue the ques-

tion from the standpoint of the personal liability of Messrs. Humphrey and Tutt. But the pleadings and agreed statement of facts do not present such a question. If an order herein must stand against them personally, the decision of the court would be of a different nature. If the court finds for the intervener, such finding, under the pleadings, must be against the parties as receivers, and not personally. The repairs were made and bill for repairs incurred while said receivers were in possession of the line of the Missouri Company, and were operating the Wabash trains over the said seven miles of track and of said bridge. Had the Wabash Company been directly—that is, through its own officials, and not through receivers—so operating its line, and made with the St. Louis Company the contract for repairs, which the receivers made, and by mutual consent of the Wabash and the Missouri Companies the lease—from the Missouri to the Wabash Company—had been terminated on the day the said Missouri line actually passed out of the possession of the Wabash receivers, the Wabash Company would have been liable to the St. Louis Company for the bill herein presented. Of this there can be no doubt. Why, then, should not the bill be valid against the receivers of the Wabash Company? It is argued by counsel for the receivers that the receiver of the Missouri Company, though appointed subsequent to the completion of the repairs, should pay this bill, since (the argument insists) the expenditures were for the benefit of the property of the Missouri Company. This argument might be potential were we considering as between the Wabash Company or its receivers, and the Missouri Company or its receivers, the question of apportioning to the Missouri Company any expenditures or liability incurred by the Wabash Company for the betterment of the Missouri property. Had the Wabash receivers paid the amount of the bill, they might with force have pressed, as against said Missouri Company, the justice of charging such payment against the property of the Missouri Company, and the injustice, as to the Wabash Company, of having the bill paid out of Wabash funds. Such apportionment might have been eminently proper, as between lessor and lessee, in adjusting their relations on termination of the lease. But why should the St. Louis Company be compelled to look to the Missouri Company or its receiver for payment? The original contract for keeping this track in repair the St. Louis made with the Wabash Company. The specific and express contract for repair to the bridge it made with the receivers of the Wabash Company. And these receivers, in writing, and in advance of the repairs, agreed to pay one half of the cost of the repairs. These receivers rightly exercised their authority in so contracting. The repairs were not large in expense, and were necessary to safe operations of the road. Relying on the strength of the agreement with the Wabash Company, the St. Louis Company made the repairs. The Wabash receivers stood by and saw the repairs made, and their liability therefor as receivers rendered complete; and, after this liability had attached to their receivership, they turn over the Missouri line to the receiver appointed therefor, but they retain the receivership of the Wabash Company;

and their liability for the repairs, made under their contract, lawfully entered into by them as receivers of the Wabash Company, became and remained a liability binding upon the trust in their hands, and nothing has been shown relieving this trust from the liability thus incurred.

Let an order be entered, directing the payment to intervener by Solon Humphrey and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, and out of and against any property in their hands as such receivers, of the sum of \$266.79, with interest at 6 per cent. from April 27, 1886.

NORTHERN PAC. R. CO. v. KRANICH.

(Circuit Court, D. Montana. November 14, 1892.)

EJECTMENT—ADVERSE POSSESSION—LIMITATION—PUBLIC LANDS.

In ejectment to recover land situated in Montana, an admission in the answer that the title is in the United States is not inconsistent with a plea of the statute of limitation, for possession held in subordination to the title of the United States may be adverse as to all others.

At Law. Action in ejectment by the Northern Pacific Railroad Company against Ernst Kranich. On motion to strike from the answer alleged inconsistent averments. Overruled.

F. M. Dudley and W. E. Cullen, for plaintiff.

H. G. McIntire, for defendant.

KNOWLES, District Judge. Plaintiff commenced a suit against the defendant in the nature of an action of ejectment to recover the possession of certain real estate. The complaint is in the usual form, showing the ownership of plaintiff, the entry and ouster by defendant, and the retention and possession of same by him. The answer denies the ownership of plaintiff, and admits possession in defendant. The answer sets up as new matter the statute of limitation, and also facts showing that the defendant had applied to enter said land under the pre-emption laws of the United States, and the contest upon this application of defendant, and the ruling of the register and receiver of the United States land office at Helena, Mont., in his favor. Plaintiff filed its motion to strike out this clause in said answer setting up the statutes of limitation, on the ground that the same was inconsistent with the allegations in the sixth clause of the answer, which shows that defendant did not claim said land adversely as against the United States, but under and in subordination to its laws, and acknowledged its title to the same.

It is admitted that the general rule is that, in order for one to make out a title by adverse possession, the person so claiming must claim title to the premises possessed as against all others. *McCracken v. City*

of *San Francisco*, 16 Cal. 591. It is true that the decision is limited in this case to the possession maintained under color of title. But I am unable to find any difference upon this point as to whether a person enters under color of title or without. Perhaps a better way of stating the nature of claim as to title that should be made by one claiming adversely land is that he should claim as owner. The fact that he admits that another is owner, or does not claim title against all others, would generally be insufficient. There is no doubt that in the answer defendant admits ownership of the property in the United States. Is there any exception as to the general rule I have stated? I think in all of the western states there is an exception thereto. If a party claims title to land here against all persons but the United States, that is sufficient. This view is recognized in the cases of *Francoeur v. Newhouse*, 43 Fed. Rep. 236; *Hayes v. Martim*, 45 Cal. 563; *McManus v. O'Sullivan*, 48 Cal. 15.

In this state I am satisfied the rule is well established not to allow, as a plea of title in a third party, a plea of title in the United States. For many years no one in Montana held title to real property against the United States. The admission, then, that the title to the property was in the United States was not at all inconsistent with the plea of the statute of limitations by defendant as against plaintiff, and the two defenses are not inconsistent. For these reasons the motion of plaintiff to strike out is overruled.

CHICAGO & N. W. RY. CO. v. OSBORNE.

SAME v. JUNOD *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 17, 1892.)

Nos. 67, 68.

1. CARRIERS—INTERSTATE COMMERCE—LONG AND SHORT HAULS—JOINT TARIFF RATES.

Where two railroad companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates Act Feb. 4, 1887, § 4, which forbids greater compensation for a shorter than for a longer haul. 48 Fed. Rep. 49, reversed.

2. SAME—PUBLICATION OF JOINT TARIFF RATE—NONCOMPETING POINT.

Under section 6 of the interstate commerce law, (Act Feb. 4, 1887), and the order of the commission of June 21, 1887, relating to the publication of joint tariffs, it is not necessary for either of the connecting lines to publish their joint tariff at a noncompeting point, or to volunteer information of such tariff to shippers.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

At Law. Actions by John Osborne and H. A. Junod and another against the Chicago & Northwestern Railway Company for damages for

violation of the long and short haul clause of the interstate commerce law. Verdicts and judgments for plaintiffs in both cases. The charge of the court to the jury is reported in 48 Fed. Rep. 49. Defendant brings error. Reversed.

Statement by BREWER, Circuit Justice:

The defendant in error, plaintiff below, recovered a judgment in the circuit court of the United States for the southern district of Iowa for the sum of \$225 for alleged overcharges on corn shipped from Scranton, Iowa, to Chicago. The action was brought under the interstate commerce act of February 4, 1887, (24 St. p. 379.) The facts material to the inquiry are as follows:

The defendant owns and operates a railroad from Missouri Valley, a town on the western border of Iowa, to Chicago, Ill. Scranton is a town in Iowa on the line of this road, 88 miles east of Missouri Valley, and therefore so much nearer Chicago. The Fremont, Elkhorn & Missouri Valley Railroad Company owns a railroad running east and west through Nebraska, and connecting with the defendant's road at the town of Missouri Valley. Blair, Neb., is a point on that road, 13 miles west of Missouri Valley. While the Fremont, Elkhorn & Missouri Valley Railroad Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operations.

During the month of January, 1888, there was in force a local tariff of rates charged on the defendant's road. This local tariff was duly published in Scranton. In accordance with it, the rate from Scranton to Chicago on corn was 18 cents per 100 pounds. All shippers shipping simply to Chicago paid that rate. The plaintiff, among others, made sundry shipments, and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate as to all such local shipments. At the same time the tariff on corn shipped through from Blair, Neb., to New York city was 38½ cents; to Boston, Philadelphia, and Baltimore, sums slightly above and below this figure. This through rate was made up in this way: By agreement between the defendant and eastern companies, corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one 80 and the other 70 miles west of Chicago, for 27½ cents, 3½ cents of which went to defendant, and the balance to the eastern companies; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railroad Company, the rate from Blair to Turner and Rochelle, on corn shipped to New York, Boston, Philadelphia, or Baltimore, was 11 cents. In other words, by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other eastern cities; and of that through rate the defendant company received, for carrying the whole line of its road, less than the local tariff of 18 cents, charged from Scranton to Chicago. This joint tariff was not published at Scranton, and no knowledge of it was given to or possessed by the plaintiff until February 24th; and until that time he made no application for shipment beyond Chicago. Thereafter he shipped to Boston, and received the benefit of the through tariff.

W. C. Goudy and N. M. Hubbard, for plaintiff in error.

C. C. Nourse and C. L. Nourse, for defendants in error.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

BREWER, Circuit Justice, (*after stating the facts.*) This case must be determined exclusively by the provisions of the interstate commerce law, as it was originally passed and before any amendment. No question was submitted to the jury, and no evidence was offered, as to whether 18 cents was or was not in fact a reasonable rate for carrying corn from Scranton to Chicago. The theory of the plaintiff's case was that the defendant company had violated the fourth section of the act, by charging more for a short than for a long haul; and, of course, if it had, it is liable to the plaintiff.

We do not care to enter into any extended discussion of the interstate commerce act. It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a quasi public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all that they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it. With him, however, lay the burden of proving the fact that the charge was unreasonable; a burden which all experience shows was onerous, and therefore seldom undertaken; the party aggrieved preferring to submit to the overcharge, rather than go to the expense and time of contesting it. Hence the efforts by state and nation to establish limits of charges, and means of evidence of easy and accurate ascertainment. While it is the duty of the courts to see that the provisions established by congress are not frittered away on technical or trifling grounds, yet it is also equally their duty to see that such a legislation is not carried beyond its clear scope, and that the owners of private capital invested in the business of transportation be not deprived of their liberty of contract and right of control any further than the lawmaking power has intended that they should be.

With these preliminary observations, we remark:

First: That congress has not attempted to require that the tariffs on all roads be uniform; nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have, as yet, been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and the Missouri river, a parallel and competing road with the defendant company; yet there is nothing in the commerce act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act; and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the act.

Secondly. That, where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined. To illustrate: On the defendant's road, the distance from Turner to Chicago is 30 miles; on the Lake Shore line, from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the 30

miles from Turner to Chicago, providing that be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents; less than the local tariff of either. That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned.

This proposition may not be as obvious as the former, and yet a careful study of the act leaves no doubt of its correctness. In the first section a definition is given of the term "railroad," which, in addition to bridges and ferries, includes "also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease." A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads, or to unite in a joint tariff. "Reasonable, proper, and equal facilities for the interchange of traffic" are commanded by the third section; but with the proviso: "This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business." No power existed at common law, and none is given by the act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff. *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 559. The whole matter is left to the voluntary action of the companies; and, in forming by agreement any joint tariff, the basis of division and the proportion of moneys each shall take is also a matter left to their determination.

The denunciation of the fourth section is against each separate common carrier, for its violation of the "long and short haul" clause on its own line. The language is:

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance."

The use of the word "line" is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the "same line," so as to compel either company to graduate its tariff by that of the other.

Further, by section 6, every common carrier is required to print and publish at every depot along its own road schedules showing its rates and fares and charges. There is a prohibition against advancing rates without giving notice, and, in case of a reduction, notice thereof must be immediately posted; whereas, in reference to joint tariffs, the requisition is simply that each common carrier furnish to the commission a copy of all contracts therefor, as well as copies of the joint tariffs; and power is given to the commission to determine the amount of publication that shall be required.

Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them according to the mere matter of mileage. In this act joint tariffs are recognized; and, if congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific.

It is worthy of note that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies; and also worthy of note that in the actual administration of affairs by the interstate commerce commission the same thing has been constantly recognized.

Applying these propositions to the case at bar, a conclusion is easily reached. There is no pretense that any shipper at Scranton, or other point on the defendant's line further from Chicago than that, was charged less for shipping grain to Chicago than the plaintiff. In other words, there was no violation of the "long and short haul" clause by the defendant, in respect to its own line; nor did the defendant, acting with eastern companies, on the line made by its road in connection with theirs, charge or receive for grain shipped from Scranton or any point west, to any eastern point, less than the through tariff. In other words, the defendant did not, separately or in connection with other companies, violate section 4. It avails the plaintiff nothing that he was unaware of this through joint tariff at the time he made the shipments which are the basis of his cause of action. No false statement was made to him. He made no inquiry in respect to its existence. The matter of publication was by the act, as it then stood, left to be determined by the commission. The provision of the statute, section 6, is as follows:

"Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed prac-

licable; and said commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

And the order of the commission made June 21, 1887, provided that—

"Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary 'pica,' copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."

Scranton was no competing point. No other line, so far as appears, touched the place; and hence no publication of the joint tariff was there required. Of course the defendant was under no common-law or statute obligation to advise the plaintiff where or how he had better ship his grain. It fulfilled its legal obligation when it published its local tariff, and advised him truthfully in respect to any rates in respect to which he made special inquiry.

For the reasons above stated, on the facts as they appeared in evidence, the jury should have been instructed to find a verdict for the defendant. The judgment of the court below will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Case No. 68. *Chicago & Northwestern Railway Company, Plaintiff in Error, v. H. A. Junod and R. Y. Culbertson, Defendants in Error*, involves the same questions, and the same judgment of reversal will be entered.

TOZER v. UNITED STATES.

(*Circuit Court, E. D. Missouri, N. D. November 15, 1892.*)

No. 78.

1. INTERSTATE COMMERCE ACT—UNDUE PREFERENCES—JOINT THROUGH TARIFFS.

Where two connecting lines agree on a joint through tariff, such joint tariff, or the share of it which either takes, is not the standard by which to determine whether either line violates, by its local rates, section 8 of the interstate commerce act, forbidding undue preferences. *Railroad Co. v. Osborne*, 52 Fed. Rep. 912, followed.

2. SAME—VIOLATION OF "UNDUE PREFERENCES" CLAUSE—INDEFINITENESS AND UNCERTAINTY.

The "undue preferences" clause of the interstate commerce act is indefinite and uncertain, and a conviction for its violation cannot be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Missouri.

George K. Tozer was indicted for a violation of the interstate commerce act, (section 3,) prohibiting undue preferences. The court sustained a demurrer to the fourth count. 37 Fed. Rep. 635. Defendant was convicted under the second and third counts. For charge to jury, see 39 Fed. Rep. 369. The court subsequently denied defendant's motions for a new trial and in arrest of judgment. 39 Fed. Rep. 904. From the judgment of conviction, defendant brings error. Reversed.

Thomas J. Portis, (*Aldace F. Walker*, of counsel,) for plaintiff in error.

George D. Reynolds, U. S. Atty., for the United States.

Charles Clapham Allen, special counsel, for the United States.

Before BREWER, Circuit Justice, and CALDWELL, Circuit Judge.

BREWER, Circuit Justice. Plaintiff in error was indicted in the district court for an alleged violation of the interstate commerce act. There were five counts in the indictment. The court sustained a demurrer to the fourth, and the defendant was found not guilty under the first and fifth, but guilty under the second and third, counts. The judgment of conviction rendered thereon was brought to this court for review by writ of error.

The facts in the case are these: Tozer was agent of the Missouri Pacific Railway Company at Hannibal, Mo. That company operated a line of road extending from Hannibal to Hepler, Kan. At Hannibal it connected with the road of the Chicago, Burlington & Quincy Railroad Company. The two companies, by agreement, established a joint tariff. By that joint tariff sugar was shipped from Chicago to Hepler at 51 cents a hundred pounds. The local tariff of the Missouri Pacific Railway Company from Hannibal to Hepler was 46 cents per hundred. The joint tariff was divided between the two companies by giving to the Missouri Pacific Company 34 and to the Chicago, Burlington & Quincy Company 17 cents. The Hayward Grocer Company, a firm doing business at Hannibal, shipped sugars from that place to Hepler, upon which shipment the regular local rate of 46 cents was charged and collected. They also ordered a Chicago firm to ship sugar from Chicago to the same point. This shipment was made over the Chicago, Burlington & Quincy Railroad, and upon it the joint rate, 51 cents, was charged and paid. It was argued in the trial court that the Chicago, Burlington & Quincy Railroad Company made a contract to carry the sugars from Chicago to Hepler, and that, after carrying them over its own line from Chicago to Hannibal, it employed the Missouri Pacific Company to carry for it the balance of the way, and paid it 34 cents; or, to state it in another way, the Missouri Pacific Company charged the Chicago, Burlington & Quincy Company only 34 cents for carrying the sugars from Hannibal to Hepler, while it charged the Hayward Grocer Company, and others living in Hannibal, 46 cents for doing a like work; and it was held that this constituted a giving to one person an undue and unreasonable advantage, and subjected one to unjust and unreasonable disadvantage, within the denunciation of section 3 of the interstate commerce act. In other words,

a comparison was drawn between the local rate of the one company and the share which it received by agreement of the joint through rate of the two companies, and, the two being unequal, the agent was found guilty of violating the act.

The decision of the court of appeals of this circuit, just announced in the case of *Railroad Co. v. Osborne*, 52 Fed. Rep. 912, precludes the necessity of any extended discussion. It was there held that each company established its own tariff, and that the reasonableness of the tariff of one is not determined by that of any other. It was also held that two connecting companies, forming by agreement a joint through tariff, create thereby, as it were, a line new and independent of that of either of the connecting companies; and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined. It is true that in that case the question arose under section 4, with reference to long and short hauls, while in this it arises under section 3, prohibiting undue and unreasonable preferences or advantages; but still the questions there decided are controlling here. If the joint through tariff of two connecting roads is not a standard by which the local tariff of either can be declared in violation of section 4, neither can it be a standard by which the question of undue preferences is determined under section 3. Because the local rate is in excess of the share of the joint rate, it does not follow that an undue preference or advantage has been given. The trial court seemed to recognize this proposition, for it charged:

"Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments, the question that I submit to you under the second and third counts is whether the difference shown in this case between the two rates of 12 cents per 100 pounds is, under all the circumstances of the case, a reasonable difference, or an undue and unreasonable difference, not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made. If you find that the difference in rate of 12 cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant, as agent of the Missouri Pacific Railway Company, knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment, then you may return a verdict of guilty on the second and third counts, although you acquit on the first count.
* * * In determining the last question submitted to you as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances, and reasons adduced by the various witnesses in justification of the difference shown, and I ask you to consider the same carefully and fairly, without any prejudice or bias whatsoever."

But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co. v. Dey*, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

"Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and un-

certain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In *Dwar. St. 652*, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, *U. S. v. Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine, 34; *Bish. St. Crimes*, § 41; *Lieb. Herm.* 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158."

Applying that doctrine in this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant. Judgment will therefore be reversed, and the case remanded for further proceedings.

CYCLONE STEAM SNOWPLOW Co. *et al.* v. VULCAN IRON WORKS.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1892.)

No. 126.

1. CONTRACTS—MANUFACTURER'S WARRANTY.

Where a contractor agrees to build an experimental machine, the first under a new patent, on plans to be approved by the patentee, with warranty for the workmanship and materials of his own shop, but expressly excepting from the warranty the boiler and other parts bought outside, and the working of the machine as a whole, the relative capacity of the boiler and engines is not a matter of the contractor's workmanship, nor is he liable for an error therein.

2. ACTION ON BOND—VALUATION.

In Illinois, when an experimental machine, nearly complete, is replevied from the person under contract to make it, at a valuation of \$10,000 by the replevisor, such valuation is conclusive upon him in an action on the replevin bond, in the absence of evidence that he was misled, and made it in ignorance of the actual condition of the property. 48 Fed. Rep. 652, affirmed.

3. SAME.

In any event, where the replevisor removed the property to a distant place, thus making a fair valuation impossible, and sold it and the patent right for \$16,000, the value of the royalty, wholly in the control of the replevisor, having been unknown at the time of replevin, his own valuation is conclusive upon the replevisor.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action on a replevin bond by the Vulcan Iron Works against the Cyclone Steam Snowplow Company and C. P. Jones. Judgment for plaintiff. Motion for a new trial denied. 48 Fed. Rep. 652. Defendants bring error. Affirmed.

M. P. Brewer, (F. B. Hart, John Day Smith, and Victor Linley, on the brief,) for plaintiffs in error.

F. B. Kellogg, (Keith, Evans, Thompson & Fairchild and Davis, Kellogg & Severance, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this cause it appears that E. P. Caldwell was the inventor and patentee of a snowplow called the "Cyclone Steam Snowplow;" that a corporation by the name of the Cyclone Steam Snowplow Company was organized under the laws of the state of Minnesota for the purpose of manufacturing and selling plows under the Caldwell patent; that on the 27th of December, 1888, a contract in writing was entered into between said snowplow company and the Vulcan Iron Works, of Chicago, a corporation organized under the laws of the state of Illinois, whereby the latter company agreed to construct a rotary steam snowplow according to the model and data furnished by the snowplow company, it being further agreed that E. P. Caldwell, the patentee, was to represent the snowplow company in the preparation of plans and drawings and in the construction of the plow, for which the iron works company was to be paid the cost, with 10 per cent. added thereto. It was also agreed that the boiler, trucks, and such other parts of the machinery as might be needed to expedite the completion of the work, should be bought of other parties, and be fitted to their places in the plow by the iron works company, it being further agreed "that the said Vulcan Iron Works guaranty the workmanship and materials made up in their own shops, but do not guaranty boiler and other parts bought outside, nor the working of the machine as a whole."

The iron works company proceeded with the construction of the plow under this contract, and had the same substantially completed on the 11th day of October, 1889, when the snowplow company brought an action of replevin in the United States circuit court in and for the northern district of Illinois against the iron works company, and thereby obtained possession of the plow, which was taken to California, and was subsequently sold to the Southern Pacific Railroad Company. In the affidavit filed in the replevin suit, and in the declaration therein filed, the value of the plow was stated to be \$10,000, and a bond in the sum of \$20,000 was given by the snowplow company, the statutes of Illinois providing that the plaintiff in the replevin action shall give a bond, with sureties, in a sum double the value of the property sought to be taken upon the writ in the case. On January 24, 1890, the action in replevin being called for trial, the snowplow company dismissed the same, and a judgment for the return of the property was entered in favor of the defendant in that action. The plow was not returned, and thereupon the iron works company commenced this action against the snowplow company and C. P. Jones, one of the sureties on the replevin bond, the same being brought in the United States circuit

court for the district of Minnesota. The defendants in this action, among other things, pleaded that, by the terms of the written contract between the snowplow company and the iron works company, the latter had guarantied the workmanship and materials made up in its own shop, and that said workmanship included the proper adjustment, adaptation, and mechanical construction of the machinery designed to propel and operate the patented device, but that the machinery furnished was not as guarantied, and upon the trial the snowplow company introduced evidence tending to show that the boiler did not have sufficient capacity for the demands put upon it, for which reason damages were claimed on behalf of the snowplow company. The contention of the plow company was that the determination of the relative capacity of the boilers and engines was left to the iron works company, and therefore it was a matter of workmanship, within the terms of the guaranty contained in the written contract. The trial court held that the guaranty of the workmanship and materials made up in the shops of the iron works company did not include the matter of the capacity of the boiler, and this ruling is the first error presented in the argument before this court.

It appears from the evidence that the plow in question was the first one ever manufactured under the Caldwell patent. The Vulcan Iron Works Company did not hold itself out as a manufacturer of snowplows, and it cannot be held that it had agreed to manufacture a plow reasonably fit for the purpose it was intended to be applied to. In fact, the machine to be manufactured was an experimental plow. It is provided in the contract that the iron works company should prepare general and detailed drawings from the model and other data furnished by the snowplow company, the drawings to be approved by the latter company before the work was entered upon. It thus appears that the model and other necessary data were to be furnished by the snowplow company, based upon which the iron works company was to prepare the necessary drawings, and submit the same for the approval of the snowplow company. In view of these provisions in the contract, the guaranty therein contained cannot be extended beyond its express terms, for it was evidently placed in the contract so as to limit the liability of the iron works company. It reads as follows: "It is understood that the said Vulcan Iron Works guaranty the workmanship and materials made up in their own shops, but do not guaranty boiler and other parts bought outside, nor the working of the machine as a whole." As the boiler was not made by the iron works company, that company did not guaranty either the workmanship or materials therein found, and, if, according to the contention of plaintiff in error, the word "workmanship" is to be construed to cast upon the iron works company the duty of furnishing a boiler of capacity enough to meet the demands made upon it in the actual running of the plow, it could be as well claimed that the duty was cast upon the iron works company of furnishing engines of sufficient power to meet the demands upon them, and screws and fans of sufficient relative size, and thus, by mere inference, the iron works company would be held bound to furnish a ma-

chine, all the parts of which were adequate for the work demanded of them, of proper relative capacity and properly fitted together, whereas it is expressly stated that the iron works company did not guaranty the working of the machine as a whole. In our judgment the trial court ruled rightly in holding that the guaranty found in the written contract did not extend to such matters as the relative capacity of the boiler and engines.

The next question arising upon the errors assigned, and the one mainly relied on by plaintiff in error, is based upon the ruling made by the trial court, to the effect that the defendants in that court were bound by the valuation placed upon the replevied property in the affidavit, writ, bond, and declaration filed in the replevin action. On behalf of plaintiffs in error it is contended that the statutes of Illinois do not require a plaintiff in replevin to affix a value to the property sought to be recovered, and that the statements found in the affidavit and declaration in the replevin action, as to the value of the property, are to be deemed to be merely admissions, which are receivable in evidence, but do not estop the parties making the same from proving the property to be of less value than that stated in such affidavit and declaration, and in support of this contention counsel cite the cases of *Wood v. May*, 3 Cranch, C. C. 172; *West v. Caldwell*, 23 N. J. Law, 739; *Peacock v. Haney*, 37 N. J. Law, 181; *Gibbs v. Bartlett*, 2 Watts & S. 35; *Muhling v. Ganeman*, 4 Baxt. 88; *Briggs v. Wiswell*, 56 N. H. 319; *Wright v. Quirk*, 105 Mass. 44.

On part of the defendant in error it is contended that in this jurisdiction this question is set at rest by the ruling of the supreme court of the United States in *Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. Rep. 947; it being claimed that the supreme court therein holds that a plaintiff in replevin and the sureties on the replevin bond are conclusively bound by the valuation put upon the property in the writ and bond. In that case the trial court refused to admit evidence, offered on behalf of the plaintiff in replevin and the sureties on the bond, tending to show that the property taken under the writ was less in value than the sum stated in the writ and bond, and the supreme court affirmed the action of the trial court. On part of the plaintiffs in error, it is argued that, owing to the special facts involved in that cause, it cannot be held that the supreme court intended to declare broadly that under all circumstances a plaintiff in replevin and his sureties are concluded by the statement of the value of the property found in the writ and bond, and that, if the recital of value is to be deemed to be anything more than *prima facie* evidence, it should not be held to be conclusive in cases wherein it appears that the valuation was fixed by the plaintiff in replevin under a mistake of facts, whereby he was misled in estimating the value of the property sought to be replevied. There is certainly much to be said in support of the proposition that, if the valuation of property in replevin proceedings has been stated in the writ and bond under a mistake as to the actual condition of the property, it should not be held to be conclusive against the plaintiff in replevin and his

sureties. For illustration, if a person seeks to replevy grain stored in an elevator, or fruit shipped in cars, and states the value on the basis of sound grain or fruit, but when taken on the writ it appears that the grain or fruit has become heated or decayed, so that the plaintiff in replevin does not in fact receive the property in the condition he had a fair right to expect it to be in, it is difficult to see why it should not be open to the plaintiff in the replevin suit and his sureties on the bond to show this fact when sued on the bond. We do not, however, deem it necessary to determine in this case the construction to be placed on the ruling made by the supreme court in *Ice Co. v. Webster*. If it be true, as contended by the defendant in error, that the supreme court has therein declared the rule to be that under all circumstances the statement of value set forth in the writ and bond is conclusive against the plaintiff in replevin and his sureties when suit is brought upon the bond, then unquestionably the ruling in the trial court in this particular was correct. If, however, the rule is that it is open to the plaintiff in replevin and his sureties to prove that the statement of value was based upon the assumption that the property sought to be replevied was in good and sound condition, whereas, in fact, the property when replevied was not in such condition, and that the plaintiff in replevin, without fault on his part, he being in fact ignorant of the actual condition of the property, was thus misled in estimating the value thereof, the evidence in this case does not show a state of facts justifying the application of this rule. The snowplow company, when about to replevy the plow, knew its condition at that time,—knew how it was constructed, the size of the boiler and engines, and all other facts necessary to enable the company to place a value upon the property as it then existed. The evidence offered on behalf of the plaintiffs in error did not tend to prove that, when the machine was delivered to the snowplow company under the writ of replevin, it was in its construction or materials any other or different from what it was understood to be when the estimate of value was set forth in the affidavit, writ, and declaration, and inferentially in the bond filed in the replevin proceedings.

Furthermore, in any view that may be taken of the force to be given to recitals of value in the writ or bond, as against the plaintiff in replevin and the sureties on the bond, we hold that, under the peculiar facts of this cause, the ruling of the trial court effectuated justice between the litigants. It is an admitted fact that the plow was manufactured under the Caldwell patent, and was protected thereby. In determining its value at the time it was replevied, not only was its cost an element to be considered, but also the price to be paid to the patentee as a royalty or for a license for the right to use the machine would necessarily enter into the question of value, and the determination of the amount to be added to the cost of manufacture to cover this item was necessarily solely within the control of the snowplow company. Furthermore, when the plow was taken from the possession of the iron works company it was taken by the snowplow company to California, and used upon the lines of railway in that state, and after certain changes and repairs had been

made therein it was sold, with the patent right, to the Southern Pacific Railway Company for the sum of \$16,000. In so doing the snowplow company deprived the iron works company of all reasonable means of ascertaining the practical working of the machine, or of estimating its value from the results of its work, except at great cost of time and money. As this plow was the only one that, up to that date at least, had been manufactured under the Caldwell patent, its removal to such a distance from the city of Chicago deprived the iron works company of all fair opportunity of having skilled witnesses examine it as a means of ascertaining its value. Under such circumstances the snowplow company has no just cause of complaint, in that the trial court held that it was bound by the valuation it placed upon the patented machine in the affidavit, writ, and declaration filed in the replevin suit. The valuation thus fixed was the sum of \$10,000, or but a little over one half of the cost of manufacture, and the recovery of the defendant in error was limited to the balance due the iron works company for the construction of the machine, to wit, the sum of \$8,527.57. The result of the judgment entered in the trial court is to compel the snowplow company to pay the balance due the iron works company for the manufacture of the plow, and certainly the snowplow company cannot complain if, having taken the plow from the possession of the iron works company, and sold it for its own benefit, it is now adjudged to pay the balance justly due under the contract of manufacture. If a plaintiff in replevin is ever to be held concluded by the valuation placed by him on replevied property, the facts of this case require such effect to be given to the recitals in the affidavit, writ, declaration, and bond by means of which the snowplow company, without any just grounds for instituting the proceedings in replevin, and without discharging by payment the lien held by the iron works company for the balance due it, took the property from the possession of the latter company, and removed it to such a distance as to practically deprive the defendant in error of all fair opportunity of proving the value of the patented machine, and instead of returning the property, when so adjudged in the replevin suit, sold the same for its own benefit and at its own figures. Under such circumstances the snowplow company and its coplaintiff in error, who was the president of the company, and who made the affidavit in the replevin proceedings, have certainly no just cause of complaint in that it was ruled by the trial court that they must be held bound by the valuation which they had placed upon the property when seeking to obtain possession thereof by legal proceedings. The judgment of the court below is therefore affirmed, at cost of plaintiffs in error.

BURR v. GREELEY.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1892)

No. 180.

1. PUBLIC LANDS—RAILROAD GRANTS—INVALID PATENTS—BREACH OF WARRANTY.

The fact that a patent to lands granted to a railroad company by the act of July 1, 1862, is void because pre-emption rights had attached thereto before the definite location of the road, will not enable a remote grantee thereof to maintain an action against his immediate grantor for a breach of warranty, when the grantee still retains possession, and has pending in the land department an application for a patent as a *bona fide* purchaser, under the act of March 3, 1867, § 8, (24 St. p. 556,) which gives preference to such purchasers in case the original pre-emptor does not perfect his entry within the time fixed by the secretary of the interior, as authorized by the act.

2. SAME.

The provision of the act of 1867, that nothing contained therein "shall prevent any purchaser of lands erroneously withdrawn, certified, or patented, as aforesaid, from recovering the purchase money therefor from the grantee company," does not add to or vary the rights of the parties at common law, but was merely intended to preserve such rights as they had thereunder.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by Henry Burr against Carlos S. Greeley to recover damages for alleged breach of covenants of warranty in a deed. Demurrer to complaint sustained, and judgment for defendant. Plaintiff brings error. Affirmed.

Statement by CALDWELL, Circuit Judge:

This action was brought by the plaintiff in error against the defendant in error to recover damages for alleged breach of covenants of warranty contained in a deed made by the defendant in error to the plaintiff in error for certain lands. The complaint alleges that the Union Pacific Railway Company conveyed the land in dispute to the defendant, Greeley, and that Greeley conveyed the same to the plaintiff, but that the only title ever possessed by the railway company was derived from a patent issued by the government to the Kansas Pacific Railway Company, under the provisions of the act of congress approved July 1, 1862, donating lands to aid in the construction of a railroad from the Missouri river to the Pacific ocean, and that such patent was void because a pre-emption claim had attached to the land in question before the railway company had definitely located its line of railroad. The court below sustained a demurrer to the complaint, and rendered judgment for the defendant, and the plaintiff thereupon sued out this writ of error.

John A. Murray and Frank H. Foster, for plaintiff in error.

A. L. Williams, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) In the case of *Railway Co. v. Dummeier*, 113 U. S. 629, 5 Sup. Ct. Rep. 566, the supreme court decided that under the act of July 1, 1862, and the acts amendatory thereof, granting lands to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, (12

St. p. 489,) lands to which a pre-emption or homestead claim had attached at any time before the line of the road was definitely fixed, by filing a map of its location with the commissioner of the general land office at Washington, were exempted from the operation of the grant, and that the failure of the pre-emptor or homesteader to make the requisite proof and perfect his claim, or its actual abandonment, did not cause the land to revert to the railroad company or become a part of the grant, but in such case it remained a part of the public domain. Before this decision was pronounced, the government had issued patents or patent certificates to the railway company for lands which were not within the grant, because pre-emption and homestead rights had attached thereto before the company filed the map of the definite location of its road in the general land office. In some instances the company had sold and conveyed such lands.

After the decision in the *Dunmeyer Case*, it was plain that, as to all lands to which the right of pre-emption or homestead had attached prior to the definite location of the line of railroad, the patents issued by the government to the railway company were void. *Railway Co. v. Dunmeyer, supra*; *Smelting Co. v. Kemp*, 104 U. S. 646, 647; *Steel v. Refining Co.*, 106 U. S. 452, 453, 1 Sup. Ct. Rep. 389; *Wilcox v. Jackson*, 13 Pet. 498; *Best v. Polk*, 18 Wall. 112; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. It was equally plain that the purchasers from the railroad company of such lands acquired no title. To correct the mistake of the land department in patenting lands to the railway company not within its grant, and to relieve, as far as practicable, all persons from loss or injury by reason of the mistake, and to place all parties, as far as it could be done, in the same situation they would have been if the mistake had not occurred, congress passed the act of March 3, 1887, (24 St. c. 376, p. 556.) The third section of that act provides in substance that, if the homestead or pre-emption entry of any settler has been erroneously canceled, such settler, upon application, shall be reinstated in all his rights, and allowed to perfect his entry; but if such settler does not renew his application within the time fixed by the secretary of the interior, then such unclaimed land shall be disposed of under the public land laws, with priority of right to *bona fide* purchasers thereof, if any, and, if there be no such purchasers, then to any *bona fide* settlers residing thereon. The fourth section of the act provides, in effect, that patents shall be issued to purchasers in good faith from the railway company of lands erroneously patented to the company, upon such purchaser making proof of the fact of such purchase at the proper land office, and that the patents issued to such purchasers shall relate back to the date of the original certification or patenting, and that the company shall pay the United States for such lands.

The complaint in this case alleges in substance that the land described therein was erroneously patented to the company because pre-emption claims had attached thereto prior to the definite location of the line of the road; that the land belongs to the United States; and that the deed from the company to Greeley and from Greeley to the plaintiff passed no title; and that the covenants in the deed from Greeley to the

plaintiff have been broken. It is apparent from the averments of the complaint, and is a conceded fact in the case, that the plaintiff is in the actual possession of the land, and that he has applied for a patent to the same under the act of congress. The plaintiff has not, in fact, been ousted of the possession of the premises, or renounced his claim to the land as a *bona fide* purchaser under the act of congress; but, on the contrary, he is in the actual possession of the land, claiming the rights of a *bona fide* purchaser under that act. It is not alleged that the original pre-emptors or any other person is in an attitude to claim a superior right to the land, or that the plaintiff's application to secure a patent to the land, as a *bona fide* purchaser under the act of congress, has been rejected or is likely to fail. The plaintiff's contention is that he can retain the actual possession of the premises, and apply for and receive a patent for the land as a *bona fide* purchaser thereof under the act of congress, without any cost to himself, and that while thus retaining the possession of the land, and setting up his claims as a *bona fide* purchaser of the same under that act, he can recover of the grantor, on the latter's covenants of warranty, the full sum of the purchase money paid this grantor, with interest. The argument is that the act of congress was designed to bestow a privilege or benefit on the *bona fide* purchasers for their own merit and protection, and that its provisions cannot inure in any degree, or in any aspect of the case, to the benefit or protection of the company or its grantees when sued upon their covenants of warranty. It is claimed that such *bona fide* purchasers can avail themselves of the benefit of the act either with or without cost to themselves, and at the same time recover from their grantors on their covenants of warranty the full sum of the purchase money and interest. Stated in different language, the plaintiff's contention is that his right of action for breach of warranty while retaining the actual possession of the land, and claiming and receiving the benefits of a *bona fide* purchaser under the acts of congress, are precisely what they would be if he had abandoned the possession of the premises and renounced all claim to the land, or if the original pre-emptor had appeared within the time allowed him by the secretary of the interior, and set up and established his claim and received a patent for the land. We cannot agree to this construction of the act. The plaintiff cannot play fast and loose. He cannot claim the benefit of the act for one purpose, and repudiate it for another. If he elects to accept the benefits of the act as a *bona fide* purchaser from the company or its grantee, and gets a patent to the land because he sustains that relation, without cost to himself, he has not been damnified, and it is not perceived what substantial ground of action he would have against his grantor. But for the deed of his grantor, he would not have stood in the relation of a *bona fide* purchaser, and could not have availed himself of the benefits of the act of congress. Claiming and accepting, under the act, the rights of a *bona fide* purchaser in virtue of his grantor's deed, he at the same time claims the right to proceed against his warrantor, the same as though he had finally lost his title and possession. He cannot do this. The complaint shows that he has preferred his claim to the land as a *bona fide*

purchaser, and that he retains the actual possession of the land. Upon these facts he is in no position to maintain an action for breach of warranty. Until his application for the benefits of the act is determined, it cannot be known what, if any, damage he has sustained by the breach of the covenants of warranty in his grantor's deed.

We do not rest our decision upon the ground that proof that the outstanding title is in the government is not, in any case, sufficient to show an eviction. We assume it to be true, as contended by the plaintiff in error, that where the outstanding title is shown to be in the government, that is, in general, sufficient proof of eviction. *Railway Co. v. Dunmeyer*, 19 Kan. 543; *Glenn v. Thistle*, 23 Miss. 52; *Brown v. Allen*, (Sup.) 10 N. Y. Supp. 714; *McGary v. Hastings*, 39 Cal. 360; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284. But this rule does not aid the plaintiff in error in this case, because he is, in fact, rightfully in possession of the land, claiming the right to a patent as a *bona fide* purchaser under the act of congress, and presumably, on the averments of the complaint, entitled to the rights of such a purchaser. Until his claim as a *bona fide* purchaser has been determined, there is under the act of congress governing this case no constructive eviction which settles the rights and liabilities of the parties. The plaintiff relies, and probably grounded his action, upon the proviso in the fourth section of the act of congress, which declares "that nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid, from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required." This proviso does not add to or vary the legal rights or obligations of the parties as they existed at common law. Its purpose was to preserve those rights, whatever they might be, and not to confer any new right. It clearly does not contemplate that one who, by virtue of his deed and the possession acquired thereunder, is entitled to claim and does claim the rights of a *bona fide* purchaser, and who receives a patent from the government for his land, which is paid for by the railway company, may, after having his title thus perfected, without cost to himself, recover back the purchase money paid by him to the railway company or its grantee for the land. Nor can such a purchaser, while retaining the actual possession of the land, and claiming, under his deed, the rights secured to a *bona fide* purchaser by the act of congress, maintain an action for the purchase money upon the ground that he had been constructively evicted by the United States, and has lost his land. He is not on the land as a trespasser. There has been no eviction in fact or in law. He is in possession with the consent of the government, with equities under the act of congress which he is asserting, and which may ripen into a legal title, and as long as that possession continues, and plaintiff's claim is being asserted under the act of congress, an action for a breach of warranties for substantial damages is premature, and it is substantial and not merely nominal damages which the plaintiff is seeking to recover.

The judgment of the circuit court is affirmed.

UNITED STATES v. VAN DUZEE.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1892.)

No. 127.

1. CLERKS OF COURT—FEES—FILING DISCHARGES OF WITNESSES.

The clerks of the federal courts are entitled to fees for filing the discharges given by the district attorney to witnesses for the government, since Rev. St. U. S. § 877, provides that such witnesses shall not depart without leave of the court or the district attorney, and it is the approved practice to give them written discharges for use in drawing their pay from the marshal. 48 Fed. Rep. 643, affirmed.

2. SAME—FILING RECEIPTS.

Although there is no law expressly requiring the clerks of the federal courts to take receipts from the United States collector for fines paid by persons sentenced for violation of the internal revenue laws, yet, as such receipts are necessary for the proper settling of the accounts of both clerks and collectors, they are "papers," within the meaning of Rev. St. U. S. § 828, cl. 3, giving fees to the clerks for filing "a declaration, plea, or other paper." 48 Fed. Rep. 643, affirmed.

3. SAME—REPORT ON ACCOUNTS.

Under the rule of court requiring the district attorney to examine the accounts of the marshal, clerk, and commissioners, and make a written report thereon to the court, such report, though not required by statute, becomes a part of the records of the court, and the clerk is entitled to a fee for filing the same. 48 Fed. Rep. 643, affirmed.

4. SAME—CERTIFICATE OF ALLOWANCE OF ACCOUNTS.

Act Cong. Feb. 22, 1875, requires the accounts and vouchers of the marshal, clerk, and district attorney to be made out in duplicate, the original to be forwarded to Washington, and the duplicate to be retained by the clerk; the papers forwarded to be accompanied by a certified copy of the order of allowance. *Held*, that the latter paper is no part of the vouchers required to be made in duplicate, and hence the clerk is not entitled to a fee for duplicates thereof. 48 Fed. Rep. 643, affirmed.

5. SAME—ENTRIES OF SUBMISSION AND APPROVAL OF ACCOUNTS.

Under Act Cong. Feb. 22, 1875, requiring the official accounts to be presented to the court in the presence of the district attorney or his assistant, it is necessary that an entry should be made, showing such submission; and the clerk is entitled to a fee for making the same, as well as for entering the subsequent order of approval or disapproval. 48 Fed. Rep. 643, affirmed.

6. SAME—DRAWING JURIES.

The clerk is entitled to compensation for services rendered in procuring the names of persons to serve as jurors, and in drawing the juries for the terms of court in the district. *Goodrich v. U. S.*, 42 Fed. Rep. 392, followed. 48 Fed. Rep. 643, affirmed.

7. SAME—DUPLICATE VOUCHERS OF ACCOUNTS.

The clerk is entitled to fees for filing the vouchers and duplicates accompanying the accounts of the marshal, since, by the instructions of the department of justice, he is required, when sending forward the originals, to certify that duplicates thereof are on file in his office. 48 Fed. Rep. 643, affirmed.

8. SAME—COPY OF BAIL BOND.

Rev. St. U. S. § 1018, authorizes the sureties on a bail bond to arrest their principal, and to deliver him to the marshal before a judge or committing officer, and requires the latter, on request of the sureties, to enter their exoneration upon the recognizance or a certified copy thereof. *Held*, that the clerk is not entitled to a fee from the government for making a certified copy for this purpose, as the sureties themselves should pay him for the same. 48 Fed. Rep. 643, affirmed.

9. SAME—ISSUING WARRANT TO BRING PRISONER FROM JAIL.

Under Rev. St. U. S. § 1030, a formal warrant is not necessary to authorize a marshal to bring a prisoner confined at Sioux City to Ft. Dodge for trial; and the clerk is not entitled to a fee for issuing the same. 48 Fed. Rep. 643, affirmed.

10. SAME—INDICTMENT—COPY FURNISHED TO ACCUSED.

The clerk is entitled to a fee for a certificate and seal to a copy of an indictment furnished to the defendant under the rule of court, as it is the usual practice to certify copies of all parts of the record furnished by the clerk. 48 Fed. Rep. 643, affirmed.

11. SAME—INDORSING APPROVAL OF RECOGNIZANCES.

As it is the duty of the clerk to approve recognizances in criminal cases, his indorsement of approval thereon, in accordance with the usual practice, is the making of an entry or certificate, within the meaning of Rev. St. U. S. § 828, allowing a fee of 15 cents per folio for such entries. 48 Fed. Rep. 643, affirmed.

12. SAME—PAYING JURORS.

The clerk is entitled to fees for administering the oath to jurors, both grand and petit, when they prove up their attendance before him; for the issuance of a certificate to each juror showing the number of days' attendance and the miles traveled, as a basis for the marshal's payment; for entering the order requiring the marshal to pay the jurors, and for making copies thereof for the marshal; and for making a report to the court of the per diem and mileage due the jurors,—since all these acts are required by the rule of court, and are useful checks upon the accounts of both officers. 48 Fed. Rep. 643, affirmed.

13. SAME—ORDER FOR DRAWING JURORS.

The clerk is entitled to fees for the certificate and seal attached to the copy of the order for drawing juries, under the provisions of the statute and rules of court, as this is the proper method of furnishing that officer with evidence of the court's order. 48 Fed. Rep. 643, affirmed.

14. SAME—FINAL ENTRIES IN CRIMINAL CASES.

According to the settled practice in Iowa, the final entries in criminal cases should contain the following papers, for which the clerks of the federal courts in Iowa are entitled to folio fees: The commissioner's order for appearance before the grand jury; the entry showing the due presentment of the indictment by the grand jury; the indictment; the bench warrant, and return thereon; the arraignment and plea; the entry showing trial and verdict; the sentence and final orders, such as granting new trial, modifying or suspending sentence, or directing manner and place of executing it; the mittimus and return showing the execution of the sentence; and the entry of satisfaction when a fine is paid. But it should not contain the bail bonds or entries of default and forfeiture thereof, the orders for attachments of witnesses who fail to appear, the attachments themselves, or the return thereon. 48 Fed. Rep. 643, affirmed.

15. SAME—SWEARING WITNESSES.

The docket fee of three dollars in criminal cases does not include compensation for swearing the witnesses, and the clerk is entitled to the statutory fee therefor. 48 Fed. Rep. 643, affirmed.

16. SAME—COPY OF SENTENCE.

Code Iowa, § 4515, requires that when a prisoner is committed to the custody of a jailer the latter shall be furnished with a certified copy of the entry of judgment. *Held* that, when a prisoner is committed to the state jail under the sentence of a federal court, it is the duty of the clerk to furnish such certified copy, and he is entitled to the statutory fee therefor. 48 Fed. Rep. 643, affirmed.

17. SAME—COPIES OF INDICTMENTS.

When the clerk, upon the written order of the district attorney, furnishes him with copies of indictments containing numerous counts against the officers of a national bank, and it clearly appears that such copies are necessary for the proper preparation of the government's case, the clerk will be allowed folio fees therefor. 48 Fed. Rep. 643, affirmed.

18. SAME—MITTIMUS.

When a prisoner is ordered to be confined until his fine is paid, the clerk is entitled to fees for issuing the mittimus, for filing the same when returned by the marshal, and for entering his return thereon. 48 Fed. Rep. 643, affirmed.

19. SAME—VOUCHERS.

The order of the court of the northern district of Iowa, directing the marshal to procure the necessary record books for the Cedar Rapids division of the district, constituted the proper voucher for his expenditures; and, as he is required to file with the clerk a duplicate of all vouchers which accompany his account, the clerk was entitled to fees for furnishing duplicates of the order. 48 Fed. Rep. 643, affirmed.

Appeal from the District Court of the United States for the Northern District of Iowa. Affirmed.

Statement by the court:

This is an action brought by the appellee against the United States to recover fees alleged to be due him as clerk of the district and circuit courts of the United States for the northern district of Iowa. The United States demurred to the several paragraphs of the complaint. The lower court sustained the demurrer as to certain of the causes of action set up in the complaint, and overruled it as to others. The United States elected to stand upon her demurrer, and thereupon judgment was rendered against the United States for the items of the account or causes of action as to which the demurrer was overruled, and the United States appealed. The opinion of the district court, reported in 48 Fed. Rep. 643, contains an accurate statement of facts relating to each item of the account, and, as this court agrees with the lower court in its conclusions of law upon the facts found as to all items as to which the demurrer was overruled, the opinion of that court is here given in full, and is as follows:

"**SHERAS, Judge.** Attached to the petition in this cause is an itemized account of the work done and services rendered for which the plaintiff seeks to recover judgment. The demurrer presents the question whether the items included in the account come within the classes of services for which the plaintiff, as clerk of the court, is entitled to compensation from the United States.

"*First.* The first question arises on a charge for filing the discharges given to witnesses summoned on behalf of the government by the district attorney. Section 877 of the Revised Statutes requires that witnesses summoned to attend court on behalf of the United States shall be subpoenaed generally, and not in a particular case, and that they shall not depart from the court without leave of the court or of the district attorney. Under the rule of this court, before a witness can obtain his pay from the marshal, he is required to obtain from the clerk a certificate showing the number of days of attendance and mileage to which he is entitled, and to properly prepare this certificate the clerk must know the day on which the witness is discharged from attendance, and also the fact that he has obtained the proper leave from the district attorney. It is and has been the settled practice for years in this district for the district attorney to furnish to the witness a written discharge, which is filed with the clerk, and upon which in turn the clerk bases the certificate which he gives the witness as evidence for the guidance of the marshal in paying the witness the sum due him. There can be no possible question that it is the duty of the district attorney to furnish the written discharge as evidence of the leave granted the witness to depart from the court, and no reason is perceived why it is not the duty of the clerk to file and preserve this discharge for his own protection and for that of the witness. If a witness duly summoned, and in attendance, should depart without leave of the court or of the district attorney, he would be liable as for contempt, and hence it is entirely proper that the files of the court or the record should show that leave had been granted. If a witness should apply, under the statute, to the court for leave to depart, and the same should be granted, the record would contain an entry to that effect, and for the making the same the clerk would be entitled to his fee. When the leave is granted, by order of the district attorney, the discharge should be filed, so as to be preserved as part of the record of the proceedings of the court, and, in either case, the clerk is entitled to the statutory fee for making the record or filing the discharge.

"*Second.* The second item in dispute is the charge for filing receipts of the United States collectors for fines paid in by or collected from persons sentenced for violation of the internal revenue laws. Under the regulations of the treasury department, the clerk is required to pay all fines collected in revenue cases to the collector of the proper district. As evidence of the receipt thereof the collector executes written receipts which operate in the double capacity of evidence showing that the collector has become liable to account for the money thus received, and as evidence that the clerk has performed his duty of payment to the proper officer. The argument in support of the demurrer to this class of items is that there is no law requiring the taking or filing such receipts, and therefore the same are not 'papers,' within the meaning of the third clause of section 828 of the Revised Statutes. It certainly cannot be possible that the government seeks to have it declared to be the law that the clerk is not required or expected to take receipts for moneys thus paid to the collector. It cannot be that the department would be satisfied with a practice of the clerk paying hundreds of dollars to the collectors, without written evidence being taken of such payments. The proposition is its own refutation, and it is entirely clear that it is the duty of the clerk, when these payments are made, to take proper receipts from the collectors, not only as evidence for his own protection, but as evidence on behalf of the government, showing that the collector has become liable for the amounts thus paid him. Such receipts are not the private property of the clerk, but should be kept in his office as part of the official papers, there to remain for the benefit of the government, and as evidence useful in settling the accounts of the clerk and the accounts of the collectors, and as such they form part of the record of the particular cases in which the fine has been collected and paid over. Such receipts are part of the papers connected with the case, are properly filed as such, and for such filing the clerk is entitled to the statutory fee.

"*Third.* The next item in dispute is the fee charged for filing the written reports made by the district attorney in regard to the accounts of the marshal, clerk, and commissioner. By a rule of this court, duly adopted and spread upon the record, it is provided that, when the reports of the officers named are filed, they must be submitted to the district attorney for his examination, and he is required to make to the court a written report of the result of such examination. The argument made in support of the demurrer that the act of February 22, 1875, does not call for a written report from the district attorney does not meet the question. This court has the right to adopt rules for the conduct of business before it, and, as already stated, it has adopted a rule requiring the district attorney to make an examination of the accounts of officers and to report thereon in writing. The accounts of officers are voluminous, and require that kind of examination that cannot well be given them in open court. The requirements of the rule of court are in addition to those of the act of 1875, and are intended as an additional safeguard against the allowance of illegal fees. Under the rules it is the duty of the district attorney to make a written report of the result of his examination of each account, and it is the duty of the clerk to file such report when made. The report is a paper lawfully filed as a part of the record of the court, and the clerk is therefore entitled to the usual fee for such filing.

"*Fourth.* The next items demurred to are the charges made for duplicate copies of the orders of court approving the accounts of the marshal, clerk, and district attorney. The act of February 22, 1875, requires that the accounts of the officers named and the vouchers thereto shall be made in duplicate, the original to be forwarded to Washington and the duplicate to be retained by the clerk. In order to entitle the original to consideration and allowance by the department, it is required that duly-certified copies of the allowance by the court shall accompany the accounts, yet these orders do not form part of the accounts and vouchers of which a duplicate is required to be left with the clerk. The 'duplicate' named in the act is the duplicate of the accounts and the vouchers, and does not include the orders of the court. To these items the demurrer is sustained.

"*Fifth.* The fee charged for entering upon the record the fact of the submission of official accounts to the court is demurred to on the theory that the act of February 22, 1875, only requires the entry of the order of approval or disapproval. The usual practice is that, in accordance with the requirements of the statute, the account is presented to the court in the presence of the district attorney or his assistant, and is supported by the oath of the party. Thereupon the court, as soon as possible, examines the account in detail, and then makes the final order.

The necessary examination precludes the entering the order of approval at the time of the entry of the fact of submission in open court, and hence the need of two entries. The act of 1875 requires that the record shall show that the district attorney or his assistant was present in court when the account is submitted, and hence there must be a record entry of the fact of the presentation of the account in open court in presence of the attorney, and the statute further requires a record entry of the final order of approval or disapproval. The clerk has no control over these matters. If the court receives the presentation of the account upon one day, it is the duty of the clerk to make the proper entry of that fact in the proceedings for that day; and then when the court, upon another day, renders its decision and orders the approval of the account, the clerk must make the proper entry thereof. For such entries he is entitled to the proper fees.

Sixth. The next point arising upon the demurrer is whether the clerk is entitled to the compensation for services rendered in procuring names of parties to serve as jurors and in drawing the juries for the terms of court in the district. This question has been adjudged in this circuit in favor of the right of the clerk to compensation for such services. See opinion of Judge CALDWELL in *Goodrich v. U. S.*, 42 Fed. Rep. 392. Relying upon the ruling in that case, the demurrer will be overruled to these items of charge in the present cause.

Seventh. Exception is next taken to the charge made for filing the duplicate vouchers accompanying the accounts of the marshal. These accounts and vouchers pass under the control of the clerk, as they are required to be presented to the court in the first instance, and then, upon approval, the clerk is required to forward the original account and the original vouchers to the department at Washington and to retain the duplicates. In the instructions issued by the department of justice to the clerk, (see Register 1886, p. 265,) the clerk is required to certify, when forwarding the originals of the accounts and vouchers, that the duplicates thereof are on file in his office. These papers are therefore matters that are to be filed, and under the ruling of BREWER, J., in *Goodrich v. U. S.*, 35 Fed. Rep. 193, the clerk had the right to file each paper and to make the statutory charge therefor.

Eighth. The next item demurred to is a charge for a certified copy of a recognizance, in a case wherein the sureties thereon caused the rearrest of the party under indictment. Section 1018 of the Revised Statutes authorizes the sureties to arrest their principal, and before a judge or committing officer to deliver him to the marshal, and at the request of the bail it is made the duty of the judge or committing officer to enter upon the recognizance, or a certified copy thereof, the exoneraton of the bail. Under this section, it would seem to be the duty of the bail to procure and pay for the certified copy of the recognizance in case they desired to have the exoneraton indorsed thereon. To authorize the rearrest of the principal, and his delivery to the custody of the marshal, it is not necessary that the recognizance or a copy thereof should be procured in the first instance, and need thereof does not arise unless the bail desires to ask the entry of discharge thereon. The copy, if made, is not furnished to the marshal as evidence of his right to receive the prisoner, for that is based upon the action of the sureties taken before the judge or officer; but it is furnished the sureties in order that they may, if they choose, have entered thereon a discharge of liability. The clerk is entitled to demand a fee from the bail, when they demand a copy, but such fee is not a proper charge against the United States.

Ninth. The demurrer must also be sustained to the charge for issuing warrant to the marshal to bring a prisoner confined at Sioux City to Ft. Dodge for trial. Strictly, under section 1030 of the Revised Statutes, a formal writ or warrant for that purpose was not needed, and, treating the warrant as in fact a copy of the order for bringing the prisoner to Ft. Dodge, no fee is chargeable therefor under the provisions of the section just cited.

Tenth. Exception is also taken to the charge for certificate and seal attached to the copy of the indictment furnished on demand to the defendant in the case of *U. S. v. Parquette*, under the provisions of the standing rule of this court. It was the duty of the clerk to furnish the copy, and it is the usual rule that copies of all parts of the record, when furnished by the clerk, shall be duly certified by the clerk. The charge is allowed.

Eleventh. The next item excepted to is the folio charge for the approval by the clerk of recognizances given in certain criminal cases. It is the duty of the clerk to approve these bonds, and it is the practice to evidence such approval by a

written entry or certificate of approval upon the face or back of the bond. This is the making of an entry or certificate, within the language of section 828 of the Revised Statutes, and the folio fee of 15 cents is chargeable therefor.

"*Twelfth.* The next class of items to which exception is taken is that including charges for administering the oath to jurors, grand and petit, when they are proving up their attendance before the clerk, for the issuance of a certificate to each juror showing the number of days he has attended court and the number of miles traveled, as the basis for the action of the marshal in making payment to the juror, for entering the order directing the marshal to pay the jurors, for making copies of such order for the marshal, and for making report to the court of the per diem and mileage due the jurors, as the evidence upon which the court relies in making the order for payment. The clerk is required to perform these services in carrying out the requirements of the rule adopted by the court, regulating the manner in which proof of the amounts due jurors is to be furnished. When the jurors are discharged from further attendance, the rule requires them to go to the clerk, and upon a proper book prepared by him to enter their names, places of residence, days of attendance, and number of miles of travel, and, as evidence of the correctness thereof, they are required to make oath thereto. Thereupon the clerk makes out and furnishes to each party a certificate showing the days of attendance and miles traveled and the amount due. This certificate is submitted to the marshal, and thus he is furnished with a check upon the juror. When the account of the marshal is made out for submission to the court, the rule requires that it shall be first submitted to the clerk, who is required to compare the payment made with the facts appearing on his book or record, and, if they agree, he is required to make a certificate of that fact upon the account of the marshal. Thus there is put in operation a check upon the juror, and also upon the marshal, for his account will not be approved unless it agrees with the clerk's record. The court is also required to make an order directing the payment of the sum due the jurors, and as the basis therefor the clerk is required to make a report to the court of the names of the jurors and the amount due them. Thus it is made the duty of the clerk to perform each act for which the fee is charged, and, as they are all services of a character for which the fee bill provides payment, the clerk is entitled to pay therefor.

"*Thirteenth.* Exception is also taken to the charge for certificate and seal attached to copy of order furnished the jury commissioner directing the drawing of juries under the provisions of the statute and rule of court. It is the proper practice to furnish to the commissioner the evidence of the order made by the court requiring him to aid in summoning a jury, and what better mode for so doing can be suggested than by sending him a certified copy of the order? The charge, therefore, is allowed.

"*Fourteenth.* Exception is next taken to the folio fees charged for making final entries in a number of criminal cases. The purpose of the final entry is to bring together in compact form upon the record the evidence of the material steps taken in the given case. Under the rule and settled practice in Iowa, there should be included, of the items claimed in the account attached to the petition herein, in the final entry, the commissioner's order for appearance before the grand jury; the entry showing the due presentment of the indictments by the grand jury; the indictment; the bench warrant and return thereon; the plea of defendant, including the arraignment; the entry showing trial and verdict; the sentence and final order or orders of the court, such as order granting new trial or modifying or suspending sentence in whole or in part, or directing mode or place of carrying into effect the sentence imposed; the mittimus and return of the officers showing the execution of the sentence; and the entry of satisfaction when the sentence, by way of fine, is paid. The final entry should not include the bail bonds, the entry of default and forfeiture thereof, orders of attachments for witnesses who may fail to appear, the attachments, and return and the order made thereon. These do not constitute any part of the proceedings against the defendant named in the indictment, although they grow out of it, and hence are not proper parts of the final entry or record.

"*Fifteenth.* Exception is taken to the charge for administering the oath to witnesses in criminal cases, it being argued that the docket fee of three dollars includes services of this nature. The fee bill (section 828) expressly provides for a fee of 10 cents in administering oaths, and in *Van Duzee v. U. S.*, 140 U. S. 199, 11 Sup. Ct. Rep. 941, it is expressly held that the docket fee of three dollars

is intended to cover the entry of the case, indexing, making minutes on calendar, and such other incidental services as are not covered by other clauses of the statute. The administering an oath is a service for which compensation is expressly provided by another clause in the statute, and the fee therefor is properly chargeable.

Sixteenth. Objection is also made to the charge for certificates and seals to copies of the sentence and order based thereon, in cases wherein a prisoner is sentenced to imprisonment, and an order is made fixing the place wherein the sentence is to be carried out. Section 1028 of the Revised Statutes provides that, when a prisoner is delivered to a sheriff or jailer under a writ, warrant, or *mittimus*, a copy thereof shall be left with such sheriff and jailer, and the marshal's return shall be made on the original. The statutes of Iowa (section 4515, Code) require that, when a prisoner is committed to the custody of a keeper of a jail or prison, a certified copy of the entry of judgment shall be furnished him. Certainly it is the proper practice when prisoners are committed to a state jail, under sentence of a court of the United States, that there shall be furnished to the jailer the evidence which the state statute requires him to demand before he will receive a prisoner under his custody. The copy of the judgment entry shows the terms of the sentence, and the order shows where the sentence is to be carried out, which is a necessity in case of sentence in the federal courts. These copies, when delivered to the jailer, are the evidence upon which he relies as proof of his authority to hold the prisoner in custody. Clearly, therefore, the copies should be certified to, and thus the jailer has furnished him that which, on its face, bears evidence of its official character. The copies in question constitute the *mittimus* required by section 1028 of the Revised Statutes, and the jailer is entitled to demand an official copy thereof before he can be required to assume the charge of the prisoner, and this requires that the clerk shall make the proper certificate with his official seal attached, and for so doing he then becomes entitled to the statutory fee.

Seventeenth. Exceptions are next taken to the folio fee for making copies of certain indictments, and certifying the same at the request of the district attorney. These indictments were found against certain officers of a national bank, and contain many counts. The charge therefor was allowed by the court, when the clerk's account was originally passed on, because the court knew the character of the cases, the large number of counts in the indictments, and that, to enable the district attorney to prepare the causes for trial, it was absolutely necessary that he should have, for his own use, a copy of the indictments which set forth in detail the various acts counted as violations of the banking act. The facts upon which the allowance was made clearly proved the need of furnishing to the district attorney the copies charged for, and, as the services were rendered by the clerk in aid of prosecution instituted by the government, and upon the written order of the district attorney, the court, in passing upon the account of the clerk, allowed the folio fees for the copies, and the fee for certificate and seal, and also for filing the written order or *præcipe*. The ruling then made is now affirmed.

Eighteenth. Exception is also taken to the fee charged for issuing a *mittimus* in cases wherein the defendant is ordered to be imprisoned until the fine is paid, and for filing same when returned by the marshal, and for entering his return thereon. The *mittimus* is the warrant issued to the marshal, directing him to commit the defendant to custody as required by the sentence, without which the marshal would not be justified in committing the defendant to jail, and its issuance and return are necessary steps in carrying out the judgment or sentence of the court. The fees charged for these services are therefore allowed.

Nineteenth. The last item demurred to is the charge for the making duplicate copies of the order of the court, directing the marshal to procure the necessary record books for use in the Cedar Rapids division of this district. These copies of the order are in themselves vouchers for the benefit of the marshal. He is entitled to a certified copy of the order of the court as the evidence of his authority to procure the requisite books which form part, at least, of the papers which vouch for the proper outlay made by him in this particular, and he is required to file with the clerk a duplicate of all vouchers which accompany his account, and hence the need for duplicate copies of the order made. The total sum sued for is \$714.40. Under the conclusions reached as herein announced, the clerk is entitled to \$666.90, the remainder of the sum total being disallowed, and judgment will therefore be entered for said amount of \$666.90.

The assignment of errors covers every ruling of the lower court which allowed to the plaintiff below any item of his account. The plaintiff did not appeal from the judgment disallowing certain items of his account, and hence the correctness of the ruling of the lower court as to those items is not before us.

Maurice D. O'Connell, U. S. Dist. Atty., for the United States.

A. J. Van Duzee, *pro se*.

Before CALDWELL and SANBORN, Circuit Judges.

PER CURIAM. We are satisfied with the findings of fact and the conclusions of law reached by the learned district judge who decided this case in the district court as expressed in his opinion, and the judgment of the district court is therefore affirmed.

AMERICAN CONST. CO. v. JACKSONVILLE, T. & K. W. RY. CO.

(Circuit Court, N. D. Florida. November 19, 1892.)

1. CONTEMPT—PROCEDURE—PETITION AND RULE FOR ATTACHMENT—TIME FOR ANSWER.
Petition and rule for attachment is a proper method to pursue in a proceeding for contempt in disobeying an order of court, although not the only remedy; and, when a copy of such petition containing the specific charges is served on defendant, six days is sufficient time in which to make answer thereto, or to ask for additional time in which to make such answer.
2. SAME—PROCEEDING AGAINST CORPORATION AND OFFICERS.
On a motion for attachment against a railroad company and its officers for contempt in violating a temporary injunction and an order appointing a receiver, an objection that the motion does not specify any person by name, whom it is sought to attach, cannot avail, when such officers are well known to the court, have been served with a copy of the petition, have appeared in their official capacity, and as counsel in litigation connected with the road, and when a proper order, if necessary, may be made from the record.
3. SAME—WHAT CONSTITUTES.
After a receiver of a railroad has been appointed, a collection by the vice president of money due the company under a mail contract, and depositing same in bank to the company's credit, and attempting to dictate what disposition the receiver should make of it, constitute contempt.
4. RECEIVERS OF RAILROAD COMPANIES—ORDER FOR DELIVERY OF BOOKS—INTERPRETATION.
An order appointing a receiver of a railroad company among other things provided that "all the books, vouchers, and papers touching the operation of the road" should be delivered by its officers, servants, and agents to such receivers. *Held*, that the order included all books relating to the previous history of the corporation, and all records of its transactions, and was not confined to books relating to the future operation of the road, or to such as the receiver might specifically demand.
5. SAME—ORDER FOR DELIVERY OF PROPERTY.
When an order of court appointing a receiver of a railroad company provides for the delivery to such receiver of "all and every part of the properties, interest, effects, moneys, receipts, earnings," etc., such order embraces the company's seal.

On Motion for an Attachment for Contempt. Motion granted.

Bisbee & Rinehart, for complainant.

Cooper & Cooper and *T. M. Day, Jr.*, for defendant.

SWAYNE, District Judge. This is a motion by the complainant company for an attachment against the defendant company and its officers

for a contempt and violation of the temporary restraining order of July 3, 1892, and for the violation of the order made appointing Mason Young receiver on August 4, 1892. This proceeding was commenced by petition filed in this court, November 7, 1892, a copy of which was served upon C. C. Deming, vice president of the defendant company, in Jersey City, N. J., November 12, 1892, and a notice of the petition was served on defendant's counsel here in Jacksonville some days previous to the hearing. The matter was argued by both parties on the 18th of November, 1892, and taken under advisement by the court. No answer was offered to the petition. No extension of time was requested for privilege to file an answer, although it was argued at the time by the counsel for the respondent that the time was not sufficient in which to appear and answer. By the rules of New York, in which said vice president Deming resides, he would have been allowed four days in which to answer. By the record here he had six days in which to do so, which the court holds was ample time for that purpose. It further holds that, while a petition and rule for attachment are not the only methods which may be pursued in an action for contempt, it is a proper method, and in this case gave the defendant railroad company and Mr. Deming all of the time and privileges that they would have been entitled to under a rule to show cause. He was served with an exact copy of the petition containing the specific charges made against him, and he had six days in which to make answer thereto or ask for additional time in which to make said answer. As the court understands his position, he did neither, but rested his defense to the motion on technical objections to the complainant's method of procedure. He did come in, however, at the eleventh hour, on the morning on which this opinion was delivered, and asked that, if it should be against him, he might have further time in which to answer.

This, therefore, being a proper method of proceeding, the defendant company and its vice president, Mr. Deming, being both in court, with ample notice of the charges against them, and with ample time in which to answer the same, and having failed to do so, it remains to be inquired whether there is evidence before the court to sustain the charges in the petition. That portion of the temporary restraining order claimed to be violated reads as follows:

"That the said defendant railway company, its officers, agents, attorneys, servants, and employes, are hereby enjoined and restrained from remitting, sending, or removing in any manner whatsoever any of the incomes, tolls, or revenues of the said defendant company from the jurisdiction of this court, either to its treasurer in New York or to any other officer or person whatsoever."

It appears by a voucher produced before the court at this hearing that the defendant, the Jacksonville, Tampa & Key West Railway Company, on July 11, 1892, paid to Cooper & Cooper, counsel, the sum of \$2,500. It further appears that this money was paid on the authority of Mr. C. C. Deming, vice president, approved by Mr. R. B. Cable, general manager, and by T. M. Day, Jr., attorney, and audited by Mr.

J. E. Starke, general auditor. It is claimed in this action that such payment was a willful violation of the order of July 6, 1892, and it rendered all the parties who are responsible therefor guilty of contempt in willfully disregarding the order of this court. The fact that the managers and directors of a corporation, charged with fraud and mismanagement of that corporation, should take the money of the corporation with which to defend themselves against that charge, presents certain novel features for the consideration of the court, the decision of which had perhaps best be reserved until the final termination of the original suit. The court, therefore, at this time expresses no opinion upon the propriety or impropriety of the use of that \$2,500 which it appears has been made.

The order of August 4, 1892, by which Mason Young was appointed receiver of the Jacksonville, Tampa & Key West Railway Company, contained the following language:

"And it is further ordered that the said defendant railway company, its officers and agents, and all persons who may have possession of any of the said railroad properties or appurtenances or rights and privileges thereof, deliver over to the said receiver all and every part of the properties, interests, effects, moneys, receipts, and earnings, and all the books, vouchers, and papers touching the operation of the said railroads or either of them, and all books of account and vouchers touching or relating to the moneys, finances, and assets of the said defendant company, including the stock books and stock ledgers of the said defendant company."

It is contended upon the part of the defendant that the motion does not specify any person by name whom it is sought to attach. The motion for attachment is against the defendant company, the Jacksonville, Tampa & Key West Railway Company, and its officers. It is known to the court, as well as to all parties concerned in this litigation, that Mr. C. C. Deming, who was served with copy of this petition on November 12, 1892, was the vice president of the defendant company, and one of the parties against whom the orders of July 6 and August 4, 1892, were made. He appeared in court in person at the hearing of that cause, not only as vice president, filing an affidavit therein, but also as counsel, taking an active part in the proceedings. The court knows him to be a proper party, and, further, that he and his counsel are aware of the same fact, and, if it becomes necessary, will have no difficulty in making a proper order for the attachment from the record.

Further objections are made by the defendant that Mr. Pennington was not a properly authorized agent of the receiver to demand the books and other property of the defendant company; and yet it appears that Mr. Deming and his counsel treated with him as such agent, and failed to make any such objection up to the date of this argument. It is evident, however, to the court that, at the time the demand was made for the books and property, Mr. Pennington was a proper agent to make that demand. The principal objection or argument used by defendant's counsel at this hearing, to clear his client from the charges brought against him, is that the language of the order of August 4th is not clear; that

there was no order in it for turning over books of former companies; that there was no allegation in it of any particular books, such as bills payable or the New York cash book, or that they were in possession of the defendants. The court does not understand that there is any reason in such objections, or that there is any possibility of drawing such an understanding from the construction of the language of the order. There is no reason why the words in the order, "all the books, vouchers, and papers touching the operation of said railroad," should be construed by Mr. Deming or his New York attorney to be limited to mean those only touching the future operation of the railroad, nor that the order for "all books of account," etc., should be limited to those that the receiver should happen to demand or be able to guess that existed, and that he should be required to show in whose individual hands each separate book might be found at the time of making the demand. There is nobody in this case who is better aware than Mr. Deming himself that the books that were wanted, and that were intended by the order to be delivered, and which were so ordered by the order of August 4, 1892, were the books that would enable the receiver to determine whether the charges against the officers of the Jacksonville, Tampa & Key West were true or false. Those books, of course, included all that related to the previous history of the defendant corporation, and all the records that went to compose it, and all transactions which took place between them; and while the court does not now say that the refusal to deliver those books to the receiver, and the effort made to thwart the order for their delivery, was made for the purpose of preventing investigation and covering up the frauds alleged, yet that must necessarily be one of the conclusions to which such attempt must force every one.

It is true there is nothing in the order about the delivery of the seal of the company, and yet the order is very explicit and full when it says, "all and every part of the properties, interests, effects, moneys, receipts, and earnings," etc. There can be no doubt in the mind of any one for one moment that that order covered the delivery of the seal, and it should have been promptly delivered on demand to the receiver or his agent.

The showing made by Mr. Pennington in his affidavit that it was the purpose of Mr. Deming to delay and prevent the delivery of the company's books to the receiver as much as possible, notwithstanding the promise to comply with the order of the court made by said Deming, and the delays that were occasioned by him and his attorney from the 15th of August, 1892, for some weeks thereafter, indicate that purpose beyond all question. His action in collecting the money under the contract for carrying the mail, after the appointment of the receiver, and the deposit of it in a bank under the name and to the credit of the Jacksonville, Tampa & Key West Railway Company, when it should have been paid to the receiver in the first instance, and his efforts to dictate to what the receiver should apply that money indicate a disposition on his part to interfere with the duties of the court's officer, and renders him clearly guilty of contempt in that matter.

The judgment of the court, therefore, is that the parties herein charged are guilty of willful contempt in violating the previous orders of the court, and they are so adjudged. In view of the fact, however, that time has been asked this morning in which to file further answer, attachment will not issue at once, but 10 days will be allowed the parties in which to purge themselves of contempt, if they desire to do so. Contempt, however, being a criminal action, and personal service being required in each case, Mr. Deming, being the only individual who has been personally served, is the only one against whom attachment can issue at present.

In re HERRMAN et al.

(Circuit Court, S. D. New York. June, 1892.)

1. CUSTOMS DUTIES—CLASSIFICATION—"ASTRACHANS."

So-called "astrachans," being a woven material consisting of a cotton foundation or web, and a rough and more or less curled pile warp composed of goat hair, in which, in some of the samples, the loops of the pile were cut and in others remained uncut, the goat hair being the material of chief value, *held*, that the merchandise was dutiable as a manufacture in whole or in part of goat hair, under Schedule K, par. 392 of the tariff act of October 1, 1890, at the rate of 44 cents a pound and 50 per cent. *ad valorem*, and not, as claimed by the collector and the government, as "pile fabrics," under paragraph 396 of the same schedule and act, at 49½ cents a pound and 60 per cent. *ad valorem*.

2. SAME—CONSTRUCTION OF ACTS—UNDERSTANDING OF MANUFACTURERS.

The fact that congress, before framing the tariff acts, advises with manufacturing experts, does not give rise to any rule of construction whereby words used therein may be interpreted according to the technical understanding of manufacturers.

3. SAME—TRADE MEANING.

A word used in a tariff act may be susceptible of a trade meaning as designating a special group of articles, although each article in the group is always bought and sold by its specific name, whereby it happens that no articles are bought and sold by the group designation.

At Law. This was an application by the importers under the provisions of section 15 of the so-called "Customs Administrative Act" of June 10, 1890, for a review by the circuit court of the decision of the board of United States general appraisers affirming the decision of the collector of the port of New York in the classification for customs duties of certain merchandise entered at that port October 27, and November 17, 1890, which consisted of goods commonly known as "astrachans," or "astrachan cloth," which were returned by the United States appraiser as "manufactures, goat hair and cotton, goat hair chief value, as pile fabrics," and duty was accordingly assessed thereon by the collector at 49½ cents per pound and 60 per cent. additional *ad valorem*, under the provisions of paragraph 396 of Schedule K of the tariff act of October 1, 1890, which, omitting immaterial portions, is as follows:

"396. On * * * and plushes and other pile fabrics, all the foregoing composed wholly or in part of * * * the hair of the camel, goat, alpaca,

for other animals, the duty per pound shall be four and one half times the duty imposed by this act on a pound of unwashed wool of the first class, and, in addition thereto, sixty per centum *ad valorem*."

The importers protested that the goods, being manufactures of hair, valued at over 40 cents per pound, were dutiable only at the rate of 44 cents per pound and 50 per cent. additional *ad valorem*, under paragraph 392 of the same schedule and act, which, omitting immaterial portions, is as follows:

"392. On * * * all manufactures of every description made wholly or in part of * * * the hair of the camel, goat, alpaca, or other animals, not specially provided for in this act, * * * valued at above forty cents per pound, the duty per pound shall be four-times the duty imposed by this act on a pound of unwashed wool of the first class, and, in addition thereto, fifty per centum *ad valorem*."

The board of United States general appraisers, sitting at the port of New York, proceeded to take voluminous testimony offered on behalf of the importers and of the government; the former producing the evidence of a large number of importers and merchants dealing at wholesale in the fabrics in question, whose testimony tended to show that at the date of the passage of the tariff act of October 1, 1890, and prior thereto, the term "pile fabrics" had in trade and commerce a restricted meaning, which comprised and included only a group of fabrics such as velvets, plushes, etc., in which the pile was uniformly cut in the process of weaving and stood erect, the surface of the fabrics consisting of the ends of the piles; and that in this class or group of fabrics the trade did not include the astrachans in question, which were always bought and sold by the specific term of "astrachans," and were never included within the group of "pile fabrics" as known to the trade.

On behalf of the government the testimony of a number of merchants and dealers was produced, tending to show that in trade and commerce in the United States at the time of the passage of the tariff act there were no fabrics bought and sold in trade by the name or designation of "pile fabrics;" and there was some testimony tending to show that "pile fabrics" was not a term or designation known or used in the trade, as applied to any goods. On behalf of the collector and the government the testimony was further produced of several manufacturers in the United States of merchandise identical with or similar to the plaintiffs' importations, which manufacturers testified that in their trade the term "pile fabrics," as technically understood, included the entire class of fabrics which were woven with a pile, namely, where the pile threads—usually the warp threads—were "thrown up" from the warp; and that, then the loops of the "pile," so-called, were either cut by a system of wires and knives following the process of weaving, or in some cases were left uncut, pile fabrics including with them all fabrics where the pile was either cut or uncut, and that it made no difference whether the pile remained standing straight or was cut or steamed or crushed in the process of finishing. The testimony of these manufacturers likewise tended to show that, as

they understood commercial terms as used in the wholesale trade with which they came in contact, "pile fabrics" had no special or restricted meaning different from the technical or common signification of the term as applied to all fabrics having a pile, whether cut or uncut, and whether curled or straight.

The board of United States general appraisers, in deciding the case, delivered a very elaborate opinion, going over the question of manufacture, and finding in substance, among other things, that the words of the statute, "other pile fabrics," could not refer to plushes, that article being enumerated in paragraph 396, and that, therefore, the words must be taken as descriptively covering fabrics which in some respects differed from, but were akin or allied to, the only fabric named. The board also cited the definition of "pile fabrics" as given in the Encyclopedia Britannica, which covered looped or uncut pile and cut pile; also the Century Dictionary definition of "astrachan" as a "rough fabric, with a long, closely curled pile in imitation of the fur;" and also the definition in Webster's and Worcester's Dictionaries of the word "pile." The board further held that the testimony of manufacturers should be admitted to explain the meaning of words used in the tariff act, inasmuch as manufacturers appeared before the committees of congress and gave testimony concerning the goods made by them, and the rates of duty to be imposed thereon. The board further found as follows:

"From the inspection of other protests concerning the same subject-matter now before us, it appears that a number of the witnesses who testify in this case to the effect that 'pile fabrics' is a term understood in the trade to embrace only fabrics similar to velvets and plushes in which the pile threads stand erect, presenting a smooth surface, are pecuniarily interested in maintaining the claims of these protests. A considerable number of disinterested merchants, both in and outside of New York, whose testimony we have taken, concur in saying that the term 'pile fabrics' was not, prior to October 1, 1890, a term in commercial use, by which goods were bought or sold; that all such fabrics are specially designated in the trade; indeed, the claim is made by merchants in a case now before us from San Francisco that certain astrachans, classified as trimmings, are pile fabrics."

The board of United States general appraisers made the following findings of fact:

"(1) That the protestants, H. Herrman, Sternbach & Co., imported into the port of New York, in October and November, 1890, certain fabrics, which the collector classified for duty as 'pile fabrics,' and levied duty upon the same at the rate of 49½ cents per pound, and, in addition thereto, 60 per cent. *ad valorem*, in accordance with the provisions of paragraph 396 of the act of October 1, 1890. (2) That the fabrics so imported were in fact pile fabrics, and on the 1st day of October, 1890, and prior thereto, were bought and sold and exclusively known in trade by the name of 'astrachans.' (3) That the so-called 'astrachan' is a fabric composed of cotton and goat hair similar in texture to plush, but different therefrom generally in the length of its pile and the style of its finish, both fabrics being often made to imitate furs, and both are largely used for similar purposes. (4) That the term 'pile fabrics' was not at the time of the passage of the act aforesaid a term of commercial designation in the United States for the purchase and sale of any fabrics made wholly or in part of wool, worsted, or goat hair. (5) That at the time last

mentioned there was no established, well-known, certain, and uniform general usage or custom in trade and commerce in the United States in relation to 'astrachans,' excluding them from or including them within the term 'pile fabrics.' "

And found the final conclusion of law as follows:

"In our opinion, the words 'other pile fabrics,' contained in the paragraph above mentioned, are generic and descriptive; and, believing that the claim of the protestants is not well founded, we overrule these protests, and affirm the action of the collector."

The record, including the evidence taken by the board, together with their certified statement of the facts involved and their decision thereon, was returned to the circuit court on the application of the importers, pursuant to section 15 of the above-cited "Customs Administrative Act" of June 10, 1890, and thereupon the circuit court proceeded to hear and determine the questions of law and fact involved in such decision, and, after an elaborate examination and presentation of the record and arguments by counsel in behalf of the importers for reversal and by the United States attorney in behalf of the government for affirmance of the decision of the board of United States general appraisers, the circuit court decided the case in favor of the importers' contention, delivering an opinion, which is given below.

Stanley, Clarke & Smith, (Stephen G. Clarke, of counsel,) for importers.

Edward Mitchell, U. S. Atty, and James T. Van Rensselaer, Asst. U. S. Atty.

LACOMBE, Circuit Judge. It is not necessary to add anything to the remarks which have been made from time to time in the course of the argument, as indicating why it seems to me right in this case to reverse the decision of the board of general appraisers. In so doing I do not understand that I am at all departing from the rule laid down in the *Muser Case*, (41 Fed. Rep. 877,) I think it was, as to the fact that they sit as experts, and gather testimony from all quarters. In the first place, they have here very plainly indicated by their own expressions on the face of their return that they have reached the conclusion in this case from the evidence which they return here. And it further appears quite plainly from their opinion that to their conclusions they were influenced by a mistaken belief or understanding as to the rules of law as laid down by the supreme court; that is, they seem to consider that these terms in tariff acts may be interpreted according to the technical understanding of them by manufacturers. Now, I know of no such rule. Some words are to be taken in their popular and ordinary signification, as they would be understood by all the world. Failing that, there is the well-known rule, reiterated over and over again, that, if words have a special meaning in trade and commerce, they are to be given that special meaning when we find them in tariff statutes. I know of no third rule that, because congress frames its statutes after advising with manufacturing experts, words should in some instances be given the technical meaning which the manufacturers give to them.

Again, the board seems to have the understanding that a term used in the tariff act is not susceptible of a trade meaning, unless some one or more articles are bought and sold specifically by that name. In that, again, I think they are in error. I think the contrary is very plainly shown in the case of *Pickhardt v. Merritt*, 132 U. S. 252, 10 Sup. Ct. Rep. 80, which I referred to before. An article may be bought and sold by the specific name which indicates that precise article, and still a group of such articles may be known to trade and commerce by a commercial term, which includes them in a special group, and which still never appears on the face of an invoice or bill of the goods when the articles are described, because they are always described by the same specific name which refers to the particular article. Inasmuch as it is apparent, to my mind at least, that the conclusion which the board reached in this case was influenced by these views, which seem to me not in accordance with those heretofore expressed and laid down by the supreme court, I shall set their decision aside, and direct that the article be classified as manufactures of wool, etc., under section 392.

BRUSH ELECTRIC CO. v. CALIFORNIA ELECTRIC LIGHT CO. *et al.*

(Circuit Court of Appeals, Ninth Circuit. October 6, 1893.)

No. 54.

1. PATENTS FOR INVENTIONS—LICENSE—RIGHTS OF LICENSEE.

A grant by the owner of a patent of an exclusive license to sell the patented article in a specified territory carries with it an implied authority to join the owner, even against his will, as a party plaintiff, in suits against infringers. *Brush-Swan Electric Light Co. v. Thompson-Houston Electric Co.*, 48 Fed. Rep. 224, approved. 49 Fed. Rep. 73, affirmed.

2. SAME—ASSIGNMENT OF LICENSE.

A licensee cannot divide up his license and assign to third parties all his rights in certain portions of his territory, unless a manifest intent to confer such rights appears in the contract of license; and such intent cannot be inferred merely from the grant to him and his "assigns."

3. SAME.

An attempted assignment by a licensee, without authority, of all his rights in part of his territory, causes no forfeiture of the rights which he acquired by his license, and, as it passes nothing to his assignee, he may still sue for an infringement committed in the assigned territory, and may join his licensor as a party complainant therein.

4. SAME.

The right to so join the licensor is not affected by the fact that the licensee has also joined as a party plaintiff a corporation which is merely its agent, and which is therefore not a necessary party.

5. SAME—ESTOPPEL.

A patent may be assigned before it is actually issued, and where the assignee grants to a third person an exclusive right to sell the patented article in a specified territory, and, after obtaining the patent, treats such grantee as having a valid license, and allows it to acquire an extensive business, he is estopped to deny the validity of the license.

6. SAME—NATURE OF LICENSEE'S RIGHTS.

A grant by the owner of a patent of an exclusive right to sell the patented article within a specified territory excludes the grantor from such territory, and con-

fers upon the grantee a right which he exercises for his own benefit, and therefore he is not merely the agent of the owner, under an agency which may be revoked at any time.

7. SAME—EVIDENCE—OPINIONS OF WITNESSES.

Affidavits by the officers of a licensee corporation that it was "understood" between it and the licensor corporation that both companies should actively prosecute infringers in the licensee's territory, were insufficient to show an agreement by the licensor to allow the use of its name in suits by the licensee; nor was such an agreement shown by the affidavit of a former superintendent of the licensor that it was understood by the officers of that company that it would support the licensee in all legal efforts to defeat infringement; for in both cases the affidavits stated conclusions, merely, and not the facts on which they were based.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the Brush Electric Company, the California Electric Light Company, and the San Jose Light & Power Company against the Electric Improvement Company of San Jose, for infringement of a patent. In the circuit court the Brush Electric Company filed a motion to be dismissed from the case, which was denied. (49 Fed. Rep. 73,) and thereupon it took an appeal from the order of denial. A motion was made to dismiss the appeal on the ground that the order was not a final, appealable decree. This motion was also denied. 51 Fed. Rep. 557. The hearing is now upon the merits of the appeal. Affirmed.

H. P. Bowie, for appellant.

There is no implied authority in any license contract under the patent laws of the United States, vesting absolutely in the licensee the right to use the name of the owner of the patent to restrain infringements in a territory covered by the license.

The monopoly granted to the patentee is created by act of congress. It differs in its nature from all other monopolies, and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes. To enable any one to sue in his own name for an infringement of patent rights, he must have the entire and unqualified monopoly which is conferred by the statute upon the patentee, and which consists in the exclusive right, or an undivided interest in the exclusive right, to the entire United States, or to a specified portion thereof, to manufacture, use, and vend, and to authorize others to manufacture, use, and vend, the patented invention. Any right short of this is a mere license. The legal title to the monopoly remains in the patentee, and he alone can maintain an action to restrain an infringement upon his patent rights.

In equity, as at law, the title remains in the owner of the patent. Any rights of the licensee must be enforced through or in the name of the owner of the patent; perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. *Gayler v. Wilder*, 10 How. 477; *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 384; *Paper Bag Cases*, 105 U. S. 767; *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244; *Oli-ver v. Chemical Works*, 109 U. S. 82, 3 Sup. Ct. Rep. 61; *Littlefield v. Perry*, 21 Wall. 205; *Bogart v. Hinds*, 25 Fed. Rep. 485; *Cottle v. Krementz*, Id. 495; *Clement Manuf'g Co. v. Upson & Hart Co.*, 40 Fed. Rep. 473; *Game-well Fire Alarm Tel. Co. v. City of Brooklyn*, 14 Fed. Rep. 255.

Where the patentee is the infringer, the licensee may sue him in equity, and enjoin in such action the infringement. *Littlefield v. Perry*, *supra*, 223.

The thing attempted here by the California and San Jose Companies is not merely to use the name of the patentee or owner of the patent, as was done

at common law by the assignee of a chose in action. There the whole cause of action or beneficial interest was in the assignee, the assignor holding only the naked legal title, having nothing at stake but costs, and the use of his name as the plaintiff being a mere formality. Here the licensee's right forms but an insignificant fractional portion of the patentee's estate, to wit, to use and sell within a restricted area; the Brush Company still having the right to manufacture everywhere, and to sell and use everywhere, except in the restricted territory covered by the license, if such it be, to the California Electric Light Company. Hence an action by the Brush Company, or in the name of the Brush Company, puts into controversy its own interest, its own right, its monopoly privileges, in and to which, confessedly, the licensee has no right, claim, or title.

A court of equity cannot compel a party to stand against his will as a complainant in an action where his own interests and rights are involved, because another claims it to be for that other's interest that he shall do so. No authority can be found for such a proceeding. The bill filed in this case involves in the adjudication prayed for the whole interest of the Brush Company in the patent in question, including the exclusive right of that company "to make" within the territory in which the San Jose Company claims a license to use and sell. A judgment for the defendant upon this bill would bar any further proceedings by the Brush Company for the protection of its interests under the letters patent in question.

Under the ruling in *Littlefield v. Perry*, 21 Wall. 223, the head of equity jurisprudence to which the question relates is that of trustee and *cestui que trust*. Where a trustee is a necessary party to an action, he must either appear or be brought in by process. If he refuses to bring an action upon the request of the beneficiary, the latter may sue in his stead, making the trustee party defendant. It would be very unnecessary to make him a party defendant, and bring him in by process, if, by merely naming him as plaintiff, the court is vested with jurisdiction to bind him by a decree. The settled practice of chancery is against thrusting a party into an action as plaintiff against his will. *Perry, Trusts*, § 886; 2 *Lewin, Trusts*, § 853; 1 *Daniell, Ch. Pr.* 183, note; *Morgan v. Railway Co.*, 15 Fed. Rep. 56, 57. *Et vide* Lube, Eq. (2d Amer. Ed.) 189; Rob. Pat. § 1099.

The owner of the patent right, having a substantial interest in the subject-matter of this suit, distinct from the interest of his licensee, cannot be subjected to the jurisdiction of this court in respect of that interest, at the mere will of such licensee, and without his own voluntary appearance, or some process of the court duly served on him, requiring his appearance, however advantageous to the special interest of such licensee it may be that such jurisdiction should be taken.

The solicitors of the California Electric Light Company and of the San Jose Light & Power Company, by joining the Brush Company as a party complainant to this bill, and by assuming to sign the bill as solicitors also of the Brush Company, conclusively commit the Brush Company to every averment of the bill, and conclusively authorize this court to adjudicate accordingly. To say that such authority to the solicitors of the California Company is to be implied from the nature of the transaction between the parties is only to beg the question. An inquiry into the nature of the transaction requires a construction of the contract, a determination of its obligation, express or implied, absolute or conditional, and then, if the authority is proved, an enforcement of the contract; but this is an adjudication of the rights of the parties to the contract, and a complete exercise of the jurisdiction of the court over the Brush Company. Clearly, such jurisdiction cannot be exercised, unless the Brush Company has been in some way subjected to the power of the court. The question, therefore, comes to this: Can the Brush Company be subjected to

the judicial power of this court as a party complainant because the solicitor of the California Company and the San Jose Company chooses to insert its name in the bill as such party?

Were the Brush Company named a defendant in the case, the court could not acquire jurisdiction over it without voluntary appearance or compulsory process; much less does the mere naming of the Brush Company as a co-complainant confer such jurisdiction.

Process is the test of jurisdiction. *Case v. Humphrey*, 6 Conn. 139; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 470.

Even had the Brush Company expressly covenanted that it would join the California Company and the San Jose Company as a co-complainant, and had thereafter refused, while it might be liable upon its covenant, the covenant would not relieve this court from issuing its process if it desired to subject the Brush Company to its jurisdiction against its consent. We know of no authority contrary to this contention. No authority, express or implied, absolute or conditional, has been shown from the Brush Company to the San Jose Company, authorizing, empowering, or directing it to join the Brush Company with it as a co-complainant in this action. There has been no undertaking on the part of the Brush Company shown to allow either the California Company or the San Jose Company to use its name in any way in any infringement suits, and the solicitor's authority even to make a party plaintiff *pro forma* must be special. 1 Daniell, Ch. Pr. 309. No authority contrary to this contention can be shown.

A licensee has no implied power to and cannot compel the owner of the patent to join with him in a suit in equity for an infringement of the patented invention; nor can the licensee, without the consent of the owner, use his name in such suit, even where the owner has covenanted to bring or to join in bringing suit. If he refuses, the remedy is, we submit, by action against him in the proper forum, either to compel specific performance, or to obtain a decree permitting the use of his name, or by action at law to recover damages for the breach of the covenant.

Covenants by the patentee licensor to protect the licensee against infringements, to maintain actions in support of the patent right, to defend all attacks made by competing, senior, or other patents, are of frequent occurrence in written licenses.

Where such covenant, clause, or stipulation is omitted from the license by the parties, it cannot be supplied by the court; the license itself being the measure of the licensee's rights. *McKay v. Smith*, 29 Fed. Rep. 295; *Emerson v. Hubbard*, 34 Fed. Rep. 327; *Ingalls v. Tice*, 14 Fed. Rep. 297; *National Rubber Co. v. Boston Rubber Shoe Co.*, 41 Fed. Rep. 50.

Even in a written license, where there is a covenant to sue infringers, the owner of the patent is not bound to protect the licensee against those who claim under adverse patents, nor does he warrant against them. *Jackson v. Allen*, 120 Mass. 77.

The rule which gives the patentee, by virtue of his ownership of the patent, control over all litigation wherein his patent, monopoly, rights, and franchise are involved or may be jeopardized, is a rule intended for his protection. Any rule short of this would place him entirely at the mercy of careless or dishonest licensees, of collusive litigation, of judgments against him, suffered by default, or it may be by fraud. Such power in the licensee would be simply ruinous to the owner of the patent. This is well indicated in *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224.

In the court below, and in the written brief filed by the learned solicitors of the California Company, it was admitted that there is no implied covenant that the licensor will protect the licensee against infringers by instituting

suits; but it was insisted that there was an implied covenant giving the licensee the right to use the name of the licensor in bringing suit, on the ground that the licensee cannot protect himself in any other way. The answer, however, to this, is that, if the licensor is not bound to protect his licensee, the latter cannot compel him indirectly to do so by using his name without his consent; and it were idle to concede, as the California Company does, that the Brush Company controls the litigation of its patent, (for it is admitted that it need not protect the licensee against infringers by instituting suits to that end unless it sees fit to do so,) if, on the other hand, the control of such litigation is nevertheless vested in the licensee, and which control it virtually would have and exercise under this implied power here claimed, to use the licensor's name in infringement suits without its consent.

Furthermore, we have shown that, if the licensee desires protection, he can stipulate for it. The owner of the patent is then to determine upon what terms it shall be granted. The exclusive licensee, under the authorities, is but at best a mere licensee, which simply means that he is licensed to do certain acts, which, if done by a stranger, would constitute the latter a trespasser. *Heap v. Hartley*, 42 Ch. Div. 461, (1889.) But there is a wide difference between the privilege of trespassing on the patent, and the right to control litigation of the patent right, to the monopoly in and to which the licensee has no claim or title. Under the decision in *Littlefield v. Perry*, as cited above, the relation of the owner of the patent to his licensee is held to be that of trustee and *cestui que trust*, and under the well-established doctrine of equity jurisprudence with reference to trusts, where the trustee refuses to institute a suit for the benefit of his beneficiary, and the latter claims the right to have such litigation begun, the *cestui que trust* can himself bring the suit in his own name, alleging the reason why, and making the trustee a defendant. In this way the rights of the *cestui que trust* are as effectually protected as though the trustee were party plaintiff; and the federal courts have held that in such a case the question of jurisdiction, as affected by residence, will be determined by looking to the relations of the parties in controversy, without regard to their positions on the record. Hence a trustee, made defendant merely because he declines to sue, will be treated as plaintiff in settling the question of jurisdiction. *Railroad Co. v. Ketchum*, 101 U. S. 289.

But this practice rests upon the power of the court to deal with those who are brought within its jurisdiction. If a trustee thus named is a necessary party, and is out of the jurisdiction, and is not before the court by appearance or process, the case cannot proceed. *Morgan v. Railway Co.*, 15 Fed. Rep. 55. It would be a very unnecessary trouble to make a party defendant, and bring him in by process, if by merely naming him as a plaintiff the court is invested with jurisdiction over him, and power to bind him by its decree. There is no practice in chancery of bringing a trustee in as plaintiff against his will. This has been attempted here by the California Company and by the San Jose Company, and that extraordinary power invoked and claimed by those two companies over the Brush Company, who is, if a trustee of a licensee, not merely such, but has rights of its own, outside of, separate, and distinct from, its licensee, and amounting to the ownership of the entire legal title to the franchise, the whole of which is imperiled by a litigation over which it not only has no control, but in respect of which it has not even been consulted, much less has it consented to bring or join in bringing. This is an attempt to deprive the patentee of his property without due process of law, and is a violation of the constitution of the United States.

There is no warrant in the decisions of any court for the exercise of such an extraordinary jurisdiction involved in this attempt of the California Com-

pany and of the San Jose Company to compel the Brush Company to stand as complainant in a chancery suit against its will, where its own rights are involved, and in which rights, admittedly, the other two complainants have no interest. The power granted by the statute to the circuit courts is to try patent suits according to the practice and principles of courts of equity, and all the principles of that jurisdiction undoubtedly apply.

The case of *Morgan v. Railway Co.*, 15 Fed. Rep. 55, lays down the broad principle that, when a *cestui que trust* comes into court with the allegation that his trustee has wrongfully refused to sue, there is an issue between him and the trustee which the court can settle only by having jurisdiction of the trustee. The same principle must apply whether the trustee be named plaintiff or defendant. To name him plaintiff without his consent can give the court no more jurisdiction to settle this question than to name him defendant without service or appearance. Hence, even conceding the California Company and the San Jose Company to be the licensees of the Brush Company, they have no implied vested right under any license to control the litigation of the patent right in the manner here attempted, by using the name of the Brush Company as a co-plaintiff with them in this action.

On the argument of this motion in the court below, the counsel for the California Company relied upon the following cases: *Wilson v. Chickering*, 14 Fed. Rep. 917; *Goodyear v. Bishop*, 2 Fish. Pat. Cas. 96; Walk. Pat. par. 400; 8 Rob. Pat. par. 938, p. 125; *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224.

Wilson v. Chickering, 14 Fed. Rep. 917. This was an action by licensee against infringer of patent for pianoforte pedals. There was a demurrer for nonjoinder of patentee, and the demurrer was sustained. Complainant claimed to be an assignee of an exclusive right to manufacture and sell. The court (Judge LOWELL) says: "He [plaintiff] has not then a statutory right to proceed alone, and I consider that the general rules of equity pleading would make the patentee a proper party to the cause." Further on the court says that the patentee is not a necessary party, his reason for this opinion being that the licensee is the only party entitled to damages. This, therefore, may have been an action at law for damages, and the discussion by Judge LOWELL of any questions not necessarily involved in that action entitles his opinion on such subjects to no weight as authority. What clearly was in Judge LOWELL's mind in regard to the right of licensee to sue was that, in case the patentee could not be brought into court, the case might proceed without him between the licensee and the infringer. His opinion as to the right of the licensee in equity to use the patentee's name in an action is *obiter dictum*, and a matter of conjecture. "Perhaps he may have that right," says the judge. This decision was made nine years ago, before the rule had been so firmly fixed that the patentee is a necessary party. In view of the decision in *Waterman v. Mackenzie*, Judge LOWELL would hardly suggest now that a suit could be brought by the licensee alone against a stranger.

Goodyear v. Bishop, 2 Fish. Pat. Cas. It does not appear distinctly from the report of this case whether the suit was originally brought by the patentee or not, and it may have been so brought.

8 Rob. Pat. par. 938. In this paragraph there is a statement to the effect that it is a part of the implied agreement between the licensor and licensee that the former will protect the latter against invasion of his rights, by instituting the necessary proceedings, but the licensee's right to sue, if the owner of the monopoly refuses, is by the same paragraph, and in the same sentence, limited to actions at law for damages. *Wilson v. Chickering*, *supra*, is furthermore the only authority cited by Robinson. By reference to Walk. Pat. par. 400, it will be observed that no authority, beyond the *ipse dixit* of the author, sustains the proposition he there lays down.

The principal reliance, however, of counsel on the other side, and of the circuit judge, is the case of *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 225. That was an action to restrain an infringement. The bill alleges that the Brush-Swan Company is vested with the exclusive license and agency throughout a specified territory to sell the patented improvement of the Brush Company. These two companies are the complainants. The Thompson-Houston Company is the defendant, and the bill charges the defendant with an infringement of the Brush patent within the territory named in the contract of license. The Brush Company, otherwise called the Cleveland Company, neither authorized, knew of, nor consented to the filing of this bill by the Brush-Swan Company, and moved to strike out its name as a party complainant therein. The motion was resisted by the Brush-Swan Company, which claimed, as licensee of the Brush Company, a vested, absolute, implied right to use the name of its licensor as a complainant in this action, by virtue of the license contract.

The circuit court (SHIPMAN, J.) says at the very outset that the facts in this case are "peculiar." He finds the contracts between the Brush-Swan and Brush Companies to be, in their important features, contracts of agency between a manufacturer and a person who, under certain limitations, is to have certain exclusive rights in the specified territory. They establish also, in the opinion of the court, "probably a contract of license under the patent laws."

The Brush Company, the court finds, has sold out control of its stock to defendant, the Thompson-Houston Company, the admitted wrongdoer in the action. "The Thompson-Houston Company, it thus appears, owns and is in control of the Cleveland Company."

The moment that fact was found against the defendant, did not the motion of the Brush Company to dismiss become, virtually, the motion of the Thompson-Houston Company? For, if the latter owned and controlled the Cleveland (Brush) Company, the Cleveland Company's motion, *ipso facto*, became the motion of the T.-H. Co. This inference becomes an irresistible, necessary conclusion later on, as we will see from the opinion. The Brush-Swan Company, in opposing the motion, contended broadly for an absolute right as licensee for a specified territory, under all circumstances, to use the licensor's name,—a claim precisely similar to that made by the learned counsel for the California Electric Company.

The court, however, declares this question—this proposition—need not be decided. It is not involved in the controversy. Page 225. But, while avoiding the question, the court is at great pains to give its opinion against the proposition of counsel. To infer such an absolute, implied power, uncontrolled—uncontrollable—from a bare license agreement, is a large power. The licensee could compel the owner to enter into an expensive and even perilous litigation, or control the owner in a way which might be injurious to him, by compelling him to submit questions to the adjudication of a court which the best interests of the owner of the patent might rather prompt him to avoid or postpone. "There is danger," says the court, "in such a power." But, continues Judge SHIPMAN, (the substance only of the decision is here given,) the moving party here, the Brush Company, is *in pari delictu* with the defendant, for it is controlled by it, and practically stands before this court as much the admitted infringer as the T.-H. Co., over whom this court has jurisdiction; and it has been reached with process through its controlling owner and defendant,—the Thompson-Houston Company. The Cleveland Company is "really a codefendant, in view of the T.-H. Co's. controlling ownership of its stock." True, it has not come in voluntarily as a plaintiff, nor has it been reached by process as a codefendant in this action, being a resident of Ohio; but this court can exercise jurisdiction over it, notwithstand-

ing, and for this reason (that it recognizes the legal, substantial, virtual identity of the Brush Company and the T.-H. Co.) they are *alter et idem*.

Here is the keynote of the court's decision. Jurisdiction has been constructively reached over the Cleveland Company through the T.-H. Co.; and the former's motion to be dismissed is not denied on the ground that the licensee has a vested, absolute right to the use of the licensor's name in this litigation to prevent infringements, but because the Thompson-Houston Company, the defendant, owns and controls the Brush Company, the nominal coplaintiff. In form there is no difficulty in the licensor, though thus considered as a defendant, suing for its own infringement, for the Brush Company and the T.-H. Co. are separate legal entities. In substance, there is no objection to treating them in equity as identical, and the court will administer equity against the nominal plaintiff through the controlling owner, the defendant. The two are really one, and jurisdiction over one will extend to both.

Such is this Connecticut case. One proposition, however, which the court lays down, is wholly without authority, nor does the court give any authority for it, and it is certainly against the settled law. There is not even a *prima facie* right in the licensee to use the licensor's name to restrain infringements. This I assert without qualification. I defy opposing counsel to produce a single adjudicated case establishing such a principle. But inasmuch as the court is at pains not to place its decision upon this ground, but upon the ground that the moving party is really the codefendant infringing licensor, it is unnecessary to further discuss that *dictum* here to show that had the court found the T.-H. Company to be an infringing stranger,—like the defendant improvement company,—instead of virtually an infringing licensor, identified in interest with and controlling the moving party, the question of the *prima facie* right of the Brush-Swan Company to drag the Brush Company into that litigation, by using its name, as attempted by the California and San Jose Companies, must have been decided by Judge SHIPMAN adversely to the contention of the California Company here, and on the authority of the very case cited in that opinion, *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, which says:

"That any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff."

Edward P. Cole filed a separate brief for appellant.

M. M. Estee and J. H. Miller, (*Estee, Fitzgerald & Miller*, on the brief,) for appellees.

It is conceded that the California Electric Light Company is but a licensee. It is given "the exclusive right to use and sell, but not to manufacture," throughout the Pacific coast. Record 77. This constitutes it a licensee. *Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. Rep. 334. The Brush Company still retains the legal title to the patent. It is also conceded by all that such a licensee cannot sue alone for an infringement, but must join the owner of the legal title as a co-complainant. The law on this subject is that, in case of infringement within the territory of a licensee, an action at law must be brought in the name of the licensor for the benefit of the licensee, and not otherwise, while a suit in equity may be brought in the names of the licensor and licensee jointly. Says Mr. Justice GRAY in *Birdsell v. Shattol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244: "A licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger. An action at law for the benefit of the licensee must be brought in the name of the patentee alone. A suit in equity may be brought by the patentee and

licensee together." *Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. Rep. 334; *Gayler v. Wilder*, 10 How. 477; *Littlefield v. Perry*, 21 Wall. 205; *Paper Bag Cases*, 105 U. S. 766.

Such being the law, it follows that, if a licensor refuses to join in a suit for infringement, and the licensee has no authority to use his name without his consent, then the licensee is without a remedy for a grievous wrong. Here, if the motion of the Brush Company prevails, and it be dismissed from the suit, then the entire suit will fall, because it cannot be maintained without the presence of the Brush Company; and the California Electric Light Company will be at the mercy of infringers, without remedy against them for invasions of its rights. In such case there would be a wrong without a remedy, a thing which equity never tolerates. Therefore we contend that such is not the law, and we state as our first proposition:

There is an agreement implied by law, in case of such a license as the one disclosed here, that the licensor will join with the licensee in suits against infringers; and if he refuses, or is inaccessible, the licensee has a right to use his name without his consent upon indemnifying him against damage.

If such be the law, then we had a perfect right to use the name of the Brush Company in this case as a co-complainant, even against its consent. That such is the law is settled both by reason and authority. In *Walker on Patents*, (pages 311, 312, § 400,) it is said:

"Licensees under patents cannot bring actions for their infringement. Where a person has received an exclusive license to use or sell, * * * all actions at law * * * must be brought in the name of the owner of the patent right, but generally for the use of the licensee; and all actions in equity must be brought by the owner * * * and the exclusive licensee, suing together as joint complainants. * * * Actions at law, brought in the name of the owner of a patent right, but actually begun by an exclusive licensee, may be maintained by the latter even against the will of the nominal plaintiff, and, where an exclusive licensee brings an action in equity in the name of himself and the owner of the patent right, that action may be maintained without the co-operation, and even against the objection, of the latter."

And so likewise Mr. Robinson, in his work on Patents, says, (volume 3, p. 125, § 938:)

"It is a part of the implied agreement between a licensor and licensee that the former will protect the latter against those wrongful invasions of his rights by instituting such proceedings as may become necessary for that purpose; and, if the legal owner of the monopoly refuses to perform this duty, or is inaccessible, the licensee may sue at law for damages in his name. A suit thus brought is under the control of the licensee, and, though the nominal plaintiff may claim indemnity against the costs and expenses of the suit, he cannot discontinue it or settle with the infringer in derogation of the rights of the real party in interest."

In *Goodyear v. Bishop*, 2 Fish. Pat. Cas. 96, an exclusive licensee brought an action in the name of the licensor to recover damages for infringement. The defendant, upon the consent of the nominal plaintiff, moved to dismiss the action. This was, in effect, a motion by the nominal plaintiff himself to dismiss, and is therefore parallel to the motion made in this case by the Brush Company. But Judge NELSON denied the motion, thereby holding directly that the licensee could use the name of the licensor even against his consent. The same doctrine had previously been announced in *Goodyear v. McBurney*, 3 Blatchf. 32. In *Wilson v. Chickering*, 14 Fed. Rep. 918, a licensee had brought suit in equity in his own name alone. The defendant demurred for want of proper parties. The court said:

"I do not, however, intend to be understood that the plaintiff will be without remedy if he cannot find the patentee, or if the latter is hostile. The

statute does not abridge the power of a court of equity to do justice to the parties before it if others who cannot be found are not absolutely necessary parties, as in this case the patentee is not. At law the plaintiff could use the name of the patentee in an action, and perhaps he may have that right in equity, under some circumstances. The bill gives no explanation of his absence; but it was said in argument that he is both out of the jurisdiction, and hostile. If so, no doubt there are methods known to a court of equity by which the suit may proceed for the benefit of the only person who is entitled to damages."

Accordingly the demurrer was sustained, with leave to file an amended bill. The trend of the decision is apparent. In our judgment, it means that the licensee had a right to join the licensor, even without his consent.

But to place the matter beyond all doubt, so far as the authority of another case is concerned, we refer the court to the case of *Brush-Swan Electric Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224. There an exclusive licensee of certain territory under this same Brush patent had, in connection with this same Brush Company, brought a suit in equity for infringement. The Brush Company, for the same purpose of swindling its licensee as in the case at bar, appeared by special counsel, and made the same motion that is made here,—to be dismissed from the suit on the ground that it had been brought without its consent. The learned Judge SHIPMAN, in rendering the opinion, after adverting to the fact that the Thompson-Houston Company acquired control of the Brush Company, (which he styles the Cleveland Company,) said, among other things:

"In this case it is true that the Cleveland Company is called upon to attack the acts of its controlling owner, and in a certain sense to sue for its own infringement. Yet the two corporations are separate legal entities. One can sue the other; and it is not necessary for the licensee to sue alone, in order to prevent an absolute failure of justice. When the owner is not the infringer, and therefore cannot be made a defendant, if the licensee is to have an opportunity to assert his alleged rights, he is at a great disadvantage, unless he has the power of bringing a suit in equity in the name of the owner, though against his will. In my opinion, he has, *prima facie*, such an implied power. Whether a court of equity would permit a wanton or unjust or inequitable use of the name of the owner of the patent by the licensee of the bare right to sell within a limited territory is a question which does not apparently arise, and upon which I express no opinion. The motion is denied."

We submit that this decision disposes of the case at bar. Opposing counsel professes to find certain dissimilarities between the two cases. Upon examination, it will be found that they are puerile. They are dissimilarities as to certain details of fact which in no way affect the legal questions involved.

In this connection it may be asked why we did not make the Brush Company a party defendant. Undoubtedly it is a general rule that, where one who should be joined as a plaintiff refuses to join, he may be made a defendant on that ground, the bill alleging that he is made defendant because he refuses to join as plaintiff. If it were possible to pursue that course here, we would be only too glad to do so; but the Brush Company is an Ohio corporation, and under the act of congress of March 3, 1887, it cannot be sued in this district. It can be sued only in the district of which it is an inhabitant, and that district is in Ohio. Consequently it would be a vain and idle thing to make it a defendant, because of inability to procure legal service of process. *Wilson v. Telegraph Co.*, 34 Fed. Rep. 564; *Denton v. International Co.*, 36 Fed. Rep. 3. The Brush Company is "inaccessible" in the character of a defendant; and, in order to avert a failure of justice, equity will infer and presume a permission to use the name of that company as a complainant; otherwise, there would be a wrong without a remedy.

Henry P. Bowie, for appellant, in reply.

Counsel for appellees say: "It is also conceded by all that such a licensee cannot sue alone, but must join the owner of the legal title as a co-complainant."

Counsel err. We concede nothing of the kind in the sense claimed. The Brush Company's position on this proposition is that a mere licensee can neither sue alone nor otherwise to restrain an infringement by a stranger. The legal owner of the patent alone has that right and responsibility, and in equity he can join the licensee with him if necessary. *Waterman v. Mackenzie*.

Three decisions of the circuit courts and two text writers are cited by appellees to sustain their contention that the licensee can use the name of the owner of the patent in infringement suits. In appellant's brief these citations are shown to be without authority, unsound, and unsupported. The decisions are not by courts of last resort. They have no more weight as authority in this court than any decision of a *nisi prius* court would have in a court of appeals.

If a licensee cannot sue at law or in equity in his own name, it is because he does not own or control the legal title, and only the owner of the legal title can sue. But, if the owner of the legal title is under the dominion of the licensee with reference to such suits, the rule is an empty one, for all the licensee need do to evade it is to use the owner's name as plaintiff in the suit, as attempted here. The theory of opposing counsel seems to be that because the patentee has the right to sue, and can join the licensee with him as a coplaintiff in equity, therefore the licensee has the right to sue in equity, and join the patentee with him as a coplaintiff. But the right of the patentee to sue is statutory, and depends upon his ownership of the legal title to the monopoly. Upon what foundation this unwarranted pretension of the licensee rests, appellees have failed to show.

The books are full of instances where the licensee has braved the rule, and sued in his own name, but always to his complete confusion and disaster. In every instance he has been turned out of court. The federal courts have always sustained demurrers to complaints brought by licensees where the licensor, owner of the patent, has not joined in bringing the action. But this is the first case on record where the licensee has gone a step further, and not only sued in his own name as licensee, but also in the owner's name, without the latter's authority, consent, or knowledge; so that this court is brought face to face with the proposition: Who controls the right to litigate the patent,—the owner or the licensee? The authorities all say "the owner," whether he be patentee, assignee, or grantee. The California Company says, "the licensee." So that the incident controls the principle. The case at bar shows the danger of such a proposition. The California Company alleges its coplaintiff, the light and power company, to be a licensee of the Brush Company, and the Brush Company is made, by this use of its name, to thus affirm what has no foundation in fact.

Why imply an authority to sue in the patentee's name from a disability in the licensee to sue in his own name? The reason of the disability is that he neither owns nor controls the legal title; and yet that very disability is claimed to vest in him a greater control over the legal title than the owner himself is conceded, for under such implied power the licensee can force the owner to litigate the validity of the legal title for the benefit of the licensee, against both the will, judgment, and discretion of the owner of the monopoly. Nay, more than that; the licensee here actually excludes the owner from all control of the litigation of his own property. Aye, even more; he commits the owner of the patent, in this very litigation, conducted in its (the patentee's)

name, to allegations touching its property rights and patent interests, and makes it declare, under the sanction of Mr. Roe's oath, and in the form of a bill of complaint filed in the action, that it has licensed the San Jose Company to use the invention in the territory where the infringement is laid, and that the same unlimited control over the patent and its fate has been conferred upon this unknown, self-styled "licensee" of the Brush Company, as is claimed by the California Company.

The learned counsel for the California Company have failed to produce a single adjudicated case, either in the circuit court or in the supreme court of the United States, which lays down the proposition for which they contend, and by which they must stand or fall. No case can be found in the whole realm of jurisprudence touching patent law which decides that a licensee has the implied, absolute, indefeasible, vested power to control the litigation of the patent right. In the only case which even approaches the subject—*Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224—Judge SHIRMAN distinctly declines to lay down such a proposition.

The interest conveyed to a licensee simply operates to prevent the prohibitory powers being exercised by the owner against the licensee, and that is the sole relation to the patent of the interest transferred. Rob. Pat. § 754.

Counsel recognize the propriety of the rule compelling them to make the Brush Company a defendant, and frankly say they would be "only too glad to do so" if the Brush Company were an inhabitant of this district, but that they cannot reach the company with process, as it is an inhabitant of Ohio.

This admits, what we have always claimed, that counsel have no right to act as the solicitors of the Brush Company in this action. It further admits that they have made that company a plaintiff because they could not get jurisdiction over it in this district, if made a defendant. And this "inaccessibility" of the Brush Company in this district is urged by counsel as a reason why the acts of congress requiring corporations to be sued at their domiciles should be evaded, and that this court should assume a jurisdiction over the Brush Company as a forced plaintiff, because the California is unwilling to go to Ohio, and there sue in the proper forum, if it really thinks itself wronged.

Counsel admit that this suit cannot be maintained without the presence of the Brush Company. Has that presence been secured, and jurisdiction obtained of this necessary party, by merely naming it as a plaintiff,—against its will and authority,—and will this court thereupon proceed to adjudicate its rights in its absence, and without appearance or process, because, forsooth, the appellees gladly would, but cannot, reach it by process if they made the Brush Company a defendant? This is little less than legal heterodoxy.

Counsel claim that, if the Brush Company be dismissed, there will be a wrong suffered by the appellees without a remedy afforded. But we think that, instead of a wrong without a remedy, the case is one where a right is asserted without warrant of law, and an attempt made through such unwarranted assertion to obtain dominion and control over the property of another,—by mere force of assertion,—without submitting the claim to the adjudication of a court having jurisdiction over the person against whom the claim is made.

As well assert title to realty on the strength of an alleged covenant to convey. This is not a failure of justice; it is a failure to sue in the right forum. Nor is it a wrong without a remedy, but an alleged wrong which, when properly presented in a court which has jurisdiction of the defendant Brush Company, will be adjudicated. Whether or not the California Company has the rights it now asserts against the Brush Company, and seeks to secure without trial or judgment, but by force alone of its own writ of execution, will then be determined.

There are several other extravagant positions advanced by counsel for appellees, but, in view of a recent decision of the supreme court of the United States, made since this appeal was taken, we think the whole controversy is closed, and disposed of in favor of the Brush Electric Company. The case is entitled *Pope Manuf'g Co. v. Gormully & Jeffery Manuf'g Co.*, 144 U. S. 248, 12 Sup. Ct. Rep. 641.

The question involved was whether a patentee could split up his patent into as many different parts as there are claims, and vest the legal title to those claims in as many different persons, so as to enable them to sue for an infringement? Upon the authority of *Gayler v. Wilder*, 10 How. 477, and *Waterman v. Mackenzie*, 188 U. S. 252, 11 Sup. Ct. Rep. 334, the court, in affirmance of those leading authorities, holds the interest conveyed or assigned was that of a mere license. The court says that, while the question involved in *Gayler v. Wilder* was different from the one involved in this case, "the trend of the entire opinion is to the effect that the monopoly granted by law to the patentee is for one entire thing, and that, in order to enable the assignee to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held in the territory specified, and that any assignment short of that is a mere license." The court then cites with approval the remarks of Chief Justice TANEY in *Gayler v. Wilder*, that the "legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it."

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

KNOWLES, District Judge. In this case the California Electric Light Company, which will be hereafter designated as the "California Company," and San Jose Light & Power Company, which will be hereafter called the "San Jose Company," desiring to bring an action against the Electric Improvement Company of San Jose, which will be hereafter called the "Electric Improvement Company," for an infringement of letters patent No. 219,208, for an improvement in electric arc lamps, granted to one Charles F. Brush, joined with them as a coplaintiff the Brush Electric Company, which will hereafter be called the "Brush Company." The Brush Company is the owner of said patent by virtue of an assignment from said Charles F. Brush. The Brush Company granted one William Kerr an exclusive license to use and sell, but not to manufacture, any and all inventions and devices under any and all patents owned or controlled by it, or which it might become possessed of, pertaining to dynamo electric machines, lights, lamps, carbons, and similar apparatus, for the full end of the term of such patents, and all extensions and reissues thereof, in the states of California, Oregon, Nevada, and territory, now state, of Washington. William Kerr, with the written consent of the Brush Company, assigned this license to the California Company. This contract was made with the said Brush Company when it was designated as the "Telegraph Supply Company." By an act of the legislature of Ohio, under whose statutes this corporation was created, the Telegraph Supply Company had its name changed to that of the "Brush Electric Company." On the 27th day of March, 1882, the California Company granted to a corporation known as the San Jose Brush Electric Light Company an exclusive license to use, rent, and sell

to others for use and sale, the said lamp described in said letters patent No. 219,208, within the city of San Jose and the town of Santa Clara, in the state of California. Subsequently the San Jose Electric Light & Power Company was incorporated, and the said San Jose Company conveyed to it the license granted to it. After the said suit was instituted, the Brush Company came into the circuit court for the northern district of California, where the same was pending, and moved the court to dismiss the action, as far as it was concerned, on the ground that its name had been used without its consent, and without authority or right. The California Company resisted this. The question is here presented as to the right of the California Company to use the Brush Company's name in instituting within the state of California a suit for the infringement of said letters patent. This case was before this court on a motion to dismiss the appeal of the Brush Company, pending in this court, on the ground that the order of the circuit court overruling the motion of the Brush Company to dismiss the cause as to it was not a final judgment. Upon considering the question then presented, we held that the order overruling said motion was a final judgment upon an important collateral matter, and appealable. 51 Fed. Rep. 557. What was it a final judgment upon? It was a final judgment upon the point as to the right of the California Company in such an action to join as a coplaintiff with it the Brush Company. There was some point made in the argument as to the manner in which this question should be determined, and it was intimated that the California Company should institute suit against the Brush Company in Ohio, under whose laws it was created, to determine the same. The Brush Company saw fit, however, to come into the circuit court of California, appeal to its jurisdiction, and ask to have it determined by it. It did so, and determined adversely to the Brush Company, and we are here called upon to review that judgment.

Upon the hearing of the motion to dismiss, numerous affidavits were introduced upon the point that the Brush Company had given the California Company an express permission to use its name in all suits within California, Nevada, Oregon, and Washington for an infringement of said patent. In these it appears that in one suit it had given such permission, namely, against the Electric Improvement Company of San Francisco, and also that this company owned 3,750 out of the 5,000 shares of capital stock of said Electric Improvement Company. From this fact the California Company contends that the Electric Improvement Company is but the agent or creature of the San Francisco Company, and that a permission to use the Brush Company's name in suing one included the other. While the facts are sufficient to warrant the suspicion that the former is but the agent of the latter, I do not think the evidence presented warrants the court in finding as a fact that such is the case. There is a statement in the affidavit of Roe to the effect that it was understood between the Brush Company and the California Company that all infringers on the Pacific coast should be actively and earnestly prosecuted by both the Brush Company and the California Company, and that they should join in all such actions. This was corrobor-

rated by the affidavits of Kerr and Cornwall. The affidavit of N. S. Possons, who was for some years superintendent of the Brush Company, is to the effect that there was an understanding between the officers of the Brush Company that it would sustain and support the California Company in all legal or other efforts, made in court, or out of it, to defeat infringing on machinery which said California Company was using or selling under the contract made by it with said Brush Company. The facts out of which any understanding arose with the California Company and the Brush Company should have been stated. Whether or not there was any such an understanding was the very point at issue, and it was for the court, under the evidence, to determine whether such an understanding had been reached, and not for the witness. A witness cannot testify to a conclusion of law. Whart. Ev. 507. As a rule, witnesses must state facts, and not draw conclusions from the evidence, or give opinions. Id. 510, and note. The question did not require the opinion of an expert. Hence the witness had no right to state the conclusions he reached from the evidence. The evidence of Possons does not go to the point of any agreement between these companies. The officers of the Brush Company may have agreed among themselves to the effect stated, but this would not prove any agreement between the said two companies. After reviewing the evidence, we cannot find that there was any express agreement entered into between the California Company and the Brush Company to the effect that the former might use the name of the latter in suits for infringements of said letters patent, instituted within the states named in the license to it. The burden of proof was upon the California Company to establish this fact. Was there any implied agreement to that effect arising out of the contract of license between the two companies, and the relations thereby created between them? As I have stated, the grant was of the exclusive right to use and sell within the states named. This, under the authorities, was perhaps nothing more or less than a license. Walk. Pat. § 296; *Hamilton v. Kingsbury*, 17 Blatchf. 264-270; *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334.

There is no foundation for the claim of appellant that the contract between said companies amounted only to the constituting of the California Company the agent for the selling of the Brush Company's devices and machines, which agency might be revoked or modified by the Brush Company, its principal, at any time. The affidavits of Potter, Leggett, and Stockley, as to the intent of the contract with Kerr, and hence with the California Company, made August 2, 1879, are subject to the same criticism passed above upon the affidavit of Roe. It was not for them, but the court, to say what was the intent of the parties to that contract. This the court should determine from the language thereof, if possible. The exclusive right granted to a person other than the patentee to use and sell a patented device within a named district of country excludes the owner of the letters patent from selling the same or using the same in that region. A licensee does not use or sell in the name of the owner of the patent, but in his own name, and for his own benefit. Having

an exclusive license to use and sell, no one has a right to use or sell in the country of such a licensee.

It will thus be seen that the licensee in this case received very important rights by virtue of its grant. If it cannot use the name of its licensor in an action to protect its rights against an infringement of the patented device or improvement it has the exclusive right to use and sell, we have a case of a person possessing important rights with no legal power to protect them; for a licensee cannot sue in his own name for an infringement of the patent concerning which he has a license. *Gayler v. Wilder*, 10 How. 477; *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334. "When a person grants anything to another he impliedly grants him the means of enjoying it." 2 Washb. Real Prop. 302. The sale of personal property located upon the land of the vendor impliedly grants to the vendee the right to enter upon the land in order that he may take possession of and remove this property purchased. *Rogers v. Cox*, 96 Ind. 157. These rules of law were established by courts to the end that justice should be subserved. The assignment of a chose in action at common law was considered to be in the nature of a declaration of trust, the assignor holding the legal title for the benefit of the assignee. 2 Bl. Comm. 442. In *Littlefield v. Perry*, 21 Wall. 205-223, the supreme court held that a patentee retained the legal title in trust for his licensee. The right of an assignee of a chose in action to sue the debtor grew out of an express or implied contract to that effect. At common law the assignment of a chose in action was accompanied by an agreement that the assignee should have the right to sue, in the name of the assignor, the debtor. 2 Bl. Comm. 442. It is well known that it was not usual to reduce this agreement to writing, and that it was an implied, rather than express, agreement, as a rule. An implied agreement or contract is "such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." Id. 443. We find that in certain cases the licensee makes with the licensor an express contract to the effect that he may use the name of the licensor in suits for an infringement of a patent concerning which he has a license, in order that his rights may be protected. In one of the briefs of appellant this agreement is spoken of as one of frequent occurrence. This matter of using the name of the owner of a patent by the licensee is a right, then, resting in contract. In speaking of the power of a licensee to seek redress for a wrong inflicted upon him by the infringement of the patent concerning which he has a license, the language of the courts generally is that he cannot sue, in his own name, an infringer. This would imply that he might sue in the name of the legal owner of the patent for that purpose. This is about the same language as was used at common law in regard to an assignee of a chose in action. He could not sue the debtor in his own name, but he could use the name of the assignor in bringing an action against the debtor without the assignor's consent. *Welch v. Mandeville*, 1 Wheat. 233. In the case of *Littlefield v. Perry*, *supra*, the supreme court did not hesitate to maintain an action in the name of the licensee for an infringement of a patent, where

the patentee was the infringer. In the case of *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, the supreme court held that a licensee might sue in his own name when it was necessary to prevent an absolute failure of justice. This is the effect, I take it, of the language of the court, there used.

These cases show how far courts have been willing to go in this matter to subserve the ends of justice. The Brush Company, being an Ohio corporation, can be sued only in that state, and hence could not be made a party defendant in this suit. Unless the California Company can use the name of the Brush Company herein, it has no means of protecting its rights. I think the same reasons that induced courts to hold that a grant gives the right to enjoy the thing granted, that implies a license to enter upon the lands of another to remove personal property thereon which the landowner has sold, and that implies a contract on the part of the assignor of a chose in action that the assignee may use his name in a suit thereon, should induce courts to hold, in a case like the one at bar, that there is an implied contract on the part of the owner of a patent, conveying an exclusive license, that the licensee should have the right to use his name in order that he may protect his rights. The appellant urges that the same rule should not apply in this case as in a chose in action, because the assignee of such an obligation receives the whole beneficial interest in the same. I cannot see, however, why the rights of an exclusive licensee, having as extensive interests as those of the California Company, should not be protected in law, as well as the assignee of a chose in action, and why the law would not imply the right to use the name of the grantor or assignor in one case as well as the other. The same considerations that induced courts to hold that such a contract was implied in one would apply to the other. In some cases it is held that in a suit in equity against an infringer an exclusive licensee and the patentee must both be made parties. *Hammond v. Hunt*, 4 Ban. & A. 111; *Huber v. Sanitary Depot*, 34 Fed. Rep. 752. If the right did not rest in contract to make the patentee a party plaintiff in such a suit, a licensee such as the California Company would be powerless, because the Brush Company could not, as I have stated, be made a party defendant, being without the jurisdiction of the court. Reason and justice would dictate that, under such circumstances, the law should imply or presume such a contract between the parties. As far as I have been able to ascertain, it has been always held, whenever the question has been presented, that an exclusive licensee has the right to use the name of the owner of the legal title to the patent in suits to protect his rights. In the case of *Goodyear v. Bishop*, 4 Blatchf. 438, NELSON, J., held that, where a suit was brought at law against an infringer in the name of the owner of a legal title to the patent, for the benefit of the licensee, a motion, made with the consent of the owner of the patent, to dismiss the action, could not be sustained, and the same was overruled. Appellant affirms that in this case there was an express contract that the licensee might use the name of the owner of the patent. This is not the language of the contract referred

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to in that decision. It was that the owner was to sue infringers, not that the licensee might use his name. If such was the language of the contract, this would show, however, that this right was the subject of contract; and, where a matter is the subject of contract, there may arise from circumstances an implied contract, which will be as binding as an express contract. In the case of *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224, it was held by Judge SHIPMAN that a licensee, whenever necessary to assert his rights, has *prima facie* an implied power to use the name of the owner of a patent in which he has a license in any action against an infringer for that purpose. It is contended because the court found in that case that the Thomson-Houston Company had a controlling amount of the capital stock of the Brush Electric Company, that therefore this latter company was a party to the action, and that Judge SHIPMAN in effect so held. I think this is a mistake. While the learned judge says that really the Brush Company was a codefendant with the Thomson-Houston Company in the suit, I do not suppose he really meant this as a matter of law in that case, for he says in the next sentence: "But, being a resident of Ohio, it cannot be served with process as a codefendant in this suit." What he did mean, I apprehend, was that the Brush Company was in such a condition that, if service could be made upon it, that company would be a codefendant. The case should be considered, however, in view of the issue presented. The Brush-Swan Company brought an action against the Thomson-Houston Electric Company for an infringement of the very patent presented in this case. In this action it joined with it the Brush Company as a coplaintiff, without its consent. The Brush Company, as in this case, came into court, and moved to strike out its name as a party complainant, because the bill had been filed without its consent or authority. This motion the court denied. This motion was not denied because the Brush Company was already a defendant in the case, but because the Brush-Swan Company had, under the circumstances, the implied power to use against its will the Brush Company's name in such a suit against the Thomson-Houston Company. It would not be a very satisfactory reason to assign for refusing to strike out the Brush Company's name as a plaintiff that it was a codefendant with the Thomson-Houston Company in the same case already, and I do not understand the learned judge to so decide. The case is one fully in point in this case. The Brush Company would undoubtedly have the right to be protected from any costs that might be adjudged against it, or incurred in the management of the suit in question. The court, upon proper motion, would without doubt compel this protection. The usual practice is in such cases to require a sufficient bond of indemnity. Under such conditions there would be an implied contract on the part of the Brush Company to permit the use of its name by the California Company in the suit at bar.

It is contended by the Brush Company that, it not in fact owning the title to the patent, and it not having been obtained at the time the Brush Company, under the name of the Telegraph Supply Company, made

its contract of license with William Kerr, the assignee of the California Company, therefore nothing in fact passed by that contract; that it should be treated as a sale of personal property that was not in existence. But an assignment of a patent is good if made before the patent is actually obtained. *Gayler v. Wilder*, 10 How. 477. The same doctrine is affirmed in *Littlefield v. Perry*, *supra*. In this case, although the patent had not been obtained at the time of the granting of the license, it was afterwards obtained, and the Brush Company became the owner thereof. The California Company has been, with the knowledge of the Brush Company, conducting an extensive business pertaining to the patent named, relying upon its license to use and sell the same. According to the affidavit of Roe, the California Company has expended in the electric light business in the city of San Francisco, \$892,531.31. It has purchased from the Brush Company electrical apparatus for which it has paid said company \$683,741. It has and is conducting an extensive business in such apparatus within the states named in its contract of license, and has sold to very many other companies such apparatus. The two companies have acted and conducted business since the Brush Company became the owner of the patent named, up to the present time, upon the theory and basis that the license granted was valid. This is emphasized in the letters of the Brush Company to the California Company in regard to the suit against the Electric Improvement Company of San Francisco. The Brush Company, in writing to the California Company about the same, calls it "your suit," namely, the California Company's suit. The California Company is required to pay the expenses of the attorneys the Brush Company sends to try the same. Many things more might be stated as to what these letters disclose upon this point. There can be no doubt but that the Brush Company considered and treated the California Company as its exclusive licensee to use and vend said patented device. In the terms of the grant of license it was contemplated that the license should extend to any patents which the Brush Company should thereafter acquire pertaining to dynamo electric machines, lamps, carbons, and similar apparatus. Under such circumstances, the Brush Company should be estopped to deny the validity of the license granted the California Company on the ground that it did not own said patent, or that it had no existence at the time the grant of license was made, or on the ground that it had no authority at that date to grant the license. To hold otherwise would work a most extensive fraud upon the California Company. The sale of a patent right contains an implied warranty as to title, and an after-acquired title obtained by the vendor inures to the vendee. *Faulks v. Kamp*, 3 Fed. Rep. 898; *Curran v. Burdsall*, 20 Fed. Rep. 835. In the case of *Gottfried v. Miller*, 104 U. S. 520, the supreme court applied this doctrine to a case where the purchaser of a machine had only a license to use it. The same rule that applies to estoppels where a vendor of a title in fee to land subsequently acquires the full title, which he did not possess at the time of sale, applies to cases of the sale of patents, according to said case. The rule in such cases would fully cover the

case at bar, and maintain the title of the California Company by way of estoppel. *Smith v. Sheeley*, 12 Wall. 358.

The Brush Company claims that the California Company has assigned all its rights in the license in the city of San Jose and town of Santa Clara to the San Jose Company, and that, as this action is for an infringement on the said patent in those places, the California Company has no interest in this suit; hence it has no right to use the name of the Brush Company therein. Again, the Brush Company urges that the California Company had no right to divide its license into parts, and assign a part to the said San Jose Company. These two positions are inconsistent. I think the latter position is the correct one. Unless there is a manifest intent in the contract of license that the licensee is to have the power to divide up his license into parts, and assign such parts in severalty, no such right exists. Walk. Pat. § 310. As a general rule, it may be said that a license is not divisible. This contract should be construed with reference to this characteristic of this class of rights. Considering this, and I think the term "assigns," as used in the license under consideration in this case, must be construed as the right to assign the license as an entirety, and not in parts. This question was considered in the case of *Brooks v. Byam*, 2 Story, 525, and there it was held that the word "assigns" in a license must be so construed where it did not clearly appear that there was an intention manifested in the contract of license to establish a different rule. The assignment to the San Jose Company, then, was without authority, and the rights of the California Company in San Jose and Santa Clara still remain with it. The fact that it has undertaken to make an assignment which it had no authority to make will not work any forfeiture of its rights. There is no stipulation in the contract of license that any such action shall work a forfeiture of the rights granted by it. Under such circumstances, there is no forfeiture. Walk. Pat. § 308; *Purifier Co. v. Wolf*, 28 Fed. Rep. 814.

There is some claim by the California Company that the San Jose Company is an agent which it has created, or caused to be created, with a view of extending the business of the sale of the lamps named in the patent. If so, I do not see that it is a necessary party to this action. While it may be true that the San Jose Company is not a proper party to this action, yet I do not see how this fact can prevent the California Company from exercising its right to join with it therein the Brush Company. For the reasons assigned we hold that the judgment of the court below was correct, and should be affirmed, and it is so ordered.

BRUSH ELECTRIC CO. *et al.* v. ELECTRIC IMP. CO.

(Circuit Court, N. D. California. October 3, 1892.)

No. 10,764.

1. PATENTS FOR INVENTIONS—PIONEER INVENTOR—ELECTRIC LAMPS.

Letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush, for an electric lamp having two or more pairs of carbons, in combination with mechanism constructed to separate the pairs dissimultaneously or successively, thus producing a steady light for a long period of time, cover a pioneer invention, and are entitled to a liberal construction.

2. SAME—LIMITATION OF CLAIMS—PRIOR ART.

The invention was not a mere improvement or modification of the single-carbon lamp previously invented by Brush, nor was there anything to limit the scope thereof in the prior state of the art, either generally or as shown in the patent to M. Day, Jr., the French patent to Denayrouse, or the patented Jablochhoff candle. *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 833, and *Brush Electric Co. v. Western Electric Light & Power Co.*, 48 Fed. Rep. 536, followed.

3. SAME—FUNCTIONAL CLAIMS.

The fact that the claims purport to cover broadly all forms of mechanism constructed to separate the two or more sets of carbons dissimultaneously or successively does not render the patent void as being for a function or result, since particular means are described in the specifications and referred to in the claims; and the patent covers such means or their substantial equivalents. *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 833, and *Brush Electric Co. v. Western Electric Light & Power Co.*, 48 Fed. Rep. 536, followed. *O'Reilly v. Morse*, 15 How. 62, distinguished.

4. SAME—ABANDONMENT.

No limitation was placed upon the Brush patent by the fact that his claims, as first presented, were rejected as functional, and that the language was twice slightly changed, for the file wrapper shows that there was no change in the essential features of the claims, and that the patent office, after a contest, finally yielded to the patentee's views.

5. SAME—INFRINGEMENT.

The Brush patent is infringed by the lamp made under letters patent No. 480,722, issued June 24, 1890, to James J. Wood, in which the pairs of carbons are separated dissimultaneously or successively, notwithstanding the fact that this result is accomplished in the Brush lamp by a clutching device, operated directly by the electrical current, while in the Wood lamp it is produced by the interposition of clock mechanism, which is brought into action and controlled by the current.

In Equity. Suit by the California Electric Company (licensee of the Brush Electric Company) and others against the Electric Improvement Company, the Brush Electric Company being joined as a plaintiff. A preliminary injunction was granted. 45 Fed. Rep. 241. Decree for complainants.

M. M. Estee, J. H. Miller, and L. L. Leggett, for complainants.

W. F. Herrin and R. S. Taylor, for respondent.

HAWLEY, District Judge. This is a suit in equity for the infringement of letters patent No. 219,208, granted to Charles F. Brush, September 2, 1879, for an improvement in electric arc lamps. The Brush Electric Company is the owner of the legal title of said patent, and the

California Electric Light Company has an equitable title as the exclusive licensee for the states of California, Nevada, Oregon, and Washington. The defendant is charged with infringing this patent by the use of the Wood lamp under letters patent No. 430,722, granted to James J. Wood, June 24, 1890, for new and useful improvements in electric arc lamps. A preliminary injunction was ordered by Judge SAWYER, upon the authority of *Brush Electric Co. v. Western Electric Light & Power Co.*, 43 Fed. Rep. 533, and *Brush Electric Co. v. Ft. Wayne Electric Co.*, 44 Fed. Rep. 284. While declining to discuss the questions involved in this case, the learned judge expressly indorsed the views announced in the cases referred to, and stated that, in his judgment, "the Brush patent is valid, and the first six claims are infringed by the Wood lamp." 45 Fed. Rep. 242. The case is now presented upon the final hearing upon the testimony taken before the examiner.

The validity of the Brush patent has, in addition to the cases referred to, been sustained in *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 826, and *Brush Electric Co. v. New American Electrical Arc Light Co.*, 46 Fed. Rep. 79. The learned counsel who argued this case for the defendant insists "that, notwithstanding all the suits that have been brought, and all the actions that have been taken, the questions arising in this case have not been settled or adequately presented or considered," and he therefore respectfully asks that all the points involved should be again independently considered and decided. Complainants claim that the principles announced and conclusions reached in the prior decisions are correct, and should be followed.

Mr. Brush's invention, as stated in his specifications—

"Relates to electric lamps or light regulators; and it consists—*First*, in a lamp, having two or more sets of carbons, adapted by any suitable means to burn successively,—that is, one set after another; *second*, in a lamp having two or more sets of carbons, each set adapted to move independently in burning and feeding; *third*, in a lamp having two or more sets of carbons, adapted each to have independent movements, and each operated and influenced by the same electric current; *fourth*, in a lamp having two or more sets of carbons, said carbons, by any suitable means, being adapted to be separated dissimultaneously, whereby the voltaic arc between but a single set of carbons is produced; *fifth*, in the combination with one of the carbons or carbon holders of a lamp employing two or more sets of carbons, as above mentioned, of a suitable collar, tube, or extended support, within or upon which the carbon or carbon holder to which it is applied shall rest and be supported."

He states at the outstart that his—

"Invention is not limited in its application to any specific form of lamp. It may be used in any form of voltaic light regulator, and would need but a mere modification in mechanical form to be adaptable to an indefinite variety of the present known forms of electric lamps. My invention comprehends, broadly, any lamp or light regulator where more than one set of carbons are employed, wherein—say in a lamp having two sets of carbons—one set of carbons will separate before the other. For the purpose merely of showing and explaining the principles of operation and use of my invention, I shall describe it in the form

shown in the drawings, as applied to an electric lamp of the general type shown in United States letters patent No. 208,411, granted to me May 7, 1878, reissued May 20, 1879, and numbered 8,718. The leading feature of this type of regulator is that the carbon holder has a rod or tube which slides through or past a friction clutch, which clutch is operated upon to grasp and move said carbon rod or holder, and thus to separate the carbons, and produce the voltaic arc light."

Before quoting further from the specifications, a brief reference to the prior state of the art will be made, in order that the true character and extent of this invention may be better understood. In 1810, Sir Humphrey Davy, with the aid of a galvanic battery of 2,000 cells, produced a light between two pencils of charcoal. This seems to have been the first dawn of a discovery which gave to the scientists of the world the thought of electric lighting. Unfortunately for Davy, he had no mechanism to adjust his electrodes, and, owing to the great cost of his battery, and the rapid combustion of the charcoal points,—lasting only a few minutes,—his invention was of no commercial value for practical use. In 1836 the more powerful battery of Daniell was tried. In 1839 the nitric acid battery of Grove was invented. In 1842 the Bunsen battery was produced. No practical result, however, in the way of advancement was attained until 1844, when Foucault substituted pencils made of hard gas carbon for the charcoal pencils of Davy, and thereby extended the duration of the light to some extent. But the expense was still too great to justify any general use of the light, and it was confined principally to laboratories, and for the experimental uses of scientists. In 1848, Archeran devised an imperfect regulating device, by means of which two vertical carbon electrodes were maintained in the same relative position. In 1857 the Holmes & Nollett machines were employed in producing the arc electric light in some of the lighthouses of France and England by the use of the Serrin lamp, which was a clockworking lamp, burning one pair of carbons, with a very expensive apparatus. It was not until 1870 that a current of sufficient strength to render electric lighting commercially practical by being generated at a small expense was attained. This was brought about by the invention of the dynamo electric machine of Gramme. None of the arc lamps invented up to this time were suitable for the purpose of general illumination. The defendant has set up, for the purpose of showing the prior state of the art, the following lamps and patents: The Archeran lamp, produced in 1848; the English patent for the Staites lamp in 1853; the Hart lamp, introduced in 1858; the Browning, Foucault, and Serrin lamps, in use prior to 1860; the patent issued in England to Louis Denayrouse, August 21, 1877; the United States patent to M. Day, Jr., February 24, 1874. The French patent granted to Khotinzky, March 19, 1875; the Rapiéff lamp, described in the Telegraphic Journal and Electrical Review of London, August 15, 1878; and the French patent for the Mersanne & Bertins lamp.

The patent of M. Day, Jr., is pleaded as an anticipation of the Brush patent; but in the argument defendant admitted that it was not an anticipation in a technical sense, and was only relied upon as showing the state of the art. The Day patent was held not to be an anticipation of

any of the claims of the Brush patent in *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 833. Judge GRESHAM correctly said "it was unlike the Brush lamp, both in construction and mode of operation," and the same view is expressed by BROWN, J., in *Brush Electric Co. v. Western Electric Light & Power Co.*, 43 Fed. Rep. 536, to which reference is here made for a description of the Day patent, the French patent of Denayrouse, and the Jablochhoff candle in the patent of Jablochhoff, as the views therein expressed sufficiently, and, in my judgment, correctly, answer the argument of defendant's counsel in relation thereto. None of the devices set up by defendant contain the principle of the Brush patent. All of them were presented by the defendant in the several prior suits instituted by the Brush Electric Company, except the French patent for the Mersanne & Bertins lamp, which does not introduce any new principle tending to limit the field of invention that was open to Brush. BROWN, J., in referring to the inventions prior to those of Mr. Brush, very properly said:

"Most of them, however, were directed to improvements in the material of which the carbons were made, in the brilliancy and steadiness of the light itself, to improvements upon the dynamos, and in the mechanism by which the carbons were held in the same relative position during the process of combustion. One difficulty, however, remained to be overcome. The electrical resistance of the carbons was such as to preclude the employment of very long rods, and their consumption by burning away was hastened by their adjacent ends becoming highly heated to a considerable distance from the arc. This difficulty was partially remedied by covering the carbon pencils with a thin film of copper, electrically deposited thereon, by which the electrical resistance of the carbons was materially decreased, much longer rods were possible, and the light maintained continuously for from 6 to 10 hours. This was insufficient, however, for all-night lighting, and necessitated the extinguishment of the lamp, and a renewal of the carbons at some time during the night, in order to keep up a continuous light."

In tracing the history of the prior state of the art from 1810, it will be observed that scientific men were continually at work trying to invent some kind of a lamp that would automatically give such a light as would be suitable for general use, and also to discover, if possible, some means whereby the burning of the light could be further prolonged. Early in 1878, Mr. Brush invented a lamp which gave a steady light, and was suitable for general use; but only one could be burned on a single circuit. Shortly afterwards he invented the series lamp, whereby two or more lamps could be operated at one and the same time upon the same circuit. There still remained another and more important discovery to be made, which, as before stated, had engaged the attention of the brightest inventive minds for many years, without any successful results, viz., how to produce a long-continued light automatically without renewing the carbons. This discovery in the open field of invention was made by Mr. Brush in 1879, and for which he secured the patent in controversy, and gave to the world the most practical and useful lamp known to electrical science, and which has proven to be of great value and benefit to the public. In the specifications he said, among other things:

"I do not in any degree limit myself to any specific matter or mechanism for lifting, moving, or separating the carbon points or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished. The lifter, D, in the present instance, is so formed that when it is raised it shall not operate upon the clamps, C, C', simultaneously, but shall lift first one and then the other, (preferably the clamp, C, first, and C' second, for reasons which will hereinafter appear.) This function of dissimultaneous action upon the carbons or their holders, whereby one set of carbons shall be separated in advance of the other, constitutes the principal and most important feature of my present invention. In the lamp shown in the drawings the lifter, D, is actuated and controlled through the agency of magnetic attraction due to the influence of the current operating the lamp, and this is accomplished as follows: One, two, or more spools or hollow helices, E, of insulated wire, are placed in the circuit. Within whose cavities freely move cores, E'. The electric current, passing through the helices, E, operate to strongly draw up within their cavities their respective cores, E', in the same manner as specified in my former patent, above referred to. The cores, E', are rigidly attached to a common bar, E², and the upward and downward movement of this bar, due to the varying attraction of the helices, E, is imparted by a suitable link and lever connection, E³, E⁴, to the lifter, D. By this connection the lifter will have an up and down movement in exact concert with cores, E', and it is apparent that this connection between magnet and lifter may be indefinitely varied without any departure from my invention; and therefore, while preferring for many purposes the construction just specified, I do not propose to limit myself to its use. * * * The operation of my device, as thus far specified, is as follows: When the current is not passing through the lamp, the positive and negative carbons of each set, A, A', are in actual contact. When, now, a current is passed through the lamp, the magnetic attraction of the helices, E, will operate to raise the lifter, D. This lifter, operating upon the clamps, C, and C', tilts them, and causes them to clamp and lift the carbon holders, B, B', and thus separate the carbons, and produce the voltaic arc light; but it will be especially noticed that the lifting and separation of these carbons is not simultaneous. One pair is separated before the other; it matters not how little nor how short a time before. This separation breaks the circuit at that point, and the entire current is now passing through the unseparated pair of carbons, A'; and now, when the lifter, continuing to rise, separates these points, the voltaic arc will be established between them, and the light thus produced. It will be apparent by the foregoing that it is impossible that both pairs of carbons, A, A', should burn at once, for any inequality of weight or balance between them would result in one pair being separated before the other, and the voltaic arc would appear between the last-separated pair. This function, so far as I am aware, has never been accomplished by any previous invention; and by thus being able to burn independently, and one at a time, two or more carbons in a single lamp, it is evident that a light may be constantly maintained for a prolonged period, without replacing the carbons or other manual interference. In the form of lamp shown, I can, with 12-inch carbons, maintain a steady and reliable light, without any manual interference whatever, for a period varying from fourteen to twenty hours."

The claims of the patent are as follows:

"(1) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as and for the purpose specified. (2) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, and establish the electric light between the members of but one pair, (to wit,

the pair last separated,) while the members of the remaining pair or pairs are maintained in a separated relation, substantially as shown. (3) In an electric lamp having more than one pair or set of carbons, the combination, with said carbon sets or pairs, of mechanism constructed to impart to them independent and dissimultaneous separating and feeding movements, whereby the electric light will be established between the members of but one of said pairs or sets at a time, while the members of the remaining pair or pairs are maintained in a separate relation, substantially as shown. (4) In a single electric lamp, two or more pairs or sets of carbons, all placed in circuit, so that when their members are in contact the current may pass freely through all said pairs alike, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as and for the purpose shown. (5) In an electric lamp, wherein more than one set or pair of carbons are employed, the lifter, D, or its equivalent, moved by any suitable means, and constructed to act upon said carbons or carbon holders dissimultaneously or successively, substantially as and for the purpose shown. (6) In an electric lamp, wherein more than one pair or set of carbons are employed, a clamp, C, or its equivalent, for each said pair or set, said clamps, C, adapted to grasp and move said carbons or carbon holders dissimultaneously or successively, substantially as and for the purpose shown. (7) In an electric lamp, the combination, with a carbon holder and the mechanism moving said carbon holder, of a lifter or support, K, or its equivalent, constructed to operate in compelling the said moving mechanism to sustain the weight of the carbon holder after its carbon is sufficiently consumed or removed, substantially as and for the purpose described."

It is claimed that this invention of Mr. Brush, as covered by his patent, is simply that of an attachment or modification of the single-carbon lamp previously invented by him. This claim cannot be sustained. The Brush double-carbon lamp operates in a materially different way, and produces different results, from any of the prior inventions. The single-carbon lamp invented by Brush had but one solenoid or magnet. His double-carbon lamp has two, so that it controls two pairs of carbons, instead of one. In the single-carbon lamp there is but one clutching and feeding mechanism, and in the double lamp there are two, and these are so combined with the other elements, and arranged in such a manner, that they perform new duties in the double lamp. Each clutch, it is true, lifts its respective carbon, establishes the arc, regulates its light, and controls the feed of the carbons, as was done in the single-carbon lamp; but, in addition to this, they serve to bring the idle pair of carbons into contact, and then separate them, and establish the arc at an exactly premeditated time, immediately after the first pair of carbons have consumed, and at which time the carbons of a single lamp would have to be manually renewed. By this new function of the clutches and the feeding mechanism, a new, distinct, and important result is obtained. The successive burning of the carbons, and a uniform and steady light, is secured throughout the consumption of both pair of carbons, extending from 14 to 20 hours, in such a manner that a steady and reliable light is produced between one pair of carbons until they have been consumed, and an equally good light between the second pair of carbons until they have been consumed. This new, successful, and beneficial result is automatically accomplished by the dissimultaneous or successive arc-forming separation of the two

pair of carbons. Another new function upon the clutching and feeding mechanism is secured by maintaining the carbons of one pair separated during the time that the other pair are consuming, so that the current may be sent through either pair whenever they are called into operation. Another function is imposed upon the duplex clutching and feeding mechanism of the lamp, which is to automatically adjust the two pairs of carbons when the current is first passed through the lamp preparatory to the formation of the arc, so that the arc is formed between only one pair of carbons, while the other pair is separated until required to burn. Still another function is imposed by the maintenance of arcs of equal lengths between the two pairs of carbons, and this is attained by compelling the regulating mechanism to support and carry the two carbon holders at all times during the operation of the lamp. It is evident at a glance that it required more than a mere attachment to his single-carbon lamp to bring into existence the idea of imposing upon the regulating mechanism of a lamp the additional duties, never before imposed, which produces a result never before accomplished.

Counsel for defendant has ably, intelligently, ingeniously, and exhaustively discussed the question as to the construction of this patent from three different standpoints, which are respectively denominated by him (1) "the complainant's construction," (2) the "liberal construction," (3) the "legal construction." His contention is: (1) That under complainants' construction the invention of Mr. Brush did not consist in the mechanism which he described, but the "invention relates to electric lamps or light regulators, and it consists, first, in a lamp, having two or more sets of carbons, adapted by any suitable means to burn successively,—that is, one set after another;" that, taken in this broad unlimited sense, the patent is void. (2) That the liberal construction takes the real invention disclosed in the patent as the true measure of its scope, notwithstanding any language contained in it, which would operate of itself to give the claims either a wider or a narrower application; and that, taking the patent in this sense, the Wood double lamp used and operated by defendant, is not an infringement. (3) That the legal construction applies to the patent the rule that any limitation put upon an application in the patent office by the applicant in order to obtain the patent is binding upon him in favor of the general public, and that, taken in this view, the claims of the patent are not infringed by the Wood double lamp. The proper construction to be given to the patent must be determined by the court, with due regard to the various provisions of the patent law, the principles thereof as interpreted by the courts, and by ascertaining the true meaning of the language used in the specifications and claims of the patent.

TANEY, C. J., in *O'Reilly v. Morse*, 15 How. 62, in summing up the provisions of the act of congress, said:

"Whoever discovers that a certain result will be produced in any art, machine, manufacture, or composition of matter by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains

can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes; and if this cannot be done by the means he describes, the patent is void; and if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown before his invention, or by machinery acting altogether upon mechanical principles. In either case, he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent if he uses means substantially different from those described."

Brush conceived a new idea, and stated it in his specifications in such a plain way that it could be readily adopted and employed by any one "skilled in the science to which it appertains," so as to lead to a practical and useful result. He clearly described his machine,—a lamp,—and the principles thereof by which it could be distinguished from all other inventions, and stated in concise language what he considered to be the best modes to apply these principles, and in the claims pointed out the parts and improvements which he claimed as his invention and discovery, and thus brought himself within the essential requirements of the patent law. Section 4888, Rev. St. U. S. In his specifications he described but two modes—but declared that there were other methods—that could be used that would accomplish the same result. His invention not only embraced the lamp, and modes of construction and operation, which he described in his patent, but included all lamps which might be so constructed as to operate in substantially the same way, by any equivalent means, to accomplish the same results. By the express terms of the act of congress, the description of his lamp in his specifications, and the language of his claims, he was entitled to a patent for his "invention or discovery," and his patent should be so construed as to give him all that he invented, discovered, and claimed; nothing more, and certainly nothing less.

In determining the construction that ought to be given to the patent in controversy, it is the duty of the court to ascertain whether Brush was a pioneer or a mere improver in the field of electrical inventions, and constantly to bear in mind that his lamp has met the public want, and has long been in general and successful use.

COXE, J., in sustaining the patent of Swan for a perforated plate for secondary batteries, said:

"In approaching this subject it is well to remember, as the court has frequently had occasion to remark before, that we are dealing with a comparatively new and abstruse art, where the most important results are said to follow from changes apparently of the most unimportant character. Complete success has not been attained, but, if we may credit the statements of those who are entitled to speak *ex cathedra* on the subject, the rapid strides in that direction during the last decade are due to changes of form and material, which, in many other arts, would be insufficient to support invention. The substitution of one material for another in a doorknob is the work of the mechanic; the substitution of one material for another in secondary battery electrodes may solve a problem which will revolutionize the motive power of the world."

This principle is directly applicable to this case:

"Before Brush entered the field, electric lamps had been contrived which burned two sets of carbons alternately, shifting the arc from one pair to the other at short intervals, making a flashing, unsteady, and unsatisfactory light. The problem which Brush set himself to solve was to secure the complete combustion of one pair of carbons before the arc was transferred to the other pair, and the transfer of the arc to the other pair by the automatic action of the electric current, so that no attendant was needed to light the second pair after the first pair was consumed; thus securing a lamp which would give a steady arc light of from 16 to 20 hours' duration. This he accomplished by his mechanism, which caused the dissimultaneous separation of the two pairs of carbons by the automatic action of the electric current actuating his separating devices, and a feeding device for bringing the carbons together as fast as they were consumed.. This long step forward in the art was taken by Brush, and at the present stage of the art it seems that the inexorable law of the electric current requires that, when two or more pairs of carbons are to be burned successively, the carbons of each pair must be dissimultaneously separated, and the arc produced between the pair last separated. Having done this for the art, Brush is entitled to cover all means equivalent to his own for obtaining the same result, one of which is a clock-work feeding device." 44 Fed. Rep. 285.

When the discovery was made and explained to the public, it could readily be seen by other inventive and mechanical minds that the means whereby the result was produced were very simple and plain, and that they could be accomplished by slight changes in the construction of the lamp. As was said by BROWN, J.:

"One of the experimenters succeeds, while all the rest fail. After the one has succeeded, it is easy to go back into the limbo of these old failures, and, in the light of the successful machine, by perhaps slight changes, make these old abortive attempts do the work of the successful inventor. But it is the successful experimenter who has shown them the way, and he, and he alone, who is entitled to be called the inventor, and be protected by a patent."

Brush should not be limited, restricted, confined, or narrowed down to the rights of a mere improver of an old machine. His invention was not, as defendant's counsel claims, "a pretty duplication of parts in an existing apparatus, another barrel on an old gun, a reversible point on an old plow, a supplemental weight in an old clock, an extra reservoir from an old lamp." He was not a mere adapter. He solved the problem in electrical science that had never before been answered by controlling a force of nature in such a manner as to produce a continuous light without the aid of manual assistance, and he discovered and devised the means whereby these results could be successfully accomplished. When this problem was solved, it became apparent to him—as it now is to others—that the same results could be brought about by various changes that might be made in the construction of the lamp. Hence he said:

"I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points, or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished."

After minutely describing the construction and operation of his lamp, he "mentioned but two ways of imparting dissimultaneous motion to the carbons of an electric lamp, viz., through magnetic attraction and through the expensive attraction of heat;" but added that this function of his device might "be accomplished by clockwork or equivalent mechanical contrivance; and in this respect, as before stated, I do not limit my invention." The fact is, as shown by the prior state of the art, and by the testimony taken in this case, that Brush was a pioneer in this branch of electrical construction. Being a pioneer inventor, he is entitled to a broad and liberal interpretation of his patent. *McCormick v. Talcott*, 20 How. 402; *Hammerschlag v. Scamoni*, 7 Fed. Rep. 593; *Telephone Co. v. Spencer*, 8 Fed. Rep. 511; *Machine Co. v. Teague*, 15 Fed. Rep. 390; *Manufacturing Co. v. City of Buffalo*, 20 Fed. Rep. 127; *Manufacturing Co. v. Bancroft*, 32 Fed. Rep. 587; *Machine Co. v. Lancaster*, 129 U. S. 273, 9 Sup. Ct. Rep. 299; *Norton v. Jensen*, (9th Circuit,) 7 U. S. App. 103, 1 C. C. A. 452, 49 Fed. Rep. 859.

The rule is unquestioned that courts have no right to enlarge a patent beyond the scope of its claims as allowed by the patent office, and, when the terms of the claims in the patent are clear and distinct, the patentee is, of course, bound by them. But patents should be "construed liberally, in accordance with the design of the constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain for their own use, not anything which is matter of common right, but what they themselves have created." *Winans v. Denmead*, 15 How. 341, and authorities there cited. "Mere rigid technicalities are to be set aside, unless there is a clear, legal necessity for sustaining them." (*Hamilton v. Ives*, 6 Fish. Pat. Cas. 253, and authorities there cited;) and "courts should not be astute to avoid inventions," (*Darrell v. Brown*, 1 Woodb. & M. 53.)

The contention so earnestly pressed by defendant's counsel, that the first four claims of the patent are void, because they are for functions and results, and not for any specific mechanism, is directly, clearly, and in my opinion, correctly, answered in the previous decisions sustaining this patent. GRESHAM, J., in *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 833, said:

"The specification describes mechanism whereby a result may be accomplished, and the claims are not for mere functions; nor, fairly construed, can it be said that they cover other than equivalent means employed to perform the same functions. The first claim construed in connection with the means described in the specification is for an electric arc lamp in which two or more pairs of carbons are used; the adjustable carbons of each pair being independently regulated by one and the same mechanism, and in which there is a dissimultaneous or successive separation of the pairs, so effected as to secure to the continuous burning of one pair prior to the establishment of the arc between the other pair. Thus construed, the invention claimed is limited to the particular means described in the specification, and their substantial equivalents. The second, third, and fourth claims also refer to the particular mechanism described in the specification for the accomplishment of results covered by those claims. They are for combinations of specific mechanisms, and their substantial equivalents, and not for results, irrespective of means for their accomplishment."

BROWN, J., in *Brush Electric Co. v. Western Electric Light & Power Co.*, 43 Fed. Rep. 537, said:

"While the claims are undoubtedly broad, they ought not to be interpreted as for a function or result, since there is nothing novel in substituting one pair of carbons for another, and thus securing a successive combustion of two or more pairs. It was done long before the Brush patent, and may still be done by manual interference by replacing one set of carbons with another, or by any mechanism which does not involve the dissimultaneous and dissimultaneously separating and feeding movement. What the claims purport to cover are, briefly, all forms of mechanism constructed to separate the two or more pairs or sets of carbons 'dissimultaneously' (a word coined for the occasion, but readily understood) or successively, in order that the light may be established between the members of but one pair or set at a time, while members of the remaining pair are maintained in a separate relation. It is claimed by the defendant, however, that the words 'dissimultaneously or successively,' contained in the first six claims of the patent, refer only to the exact instant—the very *punctum temporis*—of the separation of the carbons; and that, as the Scribner patent, under which the defendants are operating, provides for the initial simultaneous separation of the carbons, there is no infringement, though the light is formed between but one pair, the other being held in reserve to await their consumption. If this contention be correct, then it necessarily follows that Brush, who is acknowledged to be the actual inventor of the double carbon, and whom defendant's expert, Mr. Lockwood, frankly admits (page 243) to be justly regarded as having done more than any one else to make electric arc lighting on a large scale a practical success, secured by his patent the mere shade of an idea,—a wholly immaterial and useless feature,—abandoning to the world all that was really valuable in his invention."

It is true that neither of the judges reviewed the case of *O'Reilly v. Morse*, 15 How. 62, which defendant claims is a "sort of Paradise Lost among cases, * * * universally respected but rarely read;" but it is fair to assume, in justice to the learned counsel who argued the case for the defendants before Judges GRESHAM and BLODGETT, that he did not fail to urge the authority of that case against the validity of the claims of this patent with the same force and ability that characterized his argument in this case. I have carefully read the exhaustive and clear opinion of TANEY, C. J., in *O'Reilly v. Morse*, and the opinions of the supreme court in the *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. Rep. 778, and *Tilghman v. Proctor*, 102 U. S. 707, and also the pioneer case of *Neilson v. Harford*, 8 Mees. & W. 806, decided in 1841, and the other cases cited and relied upon by defendants. In the *Bell Telephone Cases* the case of *O'Reilly v. Morse* was relied upon to defeat the Bell patent. The fifth claim, which was there the subject of a fierce contest, reads as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

WAITE, C. J., in delivering the opinion of the court, said:

"In *O'Reilly v. Morse*, 15 How. 62, it was decided that a claim in broad terms (page 86) for the use of the motive power of the electric or galvanic current called 'electro-magnetism,' however developed, for making or print-

ing intelligible characters, letters, or signs at any distances, although 'a new application of that power,' first made by Morse, was void, because (page 120) it was a claim 'for a patent for an effect produced by the use of electro-magnetism, distinct from the process or machinery necessary to produce it;' but a claim (page 85) for 'making use of the motive power of magnetism, when developed by the action of such current or currents, substantially as set forth in the foregoing description, * * * as means of operating or giving motion to machinery, which may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner, for the purpose of telegraphic communication at any distances,' was sustained. The effect of that decision was, therefore, that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but that its use in that connection could. In the present case the claim is not for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current, in a closed circuit, into a certain specified condition suited to the transmission of vocal and other sounds, and using it in that condition for that purpose. So far as at present known, without this peculiar change in its condition, it will not serve as a medium for the transmission of speech, but with the change it will. Bell was the first to discover this fact, and how to put such a current in such a condition, and what he claims is its use in that condition for that purpose, just as Morse claimed his current in his condition for his purpose. We see nothing in *Morse's Case* to defeat Bell's claim; on the contrary, it is in all respects sustained by that authority. It may be that electricity cannot be used at all for the transmission of speech, except in the way Bell has discovered, and that, therefore, practically, his patent gives him its exclusive use for that purpose; but that does not make his claim one for the use of electricity, distinct from the particular process with which it is connected in his patent. It will, if true, show more clearly the great importance of his discovery, but it will not invalidate his patent."

There is no principle announced in this or the other cases that can fairly be said, in the light of all the facts in this case, to be in opposition to the views I have expressed. In all that has been said the fact has not been overlooked that Brush did not receive his patent without a contest in the patent office. The file wrapper shows that the claims we have been discussing, as at first presented, were rejected as functional, and that the language of the claims was twice slightly changed. But an examination of the claims as first presented and as finally allowed clearly shows that no substantial change was made in any essential feature of either of said claims. The record shows that the examiner in the patent office finally yielded to the views expressed by the patentee, and allowed the claims in such language as to express the theory contended for by Mr. Brush. The truth is that Brush never consented to any limitation of his claims, and no limitation was, in fact, made, although the phraseology was, as before stated, slightly changed. During the contest in the patent office he took occasion, in person and by counsel, to explain at great length and with remarkable clearness the method of movement to which he for the first time subjected the electrodes of a lamp, and showed how the two pairs of carbons are burned; that only one set of carbons could be burned at a time, and that one set was always bound to burn; and particularly described the special functions effected by the independently acting mechanism when the lamp

is first put into operation, viz., the dissimultaneous separation of the carbons, and the establishment of the light between one pair only. I quote from the argument then made by Brush's counsel:

"It is this peculiar mode of moving the carbons that produces this splendid result, and that constitutes the real essence and fact of Brush's invention. When you have this new movement, you have the all; for the mere means of effecting said movements becomes, after the conception of the real invention, a matter of no more than mechanical ingenuity. It is true that many forms of device may be devised for carrying out Brush's invention, and we will grant that they may all be patentable; but every one of them must be fundamentally tributary to this pioneer invention of Mr. Brush. The mode of movement is his. It is this mode, and not the mechanism, that constitutes this pioneer discovery; for Brush has here found out this new principle of moving his multiple carbon sets, and the result is something the world has never before seen, and something that the world very much wants."

The claim of defendant's counsel that Brush accepted a limitation of his claims is without any substantial foundation.

Under the construction which has been given to the patent, it necessarily follows, in my opinion, that the Wood lamp clearly embodies the invention of Brush, and is an infringement of his lamp. True, there is a difference in the construction of the lamps. Clockwork in the Wood lamp is substituted for the clutch mechanism of the Brush lamp, as was suggested in the patent might be done. But an inspection of the working of each lamp shows that both lamps operate in substantially the same way. The operation of each lamp is due to precisely the same causes and forces. They both automatically bring the idle carbon into contact with its mate in the same way, by the same mode of operation, by the same action of the current, and accomplish identically the same results. Every arc lamp performs three distinct functions: (1) The establishment of the arc; (2) the regulation of the length of the arc; (3) the feeding of the carbon as it is consumed. The Brush lamp has two separate and independently actuated ring clamps, which operate as clutches or latches, and when they are tilted and raised each clamp engages its smooth carbon rod, lifting it and its attached carbon, and thus separating the carbons and establishing the arc. The ring clamp or clutch associated with one of the pairs of carbons serves as a latch to hang up the feeding carbon of the idle pair during the entire time that the burning pair of carbons are consuming and are being regulated and fed. The regulation of the length of the arc is effected by the ring clamp or clutch raising or lowering the carbon just as much as may be necessary to compensate for the fluctuation of the strength of the current, or the imperfections in the carbon without necessarily feeding the carbon. The feeding of the carbon is effected by the varying frictional contact of the clamp or clutch with the smooth carbon rod. When this clamp descends, so that it impinges upon the floor of the lamp, it assumes a lesser angle of inclination to the rod, and its bite on the rod slightly diminishes, so as to allow the rod to slide or slip very slowly through the lamp, and thus feed the carbon. The two ring clamps operate, in conjunction with the floor of the lamp, as two

separate and distinct feeding mechanisms. When one is operating the other is idle, and *vice versa*.

Now, let us briefly examine the Wood lamp. It has the two clamps in the shape of two separate and independently actuated pinions, which respectively engage with the rack bars of their carbon holders; and when the pinion is raised by action of the magnetic mechanism of the lamp, it engages and raises its carbon rod and the carbon attached to it, and in this manner establishes the arc. The little final pinion or clutch associated with one of the pairs of carbons serves also as a latch to hang up one carbon during the entire time the other carbon is being regulated and fed until it has been consumed. The regulation of the length of the arc is accomplished by the pinion or clutch engaging its rack bar, and raising or lowering the carbon ever so little, as may be necessary to compensate for the fluctuations in the strength of the current or imperfections in the carbon, without necessarily feeding the carbon. The feeding of the carbon is accomplished by retarding or checking the action of the clutching pinion which engages the rack bar on the carbon rod. This is brought about by a train of gearing provided with an escapement common to both clutching pinions. The single stop of the Wood lamp is equivalent to the single floor in the Brush lamp, which operates to release or trip the feeding mechanism of each pair of carbons. When one pair of carbons is being fed, the combined clutching and feeding pinion associated with the other carbon is idle, and *vice versa*. The two pinions of the Wood lamp seem to be as much two separate and distinct feeding mechanisms as are the two ring clamps of the Brush lamp. The functions and results accomplished by the ring clamps of the one lamp, and the feeding pinions of the other, make them substantially identical. I am therefore of opinion that all of the claims of the patent have been infringed, and this view is certainly sustained by the authorities.

The contention of defendant's counsel that the lamps are essentially different, in that (1) the Brush lamp employs two feeding mechanisms, while the Wood lamp has but one, that operates both carbon pairs; (2) that the Brush lamp operates both carbon pairs, and automatically calls the second pair of carbons into function after the first pair is consumed, electrically, while the Wood lamp does this work mechanically; (3) that the Brush lamp imparts dissimultaneous initial separation to its two pair of carbons, while the Wood lamp separates the carbons of one pair only, the carbons of the other pair having been manually separated and latched up by the lamp trimmer before the lamp is put into operation, has been fully, and, as I believe, correctly, answered adversely to defendant in the previous decisions. The operation described by the words "dissimultaneous or successively," as used in the claims of the patent, "refers to that separation which results in the production of a single arc." 43 Fed. Rep. 533.

In *Brush Electric Co. v. Ft. Wayne Electric Co.*, 44 Fed. Rep. 284, where the only question seriously contested was that of infringement, *BLODGETT, J.*, in delivering the opinion of the court, said:

"The Wood lamp, like that of Brush, is a duplex lamp, organized to burn two or more pairs of carbons successively; but the feeding device of the

Wood lamp is partially actuated by clockwork, instead of its being operated entirely by action of the electric current, as in the Brush. In the Wood lamp, however, the clockwork mechanism is brought into action and controlled by the electric current. The distinguishing feature of the Brush lamp is the arrangement of the feeding mechanism, so that the carbons of the two pairs shall be dissimultaneously separated for the purpose of forming the arc; and that, after the arc is formed, one of the carbons of the pair between which the arc is formed shall be fed towards the other as fast as it is consumed, so as to preserve a steady and uniform light; and that when the first pair of carbons is fully consumed, the current is automatically transferred to the other pair, and the arc is formed between them, which are in turn fed together by the feeding device until consumed. The Wood lamp has the same characteristics. The carbons of each pair are dissimultaneously separated, and the arc is formed by the action of the current passing through magnetic coils, as is done in the Brush lamp; but the feeding, as the burning carbons are consumed, is regulated in Wood's lamp by clockwork. It does not seem to us that the interposition of this clockwork to do the feeding after the arc is formed essentially differentiates the Wood device from that of Brush. The electric current is the efficient motor in both lamps for forming the arc and controlling the action of the feeding mechanisms. * * * It was strenuously urged by the able counsel for the defendant, both in his oral and printed arguments, that the Brush patent shows two feeding devices, while the Wood lamp shows but one feeding device or mechanism. This position, if correct, would hardly, we think, answer the charge of infringement; but we do not entirely agree with the learned counsel in his position that Wood has only one feeding device. The clockwork mechanism of Wood is practically as much a separate device for each pair of carbons as the clutch mechanism of Brush, for, while Wood's clockwork is made to feed each pair of carbons in turn, it feeds the first by one pinion, and the next one by another pinion, after the arc has been produced between the second pair by the action of the electric current; thereby making his device as much a duplex feeding device as is that of Brush.

"The feature of the Wood lamp which allows the attendant, when he lights the lamp, or puts the lamp in circuit, to separate the carbons of one pair by hand, instead of allowing that to be done by the operation of the electric current, as is done by Brush, does not, it seems to us, in any degree evade the Brush patent, because it clearly appears from the proof and operation of the machines, as exhibited upon the hearing of the motion, that, if the attendant did not latch up the upper carbon of one pair, the machine itself would automatically do so, the same as it is done in the Brush lamp; and the manual separation of one pair of carbons, even before the lamp is lighted, is nothing but the adoption of Brush's dissimultaneous law, and it leaves the arc to be formed between the pair of carbons last separated. In this, as in almost all cases of infringement, there are slight differences in mode of construction and devices for the result accomplished by the patent. It is rare that we find an infringing machine which is copied with Chinese fidelity from that which it is claimed to infringe, but the infringers always endeavor to escape the charge of infringement by some modifications which shall apparently cause their machine to differ from that of the patentee. The essential thing, however, to be considered in all such cases is whether the principle embodied and claimed in the patent has been substantially used by the defendant, and, if we find that it has been so substantially used, it is the duty of the court to protect the patentee, however ingenious may be the mode of infringement."

Complainant is entitled to a decree, and to a perpetual injunction. Let counsel for complainant prepare, and in due time submit, the findings.

CORBIN CABINET LOCK Co. v. EAGLE LOCK Co.

(Circuit Court, D. Connecticut. November 15, 1892.)

No. 519.

1. PATENTS FOR INVENTIONS—ANTICIPATION—TRUNK LOCKS.

In letters patent No. 285,916, issued October 2, 1883, to Frank W. Mix, for a trunk lock, the first and fifth claims both cover the combination of a hasp plate, a hasp hinged thereto, the keeper plate, the lock bolt or lock mechanism, and the dowel pin and socket, or similar means of interlocking the plates. The first claim includes, in addition, a spring constantly pressing the hasp outward. *Held*, that these claims were anticipated by the Star lock, which has all these elements; and it is immaterial that it differs from the patented article in that the lock is not mounted upon the hasp or hasp plate, and that there is no holding protection and socket other than the staple, which takes directly into the lock proper, and is engaged by the lock bolt, for these features are not included in such claims.

2. SAME—COMBINATION—PRIOR ART.

The first claim of letters patent No. 337,187, issued March 2, 1886, to Frank W. Mix, for a trunk lock, covers "a hasp plate and a lock plate, the adjacent edges of which are constructed to interlock with each other, in combination with a hasp hinged to the hasp plate, and provided on its free end with a lock, which is received in a cup or frame in the lock plate, substantially as set forth." *Held*, that as all these elements were old, the claim is too broad to be sustained in view of the prior state of the art, as shown by the "Star" lock; the Jones patent No. 44,869, November 1, 1864; the Utting patent, No. 62,453, February 26, 1867; the Terry patent, No. 107,188, September 6, 1870; the Hillebrand & Wolfe patent, No. 120,067, October 17, 1871; the Haskell patent, No. 214,252, April 15, 1879; and the Crouch patent, No. 285,180, December 7, 1880.

3. SAME—UTILITY.

The second claim covers a hasp plate "secured to the cover of the trunk," and a lock plate "secured to the body," the two plates extending to the edges of the cover and body respectively, and the lock plate having a cup or frame for the reception of the lock, which is carried on the free end of the hasp, the hasp being "hinged to the hasp plate a considerable distance above its lower edge." The claim concludes with the words "substantially as set forth," and in the specifications the hasp is described as being "spring-pressed." *Held*, that the claim must be limited by this element and by the further element that the cup shall be so shaped as to receive and protect both the hasp lock and the hasp; and that, as thus restricted, giving due weight to the presumption of validity arising from the issuance of the patent, the claim is valid as producing a new and useful result.

4. SAME—UTILITY.

When the existence of invention is doubtful, the fact of utility should have great weight in favor of the patent. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Washburn & Moen Mfg Co. v. Beat'Em All Barbed Wire Co.*, 12 Sup. Ct. Rep. 143, 143 U. S. 275; *Gandy v. Betting Co.*, 12 Sup. Ct. Rep. 593, 143 U. S. 537; and *Topliff v. Topliff*, 12 Sup. Ct. Rep. 825, 145 U. S. 156,—followed.

In Equity. Bill for infringement of patents. Decree for complainant.

Mitchell, Hungerford & Bartlett, for complainant.

Wilmarth H. Thurston, for defendant.

TOWNSEND, District Judge. This is a suit in equity, brought for the infringement of letters patent No. 285,916, dated October 2, 1883, and No. 337,187, dated March 2, 1886, for improvements in trunk locks, originally granted to Frank W. Mix, and by him assigned to the complainant. The defenses as to both patents are anticipation and want of patentable invention.

The object of the invention in both patents is to make the lock serve the double purpose of locking the trunk and of preventing lateral move-

ment of the cover, and at the same time providing a cheap, strong, and efficient lock. Lateral displacement of the trunk and cover is prevented by providing at the meeting edges of the hasp plate and lock plate a dowel pin in one and a corresponding socket in the other, in addition to the hasp and locking mechanism. Only the first and fifth claims of patent No. 285,916 are claimed to be infringed. They are as follows:

"(1) In a trunk lock, the combination of the hasp plate, the hasp hinged thereto, the spring arranged to press upon the hasp, with a constant tendency to throw it outward, the keeper plate, the dowel pin and socket, and the lock bolt for locking the hasp into engagement with the keeper, substantially as described." "(5) In a trunk lock, the combination of the hasp plate, the hasp hinged to said hasp plate, the keeper plate, the lock bolt for locking the hasp into engagement with the keeper, and the dowel pin and socket at the meeting edges of said two plates, all combined substantially as described, and for the purpose specified."

The claims in patent No. 337,187 are as follows:

"(1) In a trunk lock, a hasp plate and a lock plate, the adjacent edges of which are constructed to interlock with each other, in combination with a hasp hinged to the hasp plate, and provided on its free end with a lock, which is received in a cup or frame in the lock plate, substantially as set forth. (2) A trunk lock, consisting of a hasp plate adapted to be secured to the cover of the trunk, and a lock plate adapted to be secured to the body of the trunk, and constructed with a cup or frame for the reception of the hasp lock, the hasp plate and lock plate constructed and arranged to extend to the meeting edges of the cover and body of the trunk, and the hasp plate provided with a dowel or extension that engages in a socket or recess in the lock plate, in combination with a hasp hinged to the hasp plate a considerable distance above its lower edge, and provided on its free end with a lock, substantially as set forth."

Each of these claims includes the following elements: (1) The hasp plate; (2) the hasp hinged thereto; (3) the keeper plate or lock plate; (4) the lock bolt or lock mechanism; (5) the dowel pin and socket, or similar means of interlocking the plates. Each claim implies that the hasp plate and keeper or lock plate shall be so applied to the trunk cover that their edges shall meet when the trunk is closed. The first claim of patent No. 285,916 has an additional element, viz., the spring arranged to press upon the hasp with a constant tendency to throw it outward.

The defendant, in order to prove lack of patentable invention in view of the prior art, has put in evidence nine patents, viz.: The Jones patent, No. 44,869, November 1, 1864; Uitting patent, No. 62,453, February 26, 1867; Gaylord patent, No. 93,078, July 27, 1869; Terry, No. 107,133, September 6, 1870; Hillebrand & Wolfe, No. 120,067, October 17, 1871; Rivers, No. 140,308, June 24, 1873; Rice, No. 188,950, March 27, 1877; Haskell, No. 214,252, April 15, 1879; Crouch, No. 235,130, December 7, 1880. Also the exhibit, "Star lock," which it is admitted was manufactured before complainant's patents. Defendant also claims that the first patent in suit anticipates the second. Nearly all these patents, including the earlier ones, have the hasp plate, the hasp hinged to the hasp plate, the keeper or lock plate, and the lock

bolt or lock mechanism. The Uitting and Terry patents have springs arranged between the hasp and its plate, the constant tendency of which is to throw the hasp outward. The Rice patent has a spring arranged to throw and keep the hasp in constant engagement with its keeper. The Hillebrand & Wolfe patent and the Rivers patent have the edges of the hasp plate and the keeper plate arranged so as to meet, and both of them have dowels and sockets for interlocking and preventing lateral movement of the trunk cover. It is admitted that it is old to make dowels and sockets on a trunk and cover, separate from the lock, so as to prevent lateral movement. The Haskell patent is for a trunk-lock guard. This is shown in two parts closely surrounding a trunk lock, which has the hasp plate and hasp, and a cylindrical lock on the free end of the hasp. The guard is fitted with dowels and sockets to prevent lateral displacement of the trunk and cover. The hasp plate is affixed to the trunk, and the keeper plate to the cover. The lock is not particularly described. The specification speaks of the class of locks as well known.

Defendant claims that complainant's patent No. 285,916 contains only an accretion of well-known devices, which operate in the same manner, when combined in defendant's structure, as they do when inserted separately, and that there is merely the substitution of one well-known device for another; thus, if in the Uitting and Terry patents the edges of the hasp plate and keeper plate were arranged so as to meet, and they were provided with dowels and sockets, as in the Hillebrand & Wolfe patent and the Rivers patent, they would embody the said first and fifth claims of complainant's patent; so, if in the Hillebrand & Wolfe patent and the Rivers patent there were substituted hinged hasps, pressed by a spring, as in the Uitting and Terry patents, they would meet these claims. The device in the Haskell patent may be modified so as to embody the claims of the patent No. 285,916 by casting the lock there shown and its patented guard integral, instead of in separate pieces. The Star lock, which was made prior to complainant's patents, has a hasp plate and a hasp hinged thereto; a keeper plate or lock plate, with a socket, into which the hinged hasp with its staple fits, so that the hasp and the keeper plate present a smooth exterior surface when the trunk is locked; a lock bolt to hook and hold the hasp; two dowel pins and sockets for interlocking the plates; and a spring arranged to press upon the hasp with a constant tendency to throw it outward. The edges of the hasp plate and keeper plate meet when the trunk is closed. Complainant's expert and complainant's counsel claim that this differs from complainant's invention "in the fact that the lock is not mounted upon the hasp or hasp plate, and in the fact that there is no holding protection and socket other than the staple, which takes directly into the lock proper and is engaged by the lock bolt." These points of difference do not seem to be included in the first and fifth claims of patent No. 285,916. These are the only claims of that patent which are applicable to the construction shown in Fig. 8 and Fig. 10 of the drawings, and must be so construed as to include the structures shown in

those figures. Defendant's expert admits that in the structures shown in said figures the lock is not mounted on the hasp. In my opinion, the Star lock anticipates the first and fifth claims of patent No. 285,916.

Both claims of patent No. 337,187 include, in addition to the five elements before mentioned, common to both patents, the lock or lock mechanism arranged on the free end of the hasp, and a cup or frame in the lock plate to receive the lock; and the second claim of patent No. 337,187 further provides that the hasp plate, with its dowel, shall be adapted to be secured to the body of the trunk, and that the hasp shall be hinged to the hasp plate at a considerable distance above its lower edge. All the elements combined in patent No. 337,187 were old and well known. No one patent appears to have all the elements arranged in just the same way. Defendant's counsel again claims with much force that this patent also merely presents an accretion of well-known devices; that, as locks with dowels and sockets were well known, and locks with hinged hasps carrying their locking mechanism on the free end of the hasp, and having a cup in the lock plate to receive the lock, were well known, and that, as the operation of the dowel and socket were not connected with the operation of the lock mechanism, and the dowel and socket could be, and had been, placed on different parts of the trunk, there was no invention in the making of the particular lock described in the patent. The Jones patent, the Terry patent, the Haskell patent, and the Crouch patent show or imply a lock mechanism hinged to the hasp, and received in a cup or frame in the lock plate. The Crouch lock seems to have all the elements of the first claim of complainant's patent No. 337,187, except the dowel and socket, which are found in former patents. In the Haskell patent, the guard, combined with the keeper plate, as shown in the drawings, makes a cup or socket for the lock. If a cylindrical lock on the hasp is substituted for the hasp and lock mechanism on the lock plate, and a dowel and socket added, in the Uitting patent, it will embody all the claims of the second Mix patent. Unless the lock in the second Mix patent is to be construed as necessarily cylindrical, the Terry patent, by the addition of a dowel and socket, would embody all the claims of this patent. In the Hillebrand & Wolfe patent, the substitution of a hinged hasp, spring-pressed, with a cylindrical lock on the free end, for the hingeless hasp shown in the patent, would satisfy the first claim of patent No. 337,187, and if such hasp were hung somewhat higher on the hasp plate it would satisfy the second. If the exhibit Star lock were modified by substituting a cylindrical lock on the free end of the hasp for the staple of the hasp and lock mechanism of the plate, it would embody the first claim of the patent under consideration; and, if such hasp were hinged on the hasp plate, it would embody the second. In a case like this, if any claim is to be held valid, it must be because the article produced is shown to have a special utility, and to answer the requirements of its department more fully than anything that has gone before; and the monopoly should even then be restricted as closely as may be to the improvement actually shown. The first claim of patent No. 337,187

appears to be too broad to be held valid in view of the prior art as shown in this case.

The second claim is more closely limited. The hasp plate, with the dowels, must be on the cover, and the keeper plate, with the sockets, must be on the body, of the trunk. This seems to be the most convenient form. The hasp, which the specification describes to be "spring-pressed," and which should be so limited, is to be hinged a considerable distance above the edge of the hasp plate. The lock must be mounted upon the free end of the hasp, and must be limited to a cylindrical form. Made in this way, the lock seems to combine more advantages, and have greater utility, than any that has preceded it. The question of utility is steadily coming into greater prominence as a test of invention. Where an art has grown by successive steps, the inventor who supplies the last requisite to making a better article than his predecessors is now allowed the benefit of that last step, even though it seems to be a short one. There seems to be no doubt of the utility of this invention; at least the defendant is hardly in a position to dispute it. Defendant's counsel claims that it is not enough that a device has grown into extensive use, but that it must also have displaced previous devices, in order to raise any presumption of the utility entitled to be considered in determining the question of patentability. This device seems to have displaced former devices in the manufactory of the defendant, at least, as well as in that of the complainant, and large numbers have been made and sold both by complainant and defendant. Complainant's expert says, and his counsel quotes:

"The Mix invention, as embodied in the second Mix patent, consists of a complete reorganization of the Crouch type of lock, whereby it may be successfully mounted upon the trunk lid, and co-operate with the keeper upon the trunk body, and all the parts be adequately protected, and the lock-carrying hasp be spring-pressed, so as to hold it normally slightly in front of the cup. To this end he did not hinge the hasp to the extreme end of the hasp plate as in the prior Crouch and Excelsior constructions, but he carried the hinge, as the patent says, 'a considerable distance above the lower edge,' so that the lock case upon the free end of the hasp would extend below the valance only far enough to engage a cup plate, which was mounted so high upon the body of the trunk as to extend to the meeting edges of the cover and body of the trunk."

He also so shaped the cup plate that it would both receive and shield the lock case and the hasp carrying the lock case.

The shaping of the cup plate or lock plate so as to receive and shield the hasp carrying the lock case, as well as the lock case itself, is put forward as an important point in complainant's case. I think this element should be so limited. With the respective elements limited as above stated, I think that the second claim of patent No. 337,187 ought to be sustained. So far as appears from the evidence, this lock is superior to, and combines more advantages than, any which has preceded it. On the whole, it seems to me to be so far superior to the others which have been brought to my notice as to constitute a new and useful result, and to come within the scope of the decisions which hold that

the fact that the new combination of old elements produces a new and useful result is strong evidence that such combination is the product of inventive ingenuity, and not merely an aggregation of devices. The doctrine that utility should have great weight in favor of the existence of invention when the question is doubtful is fully sustained by the supreme court. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 12 Sup. Ct. Rep. 443; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. Rep. 598; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825. The doctrine of these cases is carefully considered and practically applied to its full extent in *Watson v. Stevens*, 60 O. G. 1884, 51 Fed. Rep. 757. I do not think that the doctrine that an accretion of old devices, or the substitution of one well-known device for another, does not involve invention, applies any more strongly in the present case than in the case last cited. As in that case, the considerations on each side seem to me to be very closely balanced. The presumption arising from the fact that the patent office issued the patent is to be allowed due weight. The second claim of patent No. 337,187, limited as above stated, is sustained. Let there be a decree for an injunction and an accounting.

THE OLYMPIA.

THE JOHN SHERMAN.

THE OLYMPIA v. THE JOHN SHERMAN.

(District Court, E. D. Michigan. June 2, 1891.)

1. COLLISION—STEAMER AND TOW—PARTING OF TILLER ROPE—INEVITABLE ACCIDENT.

The steamer Olympia, on approaching a steamer with two lumber schooners in tow in the Detroit river, at full speed, (about 10 miles an hour,) put her helm hard astarboard in order to pass, but the tiller rope parted. The engines were immediately reversed, and everything possible done, but the momentum of the Olympia carried her against one of the tows, and sunk her. The tiller rope was of suitable size; had been purchased of a reputable dealer at a price which should have secured a good article; had been in use but two years, while the usual use is from three to five years; and had been thoroughly inspected just before entering the river. It was examined by experts at the hearing, and no flaw or crystallization discovered. The steering gear was worked by steam engines capable of putting severe strains upon the rope, but the use had not been exceptionally severe. *Held*, that the accident was inevitable, and the steamer not liable therefor.

2. SAME—STEAM STEERING GEAR.

The use of steering apparatus worked by steam engines, geared to a worm screw, puts such violent and sudden strains upon the machinery that when a collision results from its sudden collapse it is not enough to exempt the vessel from liability that the material was originally of the best quality, and that its service, dimensions, and workmanship warranted a reliance on its sufficiency, but these conditions must be supplemented by the closest attention to their preservation.

3. SAME—COSTS.

Since only judicial inquiry could have brought out the evidence showing that the steamer was not at fault, the libelants were justified in bringing suit, and costs should not be allowed to the claimants.

In Admiralty. Libel *in rem* by the owners and insurers of the schooner John Sherman against the steamer Olympia for collision. Libel dismissed.

Moore & Canfield, for libelants.

H. D. Goulder, for claimants.

SWAN, District Judge. This suit is brought by the owner and insurers of the schooner John Sherman to recover for the loss of that vessel, which was sunk by collision with the steamer Olympia, in the Detroit river, about 4 o'clock p. m. of May 8, 1891. The Sherman was in tow and next astern of the steamer Lowell, which had also in tow, astern of the Sherman, the schooner Roberts. The Lowell and her consort, all lumber laden, were bound from Cheboygan, Mich., to Toledo, Ohio, and were running about eight miles per hour at the time of the collision. Their course down the river took them well on the Canadian side of mid-channel, or about one third of the width of the river from the Canadian channel bank, and at the time of the collision the Lowell and her tow were below Walkerville, Ont., which is about one and a quarter miles above the foot of Woodward avenue, Detroit. The Detroit river at the place of collision is about half a mile wide. Neither vessel of the tow was carrying sail. The Olympia, a steamer of 2,000 tons (gross) register, 276 feet long, and 41 feet beam, drawing 14 feet 2 inches, laden with 1,850 tons of coal, and bound from Cleveland to Duluth, came up the river on the usual course until she had rounded Sandwich point, below Detroit, when, for the purpose of picking up the marine reporter, she edged over towards the American side, passing Woodward avenue at reduced speed, about three or four lengths from the Detroit dock line, or about as far from the American side as the Lowell and her tow were from the opposite bank. Just after passing outside the revenue cutter Fessenden, which lay a few hundred feet above the foot of Woodward avenue, the marine reporter's line was cast off, and the "All right" signal was given to her engineer, and the Olympia put at her accustomed full speed, about 10 miles per hour. When this signal was given, she was heading up the river, having Belle Isle a little on her starboard bow. To put her on her course to pass up the Canadian channel to the eastward of Belle Isle her wheel was ported, and she swung until she had brought Belle Isle on her port bow. When this was accomplished, the Olympia and Lowell had not quite got abreast of each other. The Olympia was then heading under the stern of the Roberts, the Lowell's second vessel. To preserve this course, and to check the swing of the steamer, her wheel was starboarded, but failed to break her swing. Seeing this, her master ordered it hard astarboard, in obeying which the tiller rope slackened on the barrel of the wheel, indicating unmistakably that the steering gear had given way by the breaking of the tiller rope. This was seen by the master of the Olympia from his post on top of the pilot house, just as he gave the order to hard astarboard. He at once signaled to the engineer to stop and back, which was promptly done, and instantly followed those orders by

sounding three or four alarm signals to the Lowell and her tow, which were then three or four lengths of the Olympia away. The effect of reversing the Olympia was to swing her stern to port and her bow to starboard. Laden as she was, her headway was such, despite the power of her engines working astern to their full capacity, as to carry her across the current, until, stem on, she struck the John Sherman, which was about 500 feet astern of the Lowell, on the starboard side, between the main and mizzen rigging, cutting into her four or five feet, the force of the blow lifting the port side of the schooner, springing her deck, and throwing her masts out of line. The wheel of the Sherman was put hard astarboard upon the Olympia's alarm whistles, but her position in the tow prevented any effectual maneuver to get out of the way. The answer of the claimant charges the Sherman with contributing to the collision by neglecting to make due effort to avoid the Olympia, when apprised of her helpless condition, either by swinging off to port, or by casting off her towline, but the proof is satisfactory that, placed as she was, the Sherman was as helpless as the Olympia, and that such effort as was possible was made to escape. The collision was indeed inevitable when the Olympia's tiller rope parted.

The Olympia was built in 1889, and had been running less than two seasons at the time of this disaster. She was equipped with a steam steering gear of the most approved pattern, and her tiller rope was of charcoal iron wire, one inch in diameter, the size employed on steam vessels of her tonnage. She had also a hand wheel, and was provided with relieving tackles, adjustable to the tiller in from three to five minutes. The ordinary full watch on deck and at the engines were in charge of her navigation, and their competency is unquestioned. The faults alleged against the Olympia are:

"(1) In not keeping her course, and passing the said schooner and the tow, in which she was on the port side, and as she might safely have done, and in leaving said course, swinging to starboard, and towards said schooner and said tow. (2) In not promptly stopping, reversing, or checking her speed after she had turned towards said tow, and when she was approaching said schooner, so as to involve risk of collision."

The answer, among other defenses, charges that the Sherman was weak and unseaworthy, and that the consequences of the collision were in large part owing to her condition, and not to the force of the impact. The main defense is that the collision—

"Was caused by unavoidable accident, which could not be foreseen, and against which human prudence could not guard; that the cause of the steering gear failing to work was ascertained to be the breaking of the wire wheel rope aft on the starboard side; that it was a wire rope, of suitable and ample size, which had been bought at a price which should have insured the best material, and was sold and represented to the boat as of the best material for that purpose, and was properly rigged and fitted in the most approved manner; that it had been overhauled in Cleveland the day previous to this collision, and her steering gear had been put, so far as human knowledge and ingenuity could do so, in perfect condition; and that, according to a standing rule, the mate had looked over and examined the steering gear, including

this rope, before the vessel entered the Detroit river, but a few hours before the accident, on which occasion he found everything apparently in good order and condition."

The answer further denies all fault, negligence, and omission by the claimant or the officers and crew of the *Olympia* in her equipment and navigation.

The proofs acquit both the *Sherman* and the *Olympia* of the omission of any measure which would have averted or mitigated the collision after the breaking of the latter's wheel rope. The collision being admitted, the primary inquiry is whether its cause was any defect in the equipment of the *Olympia* against which due care and skill could have provided. If the defense of inevitable accident is sustained, it will dispense with the necessity of weighing the proofs as to the condition of the *Sherman*, as a factor in the extent of the damage.

It appears from the proof that on August 26, 1890, the *Olympia* ran onto the Boston shoals, at the mouth of the Detroit river, and that the accident was caused by the parting of this same tiller rope. The rope was examined, and found to have parted in the starboard forward block, through which it led, and that the break was occasioned by the warping of the block, which was set in close proximity to the steam pipe leading to the forward part of the boat. The effect of the heat was to warp the block from its proper horizontal position, and thereby the tiller rope, under the power of the steering engine, was brought against the pin of the sheave, and parted. The evidence shows that a single contract of the pin and the wire tiller rope drawn by the steering engine was sufficient to cut it. This break was at once repaired. The chafed portion of the tiller rope was cut out, it was changed "end for end," and again rove. It was used the remainder of the season,—some three months,—in four or five round trips of Lake Superior, without developing any indication of weakness or defect. On May 7th, the day before the collision, just before departing from Cleveland, the master of the *Olympia*, for the purpose of bringing into horizontal position the block next to the quadrant on the rudder post, caused a short splice to be inserted in the tiller rope between that block and the block on the starboard quarter. The splicing was done by George Patterson, a competent wire rigger of over 20 years' experience, who had set up this rope on the *Olympia* when she came out, and he was aided in the work by Bogie, the second mate of the steamer. Speaking of the condition of the tiller rope between the quadrant and the block on the starboard side, (the locality of the break,) Patterson, when asked if in making the splice he thought to examine the rope as to its fitness for splicing, answered: "No, sir; but if the rope had been bad, I could tell that by handling it. I found out the rope was good, and I spliced it. If I had found the rope bad, I would not have spliced it." Bogie testified as positively that it was apparently good, and that he handled it before and after Patterson spliced it, and also examined it at the time and place of the break, but could not learn the cause of its parting. Other witnesses concur that there was no defect which could be seen or detected

by manipulation. The rules prescribed by the owners of the Olympia required the steering gear to be inspected before entering the river in her route, and, in obedience thereto, the first mate, who died before this suit was brought, was sent by the master to make that examination as the Olympia was approaching the mouth of the Detroit river, about three hours before this collision. The mate reported that he had performed that duty, and found the steering gear "all right." The rope was produced at the hearing, identified, and inspected by experts, but nothing was elicited to account for its rupture. The wire was sound, smooth, pliable, without flaws, and of good quality. With the wheel hard over, the forward end of the splice was brought within about a foot of the starboard block aft, no part of the splice traveling on the sheave. The rope parted between the splice and the starboard quarter block. The fag-ends of the break were of unequal length, indicating that the strands had been pulled apart, as if yielding to a violent strain. The tensile strength of a rope of this diameter varies from 30,000 to 35,000 pounds. The effect of strains is to crystallize and weaken the iron. No indication of crystallization was found. There is nothing in the proof impeaching the quality of the material, or explaining the cause of its rupture. It was purchased from reputable dealers, and manufactured by makers of good standing, who customarily tested their wares before putting them on sale. The proofs agree that its size, material, workmanship, and condition assured its fitness and adequacy to its use when originally put in the steamer. The service in which the Olympia was employed was not exceptionally severe. The evidence is undisputed that the life of such a tiller rope may be relied upon for at least three, and generally four or five, years of use, though in view of the facts of this case I am inclined to regard the shorter period as the safer limit. The fact that the break was not in the splice, but in the intact, and apparently sound, portion of the rope negatives any suggestion of connection between this and the disaster of the year before at the Boston shoals; especially since the good condition of the gear is confirmed by its subsequent satisfactory service up to the very day of this collision, and by its present appearance. Had the first mishap been occasioned by any defect in the rope, the aspect of the case would have been entirely different.

We must look elsewhere for the cause of this mischance. The Olympia's steam steerer is worked by double engines of seven horse power, geared to a worm screw. The rapidity with which this force is applied to its work necessarily subjects the tiller rope to violent and severe strains, and the increasing frequency of accidents of this kind to steamers is, in part, at least, chargeable to this powerful and expeditious machinery. Its instantaneous action, though invaluable in sudden emergencies, necessitates the highest vigilance in the inspection and maintenance in perfect order of its connections. The very facility with which it is operated rarely reminds even the experienced mariner of the necessary effect of a great power, so easily put in motion, upon the connections to which it is applied. The error of giving a vessel too much

wheel is corrected apparently by a touch of the hand, but in fact by a power acting with such energy that its effect upon the fabric wrought upon is rarely considered or appreciated. Even with the most competent and experienced wheelmen at the helm, the great and unavoidable wear and strain of the gear, occasioned by the frequent sharp changes of course incident to the navigation of the sinuous and comparatively narrow channels of the waterways between the Great Lakes, crowded, as they are, with a vast commerce, is so natural and necessary a result of the use of machinery working with such power and celerity that the degree of care and skill required to keep it in safe condition in all its parts would be accounted extraordinary were there less need of it. The propriety of insisting upon this measure of diligence in the use and care of this equipment is manifest. It is not enough to exempt a vessel from the consequences of injury to life and property traceable to the sudden collapse of the guiding power that the material was originally of the best quality, and that its service, dimensions, and workmanship warranted reliance upon its sufficiency, unless these conditions are supplemented by the closest attention to their preservation. Ordinary care and skill are relative terms, limited only by the circumstances which invoke them, and the field for their exercise enlarges with the dangerous character of the agency employed. The same considerations which exact from a vessel propelled by steam the utmost care and circumspection in navigation, because of her speed and power, more forcibly require that the machinery for the control of her course shall be equal to that end, so far as reasonable care and skill can make and maintain them. If such care and skill are bestowed in their use and preservation, and an accident occurs, the law gives immunity, regarding it as unavoidable. It is urged that the defense of inevitable accident is not one to be favored. It must be confessed that there is a popular prejudice against it. There is a seeming hardship in leaving an injured party, innocent of fault, to bear the consequences of a misfortune, without redress against the person or thing causing the loss by pure fortuity; yet the argument against this defense loses sight of the fact that the imposition of liability for any part of such loss upon one not culpable would not only be a judicial wrong, which shifts the misfortune upon an innocent person, but its effect would be disastrous to the safety of life and property, by removing a strong incentive to the exercise of care and skill in the conduct of every occupation and business. The courts would then become, not only tribunals for the assessment of damages, without power to inquire into other facts, but instruments of rank injustice. The popular sentiment against absolving a person who without fault of himself or his servants has caused damage to another is as unjust and impolitic as the obsolete law of deodand, which forfeited to the king the animal or thing which caused the death of a human being. The civil law, the common law, the maritime law, and the law of Great Britain and the United States agree that where a collision takes place by inevitable accident, without blame being imputable to either party, the consequences of the misfortune must be borne by the party upon whom it happens to fall.

Pars. Shipp. & Adm. 525, and cases. It is not necessary to this defense that the party proceeded against should have used extraordinary skill and diligence, but simply, "that degree of skill and that degree of diligence which is usually found in persons who discharge their duty." *The Thomas Powell* and *The Cuba*, 2 Marit. Law Cas. (O. S.) 244; *The Marpesia*, L. R. 4 P. C. 212, and cases cited; *The Virgo*, 3 Asp. 285; *The Pladda*, L. R. 2 Prob. Div. 34. "The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view,—the safety of life and property." *The Grace Gardner*, 7 Wall. 203; *The Mabey* and *The Cooper*, 14 Wall. 204–215. The courts of common law hold the same doctrine, which is well expressed in *Bygert v. Bradley*, 8 Wend. 478:

"When we speak of an unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible, from the nature of things, for the defendant to have prevented. All that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise."

See, also, *Weaver v. Ward*, Hob 134; *Loose v. Buchanan*, 51 N. Y. 476; *Bizzell v. Booker*, 16 Ark. 308; *Morris v. Platt*, 32 Conn. 75; *Brown v. Marshall*, 47 Mich. 576, 11 N. W. Rep. 392; *Gault v. Humes*, 20 Md. 297; *Morgan v. Symonds*, 1 Jur. 137.

Tried by this rule, it is clear that the claimant has established his defense. Every practical precaution seems to have been taken to forefend this casualty. Its occurrence may, with equal reason, be referred to a sudden and extraordinary strain, which is the theory of masters of experience, or to a latent undiscovered defect in the rope, or the co-operation of both these causes. Whether occasioned by either or both, it was inevitable. The claimant had a right to assume that the reputable ship chandlers from whom the tiller rope was bought were competent and careful dealers, and had used due care in their purchases; and also that an article of such vital importance to the safety of a steam vessel, made by manufacturers of good standing, might be relied upon as adequate to the purpose for which it was designed, especially when it had withstood the proper test. Its use and service approved the claimant's judgment. There was nothing to indicate weakness, though its condition was carefully observed. Consequently, no negligence in its use is shown. *Railway Co. v. Huntley*, 38 Mich. 547; *Readhead v. Railway Co.*, L. R. 4 Q. B. 379; *Daniel v. Railway Co.*, L. R. 5 H. L. 45; *Richardson v. Railway Co.*, 1 C. P. Div. 342.

Nor does the evidence sustain the imputation of fault founded on the failure to use the relieving tackle. There was no time to bring that appliance into use. It is not intended for use in emergencies demanding prompt action, nor for the navigation of a large steamer in a narrow channel, but it is a temporary steering gear, to be hooked to a tiller in bad weather, as a safeguard against the consequences of the breaking of the tiller rope, or as a substitute for it, when broken, until it can be

repaired. The master of the steamer testifies that it could not have been hooked on ready for use under three to five minutes, while less than three minutes elapsed from the discovery of the break until the collision. The fact that the injury has befallen the libelants without fault on their part, and they are the only sufferers, has naturally invited a close scrutiny of the defense; but the proofs fail to disclose any grounds for the condemnation of the Olympia. The loss must rest where it has fallen, and the libel must be dismissed.

The circumstances under which the collision occurred justified the libelants in bringing suit for their loss, as only judicial inquiry could have elicited the evidence which has exonerated the Olympia. If it had appeared that an equally full showing of the proofs in her defense had been made prior to the filing of the libel, I should have followed the American rule, and allowed costs to the claimants, but, under the circumstances, no costs will be allowed.

END OF VOLUME 52.